AN UNINTENDED ACTIVIST: JUDGE RONALD N. DAVIES AND THE INFLUENCE OF THE NORTHERN PLAINS ON TWENTIETH-CENTURY CIVIL RIGHTS AND JUDICIAL PROGRESSIVISM

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ABSTRACT

A devotion to an open and progressive interpretation of human rights and the law secured Judge Ronald N. Davies' legacy as an unintended, yet influential activist for advancing civil rights and of the twentieth century. His views helped change the definition and meaning of judicial activism in the modern vernacular and transform it into a new notion of judicial progressivism. A biography of Davies crystallizes the meaning of the racial and civil relations across an evolving American landscape. A study of his life alters the way in which scholars and the public perceive and understand the role of the Northern Plain in shaping lasting changes in America's progressive movements through an interdisciplinary approach of history and law.

When Davies of Fargo, North Dakota, rose to the bench of the United States District Court, he ceased any formal political party affiliation and became a Constitutionalist. With an egalitarian approach to the law, he oversaw numerous court proceedings and handed down rulings with measured consideration for any case that appeared on his docket. As his federal appointment came to include cases involving the desegregation of public schools, civil lawsuits against large-scale corporations, and the Alcatraz Indian Occupation, Davies' sphere of influence exceeded regional and Civil Rights Era boundaries and characterized him as national figure in new facets of legal precedent. His rulings challenged traditional ethics as dictated by society's majority-consent in the law and cast him as a seminal figure that embodied the meaning and influence of the northern plains within the law and advancing civil rights and social justice in the United States.

His efforts to uphold a more inclusive and equal legal standard set into motion renewed consideration of the ways in which an individual's actions within a broader institution can stimulate a modern national consensus despite entrenched historical precedent. Therefore,

Davies' life and career reflect a historical sensibility of the role, application, and influence of law-based code of ethics. His decisions, though not intended as overt civil activism, instilled lasting social, cultural, and political change in twentieth-century civil rights.

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DEDICATION

This dissertation is in humble dedication to Judge Ronald N. Davies. Thank you for everything you accomplished in your life, with or without intention. You have left a legacy of meaningful poise, character, and progress. May your memory live on through your triumphs.

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LIST OF ABBREVIATIONS

AAA.....Agricultural Adjustment Act.

AIM.....American Indian Movement.

BLM.....Black Lives Matter.

CCC.....Capital Citizens' Council.

CORE.....Congress of Racial Equity.

DNA.....Deoxyribonucleic Acid.

FBI.....Federal Bureau of Investigation.

FBIA.....Federal Bureau of Indian Affairs.

FDR.....Franklin Delano Roosevelt.

FTCA.....Federal Tort Claims Act.

FTC.....Federal Trade Commission.

GSA.....Government Services Administration.

IAT.....Indians of All Tribes.

ICC.....Interstate Commerce Commission.

KKK.....Ku Klux Klan.

LGBT.....Lesbian, Gay, Bisexual, Transgender.

LRC.....Legislative Research Council.

NAACP.....National Association for the Advancement of Colored People.

NCAI.....National Congress of American Indians.

NPL.....Non-Partisan League.

NYA.....National Youth Administration.

NRA.....National Recovery Act.

REA.....Rural Electrification Act.

ROTC	Reserve Officers' Training Core.
SCLC	Southern Christian Leadership Conference.
SDS	Students for a Democratic Society.
SEC	Securities and Exchange Commission.
SFSU	San Francisco State University.
SNCC	Student Nonviolent Coordinating Committee.
SSA	Social Security Act.
UCLA	University of California Los Angeles.
UND	University of North Dakota.
WEC	Women's Emergency Committee to Open Our Schools.
WPA	Works Progress Administration.

1. INTRODUCTION

When President Dwight D. Eisenhower appointed him United States District Court Judge for North Dakota in June 1955, Judge Ronald N. Davies of Fargo ceased any formal political party affiliation and became a Constitutionalist.[1] As a bipartisan public servant, he oversaw numerous court proceedings and handed down rulings with measured consideration for any case that appeared on his docket. Davies was temporarily assigned, again by Eisenhower, to the Eastern District of Arkansas on August 26, 1957. The *Aaron v. Cooper* case was fraught with racial tension, volatility, and direct opposition from the general public, and regional, state and national government leaders. The case tested Davies' judicial resolve in a high-profile and contentious legal situation. Davies' now-famous ruling in September of the same year not only enforced the racial integration of Central High School in Little Rock, Arkansas, at a momentous time in twentieth-century race relations, but also cast him as a broadminded figure whose actions highlighted the influence of the northern plains within the law, and civil rights in the United States in the twentieth-century.[2]

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[1] According to the Stanford Encyclopedia of Philosophy, Constitutionalism is defined as an idea that the government's powers can and should be limited by the law. Largely based on the philosophy of John Locke and the founders of the American republic, the concept of Constitutionalism centers on the authority and legitimacy of the government as dependent on observing legal limitations. As will be discussed throughout this work and more pointed in Chapter 6: The Litmus in Little Rock, it is prudent to make distinguish the difference between "Constitutionalist" and "Originalist" on the outset. As accepted by general contemporary scholarship, a "Constitutionalist" refers to a position or practice that government be limited by a constitution, but where analysts, such as executives, legislators, and judiciaries can take a variety of positions on what the constitution means. Whereas an "Originalist" asserts that all statements in a constitution must be interpreted based on the original understanding at the time it was first adopted. In a broad comparison, an Originalist maintains a narrow and strict approach to constitutional interpretation while a Constitutionalist holds a more flexible purview of a constitutional doctrine.

[2] Wil Waluchow, "Constitutionalism," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2018 (Metaphysics Research Laboratory, Stanford University, 2018), accessed January 26, 2020, https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/; Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2015), xii.

Born in Crookston, Minnesota, raised in the northern Great Plains, and educated at Georgetown Law, Davies committed much of his professional career to a life of public service. Throughout nearly five decades, he served in private practice, as a municipal judge in North Dakota, and as a federal appointee of the United States' Eighth District Court. It is within the federal legal system that he rendered decisions of national precedent, which sent ripples throughout the social, cultural, political, and legal sectors in the United States. By the end of his life, he was seen as an influential figure in the advancement of civil rights in the twentieth century. Although it was not an expressed goal of his professional career, Davies helped change the meaning of judicial activism to one of judicial progressivism.

It is at the intersection of progressive politics and the federal legal system during the Progressive Era, which lasted from the 1890s to the 1920s that a new notion of judicial action developed into judicial progressivism.[3] At its core, progressivism enshrines a broad political theory that favors social reform representing the interests of ordinary people. As a contemporary movement in the twentieth-century United States, advocates have sought political change and the support of government actions to objectify a collective agenda. Consensus, cooperation, and coordination throughout the executive, legislative, and judicial branches of government were

[3] At this point, it bears emphasizing that the forms of progressivism discussed in this work are not necessarily congruent to the contemporary notions by the same name, despite sharing multiple roots in history. In its infancy, the first progressives were most interested in limiting the political influence of large corporations. Progressives of the late-nineteenth and early twentieth centuries also wanted to establish a more transparent and accountable government which, in their estimation, would work to improve American society, but were not identified as a liberal or left wing of either the Republican or Democratic political parties. However, while modern progressives still advocate for public policies that they believe will lead to positive social change, scholars and political scientists identify contemporary proponents as inhabitants of a left-of-center or far-left wing of the Democratic party than decades prior; Walter Nugent, *Progressivism: A Very Short Introduction* (Oxford ; New York: Oxford University Press, 2009), 11.

vital to progressivism's success and each of the three branches became enveloped in the era's demand for change.[4]

At the same time, neither judges nor the legal system was binary. Therefore, judicial progressivism is defined as neither liberal activism nor conservative restraint, but rather as a philosophy, practice, and pathway for civil rights and social justice to make their way through the legal system separate from existing examples of judicial activism and restraint. As a new lens for viewing the actions of the judiciary, judicial progressivism establishes an expanded understanding of the modern legal institution beyond an either-or fallacy of activist and restrained judges. While the political parties can guide one president's decision to pass the political ball to a lifetime appointee of the court who is best likely to uphold the party's agenda and spectrum of policy, so too can a sole judge's decisions either reflect the impact of political sway or demonstrate the singular ability to affect progressive transformation of the status quo, whether intended or not. The addition of progressivism as both an ideology and social movement to the definition of judicial action encompasses a more comprehensive synthetization of federal judges in the twentieth century and the significance of their decisions in shaping the politics and legal system in the United States in the modern era.

The objective of this dissertation is to illustrate how Davies' helped define judicial progressivism and expand upon the intellectual currents of twentieth-century American legal and progressive history. It will show that the significance of his actions exceeded regional civil rights era boundaries and augmented a modern understanding of the American system of justice. Framed by an examination of his life and analysis of relevant cases, both a thematic and

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[4] Maureen A. Flanagan, *America Reformed: Progressives and Progressivisms, 1890s-1920s* (New York: Oxford University Press, 2006), 76.

chronological breakdown validates Davies' demonstration of judicial progressivism in action. By extension, the following study seeks to add to the changing interpretations of the Progressive Era and the role of the judiciary in shaping views of history.[5]

In order to better define judicial progressivism, it becomes necessary to underscore an interdisciplinary approach of history and law. Such progressive and activist actions as those executed by Davies and other federal judges continue to warrant further inquiry to understand the full impact of legal decisions on American politics, law, and society. A focused study of his life adds new contours to the meaning of civil rights and race relations across multiple generations. Viewing Davies' as a progressive jurist alters the way in which scholars and the public perceive and understand the role of the northern plains in affecting lasting change in America's progressive movements.

The scholarship contained in this study is not a full biography of Davies. Rather, it is a character study that focuses on interpreting his professional life as an example of judicial progressivism, while also arguing his significant influence on the judiciary and the Civil Rights Movement. Pulling Davies and similar actors into the progressive narrative does not present a paradigm-altering break from the established framework. However, a study of his life, social and political transformations, and the progressive decisions made by many stimulate a fresh departure from the parochial views based on the argument of biased political motivations and present a contemporary revision of a limited definition of activism.

Based on the available evidence, his life and judicial career do not cast him as a sole actor, but as an individual within a larger shift. His legal decisions were not radical for the time

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[5] William G. Anderson, "Progressivism: A Historiographical Essay," *The History Teacher* 6, no. 3 (May 1973): 427.

nor where they taken in conjunction with some of his contemporaries. Davies was not an outspoken champion of a specific agenda nor were the long-term and widespread consequences of his decisions intended. Yet, as part of the growth of progressivism and the enhanced political power of the judiciary, several of his rulings underlined a departure from the activist and restrained judges.[6] During his time on the federal bench from 1955 to 1984, he also demonstrated the influence of the northern plains region in the practice of judicial progressivism.[7] Davies did not view himself as a protagonist of the civil advancements nor did he suggest others to see him through a heroic lens. He did not use his position to rescue a race or invoke privilege to accomplish a racially-progressive agenda. Instead, his work reflected the social and civil advancements of the modern era and advancement in scholarship like the New Civil Rights and New Social Movements fields of study.[8] As the Civil Rights Movements reached its zenith in the mid-twentieth century and gave way to new contemporary movements like Black Lives Matter (BLM), March for Women's Lives, Lesbian, Gay, Bisexual, Transgender (LGBT), and the Indigenous Peoples Movement in the twenty-first century, today's advocates still face long-standing social and civil struggles with the instances in which even those whose lives were and are not the central focus of collective action can inhibit a movement with inaction. In meeting a moment and doing nothing, people with the power to affect change allow institutional racism and sexism to persist.[9] Davies did not address the social and civil challenges of his time with

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[6] Steven F. Lawson, "Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s," *The Historian* 42, no. 3 (1980): 436.

[7] Michael J. Lansing, *Insurgent Democracy: The Nonpartisan League in North American Politics* (University of Chicago Press, 2015), 336.

[8] Risa Goluboff, "Lawyers, Law, and the New Civil Rights History," *Harvard Law Review* 126, no. 2312 (2013): 24; Nelson A. Pichardo, "New Social Movements: A Critical Review," *Annual Review of Sociology* 23 (1997): 411–30.

[9] Enrique Larana, Hank Johnston, and Joseph R. Gusfield, eds., *New Social Movements: From Ideology to Identity* (Philadelphia: Temple University Press, 1994), 22.

passivity. However, though an inherited career trait, it was judicial progressivism that helped secure and drive the gains of the social and civil movements, not any singlehanded action by Davies.

Davies decisions to uphold a more inclusive and equal legal standard helped shift modern jurisprudence and reflected larger societal changes rooted in the twentieth-century progressive reform movement. Despite an entrenched precedent of conservative courts Davies' life and career characterize a historical sensibility of the role, application, and influence of law-based code of forward-looking principles. His professional actions defined him as a progressive jurist. Available evidence does not indicate that he intended for his decisions to become statements of civil activism. He had instead inherited a practice of judicial progressivism. As part of existing movements that advocated for civil rights and social justice, his role as a federal judge instilled lasting change in twentieth-century civil rights and across social, legal, and governmental institutions in the United States.

The politics and culture of the northern Great Plains further influenced Davies' development as a judicial progressive in the twentieth century. Placed in the larger context, the region and state of North Dakota did not develop in a vacuum. It was the northern-Midwest region and states like Minnesota and North Dakota that departed from the familiar North-South regions that had historically divided the nation. Many of North Dakota's residents, politicians, and social leaders reflected a different mood than many other states. As a separate regional voice, new identities emerged and helped shape the development of a progressive ideology in the

United States.[10] So too did the same social and political transformation of the region shape the identity and actions of Davies.

While analyses, syntheses, and reevaluations of United States legal and social history are not unique, an examination of Davies' own jurisprudence contributes a new dimension to the existing scholarship of understanding. Academics, like Richard Hofstadter, Maureen A. Flanagan, and Lawrence W. Levine's scholarship focus on the history of progressivism and the people, places, and events that transformed a grassroots movement into an era of philosophical, political, and social change. Others, like Alpheus Thomas Mason, G. Edward White, and Arnold M. Paul center their historical treatment around tenets of sociological jurisprudence, judicial activism, and legal progressivism. Still others, like Tomiko Brown-Nagin, provide more comprehensive views of the history of civil rights and social justice. Judicial progressivism describes the advancement of two different social and civil movements into the same system of law. It is where the history of social movements and the law collide that situate Davies at the cross-purposes of social, political, and legal histories and showcase the role that the judiciary has playing in the evolution of social and civil movements in the United States.

There remains a shortage of sources that provide detail of his life outside the public sphere. Yet, as a judge, Davies did not develop isolation nor did he operate alone in his rise to the federal judiciary. A supporting cast of influential figures and milestone activities also helped weave the fabric of who he became. This study incorporates the public records that exist within the scope of social and civil transformations in the twentieth-century United States and includes an exploration of his early life, military service, undergraduate, and legal education. Coupled

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[10] Elwyn B. Robinson, *History of North Dakota* (Lincoln: University of Nebraska Press, 1966), accessed August 27, 2019, https://commons.und.edu/oers/1, xv.

with a treatment of the early Republican network of political and judicial figures fixes the context for an understanding of his federal appointment and subsequent legal decisions. The available sources have created the opportunity to exam events that involved his legal expertise within the wider context of seminal movement like the progressive and civil rights eras of the late nineteenth and early twentieth centuries. The utilization of any relevant materials will serve in better understanding how the northern plains, Davies, and the concept of judicial progressivism changes the way scholars think about civil rights in the United States.

Representing the historiography chapter, Chapter 1 focuses on scholarly arguments made by historians, delineates the historiographical landscape, and addresses Davies place within the broader waves of past synthesis. Chapter 1 is not about Davies and his life, so much as it represents both the existing scholarship and the new arguments posited in the following research. A historiographical chapter is necessary for situating Davies within the known annuls of progressive, legal, and civil rights history while introducing progressive jurisprudence through a historiographical lens. A "history of history" sets the time, space, and place for a study of Davies' life and work. Chapter 1 positions Davies within the existing waves of scholarship, solidify his relevance to civil rights and legal history, and validates a contribution to scholarship in the interdisciplinary fields of history and law.[11]

As a focused analysis within the wider scope of progressive change in the twentieth century, Chapter 2 devotes a pertinent amount of time to the social, legal, political, and ethical climate in and around the United States. Chapter 2 includes a legal and political analysis of the northern plains region where Davies began his ascension. It serves as both the historical

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[11] Lois W. Banner, "Biography as History," *The American Historical Review* 114, no. 3 (June 1, 2009): 586, accessed April 14, 2015, https://doi.org/10.1086/ahr.114.3.579.

backdrop of the nation and the region's place in the twentieth-century social, cultural, and legal landscape of the United States.[12]

Chapter 3 appears with the intention of paralleling the previous chapter. A treatment of Davies' upbringing, undergraduate and legal education and military service focuses on his individual experiences both inside and outside the region of the northern plains. It serves in better understanding how the northern plains in general and Davies in particular changes the way scholars think about civil rights, and judicial activism in the United States.[13]

Chapter 4 provides a historical backdrop of the northern plains and the region's place in the twentieth-century social, cultural, and legal landscape of the United States. It also introduces the sub-narrative for the roots of progressivism and the political and judicial historical time line as a small cadre of Northern and Midwestern legislators first rescued progressivism from extinction. The chapter then explores how judges went on to secure its legacy by upholding progressive legislation in court and expanding its presence with their decisions and published opinions and where Davies demonstrated judicial progressivism in both civil and criminal courts. Davies did not self-identify as an activist nor did he maintain an outspoken record of proactivist intentions with his position. But progressive legal opinions became the unintended consequence of many of his decisions. Likewise, this chapter lays the foundation for a later assessment of progressivism's future and continued path forward as being kept alive by judicial precedent first initiated by the inheritors of judicial progressivism.[14]

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[12] Sidney M. Milkis and Jerome M. Mileur, *Progressivism and the New Democracy* (Amherst: University of Massachusetts Press, 1999), xi.

[13] Robinson, "History of North Dakota," 353.

[14] Ronald Briley, "Lynn J. Frazier and Progressive Indian Reform: A Plodder in the Ranks of a Ragged Regiment," *South Dakota History* 7 (Fall 1977): 454.

Chapter 5 represents a keystone chapter that revises the existing scholarship on the "Little Rock Integration Crisis." It will both highlight and underscore Davies' role and judicial decisions in the national debate over race, the power of state governments, and the federal Constitutionality that surrounded racial desegregation of public schools across the nation. Much scholarship exists in regards the Crisis in Little Rock. However, Chapter 5 reveals a new consideration of the same events by place Davies and the federal judiciary as central figures in the lasting outcomes of the crisis and legal case.[15]

Chapter 6 bridges the time periods of the racially-charged legal developments between the "Crisis in Little Rock" and the "Alcatraz Indian Occupation." It renders a complete illustration of Davies' life, influence, legacy, and the lasting effects of his interpretation of the law. This chapter acts as a progressive juxtaposition to the previous chapter. Davies had a federal statute of *Brown v. Board of Education* to guide him with the desegregation case in Little Rock. His decision in that case upheld the progressive-era standards of the early twentieth century and aligned with his network of Republican supporters from the northern-Midwest region. Between the mid-1950s and late 1960s, he had to confront a number of civil cases at the federal level for which no legal precedent existed. His civil decision rulings, and three high-profile cases in particular, not only reflected his willingness to risk an unpopular stance in favor of a more human and civil rights-centered opinion, but also demonstrated an expansion of progressivism as a result of his unintended activism as a judicial progressive on behalf of the "little guy" in the

[15] Colleen A. Warner, "From Fargo to Little Rock: Federal Judge Ronald N. Davies and the Public School Desegregation Crisis of 1957," *Western Legal History* 17, no. 1 (2004): 17.

face of one of progressivism's most notable villains: big business entities backed by a tradition of government support.[16]

At the same time, Davies never lost sight of the human element in consideration of his cases. Chapter 6 shows that even though criminal cases seeking federal indictments crossed his docket with already-prescribed punishment procedures, in the case of Irvin Warfield, Jr., Davies chose to use the experimentation and testing within the laboratory of the law and blaze new trails that offered a positive path of progress and improvement rather than a one-way ticket to condemnation and irreversible despair. As a result, he further underscored the evolving progressive definition of what one judge, the Honorable Myron H. Bright, Circuit Judge, United States Court of Appeals when delivering a speech in memoriam following Davies' passing, called a "just result" in the modern era of twentieth-century American law.[17]

Chapter 7 explores Davies' little-known time serving as a judge in San Francisco and his public admonishment of the federal government's actions during the "Alcatraz Indian Occupation." The ramifications of Davies' involvement at another juncture of civil rights, and the law within the Native American realm has been on the periphery of his career. Therefore, the case from 1972 presents the opportunity for further inquiry into the events themselves, as well the connections to Davies early work with Senator Frazier and the Committee on Indian Affairs as a key element to his influence and impact on civil rights as an unintended activist.[18]

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[16] Flanagan, *America Reformed,* 118.

[17] The Honorable Myron H. Bright, "Ronald N. Davies, My Friend," *North Dakota Law Review*, Vol. 87: 195 (2011), 4.

[18] Troy R. Johnson and Donald L. Fixico, *The American Indian Occupation of Alcatraz Island: Red Power and Self-Determination* (Lincoln: University of Nebraska Press, 2008), 246.

Chapter 9 functions as a follow up chapter with Davies' later activities, final transition into retirement, and ultimate legacy. It maintains a continuity characterizing his adherence to enforcing the power of the Constitution and expanding judicial progressivism through his tactful presence in United States law beyond the end of his career and life. Attention is paid to the awards and public recognition he received later in his life and career based on his controversial determinisms of the past. The chapter places emphasis on the evolution of his presence within the federal legal system against the backdrop of wider shifts in American society, politics, civil rights[19]

Serving as the final chapter, Chapter 10 outlines last remarks for the Davies' and judicial progressivism's arch. It maintains a continuity that illustrates his adherence to enforcing the power of the Constitution through his tactful presence in United States law in a synthesis of his career and ultimate place in history. Lasting thoughts reassert the ways in which his life has impacted and changed our understanding of civil rights and the role of law in the United States'. Conclusive in highlighting Davies as a prominent figure within the legal and ethically progressive moorings, there will also be an identification of areas where scholars may be able to add to narrative and further push the dialog posited in the dissertation forward.[20]

As evidenced in the historiographical salvo, the proceeding dissertation does not present Davies as divergent figure in history. What Davies accomplished was not singular nor does it place him as a single bearer in the advancement of civil rights. Rather, his actions situate him and the federal judiciary within the larger influences of the Progressive movement.[21]

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[19] Oliver Wendell Holmes Jr., *The Path of the Law* (Eastford: Martino Fine Books, 2012), 32.

[20] G. Edward White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America," *Virginia Law Review* 58, no. 6 (September 1972): 1028.

[21] Anderson, "Progressivism," 452.

Davies performed his job as a public servant absent a discernible social or political motivation. Framed by each chapter, his role and actions as a federal judge not only redefined the ways in which one can see the power and politics of the judiciary, but also the influence of a region and a jurisprudence that upholds non-partisan action within the legal profession. The larger outline emphasizes that by definition, movements like those occurring on behalf of progressivist ideas and civil rights are huge and circular with no single intellectual, actor, or authority. As a result, an examination of Davies' life and career within the context of the larger social and political progressive transformations reveals his professional conduct as an example of another category of progressive judges woven into the fabric of the modern era of United States history.[22]

[22] Arnold M. Paul, "Legal Progressivism, the Courts, and the Crisis of the 1890's," *The Business History Review* 33, no. 4 (Winter 1959): 509.

2. HISTORIOGRAPHY

A History of Histories

The twentieth-century backdrop against which Davies grew up and forged a legal career saw its share of social, cultural, and political shifts in the country's historical narrative. Historians first framed the United States' transition throughout the new century in broad terms. Studies of the rise of progressivism and civil rights became the foundation for the era's historiographical scholarship. Elements of larger culture sweeps of historical analysis then flowed into focused interpretations of civil rights legal history and activist legal history. It is within the smaller channels of historical analysis that a study of progressive jurisprudence emerges and enriches existing scholarship of twentieth-century developments in progressive, civil rights, and judicial understanding.

As a character study, an examination of Davies' career as a public servant within a historiographical context enhances a larger analysis of the changing relationship between politics and the judiciary in the twentieth century. The influence of the progressive and civil rights social movements at the intersection of the law and politics accentuates the impact of the federal judiciary and individual jurisprudence on political, legal, and historical change. A historiographical inclusion regarding the influence of the northern plains at the juncture of politics and the judiciary also represents a cross-discipline approach to reaching a more informed consensus with a redefinition of judicial activism.

The historiography of progressivism and its waves of backlash began before its articulation in the modern era.[23] By the 1890s, future-focused middle-class ideologues sought a pathway to mitigate inequality in America's public political landscape. In response to the unchecked growth of a large-scale private corporate culture, fears of corruption and maleficence within America's modernizing society and government increased. Many began to call for government redress and long-term substantive change. Yet, many scholars sought to understand the roots of imbalance in modern terms. Richard Hofstadter, preeminent historian of the twentieth century and two-time Pulitzer Prize winner, published a foundational piece in the field of progressive history that contextualized the political battles of the Progressive Era through an assessment of three American interpretive historians. First published in 1968, *Progressive Historians* delineates the ideas and contributions from Frederick Jackson Turner, Charles A. Beard and V.L. Parrington and situates their views of historical tradition within a liberal-minded understanding of American politics. *Progressive Historians* functions as both a critique of historical thought during a decisive era in America's development and an account of how Turner, Beard, and Parrington led scholars into a controversial world of twentieth-century political history. Through Turner's "frontier" thesis, Beard's constitutional elitism and economic stance, and Parrington's argument that the history of literature reflect the history of the national political mind, Hofstadter introduced new concepts and methods for synthesizing history's scholarship and redrew the guidelines for American historiography. Hofstadter had also outlined a

[23] It is worth reiterating that the descriptions of early progressivism used to frame this scholarship is not to be considered in the same understanding of progressivism as represented by contemporary standards with defined characterization as left or far-left political advocates.

framework for the history of the Progressive Era; that which encouraged other scholars to add to its larger historiographical construction.[24]

Alonzo Hamby, Distinguished Professor of History Emeritus at Ohio University, in his 1973 book *Beyond the New Deal: Harry S. Truman and American Liberalism* turns Hofstadter's progressivism into a study of the ideology where history and political science meet. According to Hamby, the progressivism that emerged in the late 1890s and lasted through the early 1920s defined a new political movement. Extending the Hofstadter interpretation of Turner's thesis, Hamby describes early progressivism as a means for many underrepresented American to address the ideas, impulses, and kitchen-table issues that stemmed from the modernization of American society. In Hamby's estimation, like Turner's frontier-democracy link founded in westward expansion and incorporated by Hofstadter's broader outlook, progressivism established much of the tone of American politics throughout the first half of the twentieth century.[25] Reformist in nature and stemming from a grassroots social movement, the Progressive Era rose to combat the excesses of the Gilded Age with a focused set of core principles aimed at instilling efficiency in all facets of society, including an emphasis on the elimination of waste and corruption throughout public and private institutions. Progressives forged tight bonds over their shared support of workers' rights and the improvement of labor conditions and compensation for all wage earners across the nation. In addition, they adhered to a broader philosophy and shared belief that centered on issues of fairness, equality, and a greater sense of civil rights, social justice, and broad inclusivity among all people in the United States.

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[24] Richard Hofstadter, *Progressive Historians* (New York: Knopf Doubleday Publishing Group, 2012), 24.
[25] Alonzo L. Hamby, *Beyond the New Deal: Harry S. Truman and American Liberalism* (New York: Columbia University Press, 1973), 9.

Maureen A. Flanagan, urban historian and Professor of History Emeritus at Illinois Institute of Technology, in her 2006 publication of *America Reformed: Progressives and Progressivisms, 1890s-1920s*, redirects the twentieth-century historiographical narrative from a clear-cut analysis of actual reforms underlying progressivism to a twenty-first century historical revision of the ways in which Americans organized themselves to confront the problems of their society. By examining how such reorganizations drew Americans into a new type of relationship with the federal government, Flanagan expands the existing historiographical base to include the meaning of democracy with emphasis on the "social justice" movement as an integral aspect of progressive reforms. Flanagan's work provides a contemporary update to progressive scholarship with coverage of how women, black Americans, and ethnic and working-class organizations participated in progressive reform movements. Flanagan reveals how the reform struggles of the period all revolved around defining the nature and purpose of U.S. democracy.

As a philosophy, progressivism is based upon the idea of progress, which asserts that advancements in science, technology, economic development and social organization are vital to the improvement of the human condition. In the broad context of the American social movements, progressivism supports or advocates social reform. Not without its political leaning or biases, progressive ideology nevertheless provided a separate space for action and change between the activist and restraint polarization. Like the nation's judiciary, progressivism as a platform for social reform also become increasingly political as it developed into a defined era lasting from 1890 to 1920.[26] Both Louis Brandeis, Associate Justice of the Supreme Court from 1916 to 1939, and John Dewey, philosopher, psychologist, and educational reformer of the early

[26] Nugent, *Progressivism*, 2.

to mid-twentieth century, rose to the fore as early supporters of progressivism. Each were early contributors to the development of theories of progressivism whether in the legal system or education. Brandeis and Dewey were among the first whose efforts made it possible for other advocates to inherit progressive change.

Although the Progressive Movement incorporated a broad set of principles with a heavy urban-industrial base of support and leaders from dense and active population zones, politicians and their voting blocs from rural farming sectors of the northern-Midwest region enlarged the movement's constituency and augmented its national agenda of reform and restructure. Guided by the belief that average citizens should have more control over their own government systems, Northern progressives, like William U'Ren and Robert LaFollette, wanted to make public servants more responsive to the direct voice of the American people and pursued a reformation in the spirit of "brotherhood" and "direct democracy."[27] In essence, they conveyed their mission as being "intensely occupied in forging the tools of democracy, the direct primary, the initiative, the referendum, the recall, the short ballot, commission government."[28] Thus, even though congressmen and voters scattered across the northern plains lived with a physical and experiential disconnection from their urban counterparts, they nevertheless shared an ideological and methodological agreement of progressive goals. The impact of progressivism stretched across the nation and was then able to affect the lives of most Americans regardless of their race, gender, economic standing, or geographic location. The people and institutions of the northern-

[27] Milkis, *Progressivism and the New Democracy*, 19–20.

[28] "La Follette Campaign Literature, "Turning Points in Wisconsin History," Wisconsin Historical Society, accessed November 5, 2019, http://content.wisconsinhistory.org/cdm/compoundobject/collection/tp/id/52010/show/51998.

Midwestern plains and the state of North Dakota were no exception to progressivism's reach and influence as they too had a vested interested in middle-class national reforms.

This study expands civil rights scholarship beyond its traditional trappings in southern-based historical narrative. Civil rights historiography that stems from the late 1960s and 1970s focuses primarily on headlining events and leaders of national importance as well as the glossary legislative and judicial securities that most assumed defined the success of the movement and thus marked the end of the era. Yet, more analysis, synthesis, and resulting scholarship have since emerged. Specifically, a 2005 article by Jacquelyn Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," signals a renewed need to posit a more nuanced approach to understanding race not only throughout the twentieth century, but also into the new millennium.

Keeping pace with the larger modifications in civil rights historiography in the latter decades of the twentieth century, Hall's work shifts the focus from the highly recognizable banner figures to the local communities and grassroots activities. Likewise, Steven F. Lawson, in his 1991 article, "Freedom Then, Freedom Now: The Historiography of the Civil Rights Movement," recognizes that scholars have begun to pay attention to a more interactive model that admits a desire to connect the local with the national and the social with the political to create a better understanding of the impact of the Civil Rights Movement. Lawson also notes the importance of the lesser known figures, organizations, and actions that played a vital role in the development and pace of the movement and contribute to the modern idea that the movement is actually far from complete.[29]

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[29] Steven F. Lawson, "Freedom Then, Freedom Now: The Historiography of the Civil Rights Movement," *The American Historical Review* 96, no. 2 (1991): 456.

Both Hall and Lawson refocus their interpretations by concentrating on the more individual elements of progress and expand the boundaries of the movement. However, while both acknowledge the role of the legal system in the larger narrative, they leave the aspect open for further inquiry, synthesis, and interpretation in a current context of historiographical study. Therefore, the intersection between legal and civil rights scholarship is at the heart of Davies historical significance and originality and rightly places him within legal, civil, and historical advancements in the United States. At the same time, this northern plains judicial figure who controversially sought to enforce federal law at various local, regional, and national levels, including Little Rock, Arkansas; Grand Forks, North Dakota; and San Francisco, California, played a significant role in the history of the Civil Rights Movement.

Likewise, traditional scholarship that uses eighteenth, nineteenth, and twentieth century historical studies to crystalize a contemporary interpretation of the Civil Rights Movement remains deeply rooted in studies and publications that focus heavily on the South. Many ignore the roles of the North and West in developing both an understanding of race and achievements in civil rights in the social, cultural, political, economic, and legal structures in the United States. Therefore, scholarship regarding the Civil Rights Movement and the changing concept of race in American society, culture, politics, economics, and legal institutions abounds in various forms of traditional and contemporary historical advancements. Still, a study of Davies as an example of the influence of the northern plains on the development of judicial progressivism embodies an original contribution to the wider narrative. A synthesis also provides a standalone history that underlines the influence of specific case laws within society, politics, activism and the legal institutions of the United States.

Certain works explore both micro and macro aspects of the Civil Rights Movement from the North and West, like Quintard Taylor's 1995 work, "The Civil Rights Movement in the American West: Black Protest in Seattle, 1960-1970," Thomas J. Sugrue's *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North, 2008,* and even *Crusaders for Justice: A Chronical of Protest by Agitators, Advocates, and Activists in Their Struggles for Civil and Human Rights in St. Paul, Minnesota, 1802-1985* by Arthur C. McWatt in 2009, but are limited in number and scope; thereby creating a specific space to situate Davies and progressivism as an outcropping of progressive ideology from the northern-Midwest regions, but also the social, political, and legal influence beyond the southern reaches of the traditional narrative.[30]

Like the broader sweeps of American history, studies of the larger landscapes of progressive and civil rights history began to accentuate the smaller features of influence. Having an established a framework of the general historiographical components, scholars started to explore nuanced aspects of twentieth-century shifts in society, law, and politics. Subfields of analysis gave rise to new opportunities to not only augment existing scholarship, but to also take developments in different disciplines in concert with each other. Rather than considering the history of civil rights and the law as separate extensions of a main historical body, historians, political scientists, and legal scholars treated civil rights and legal history narratives as individual

[30] Quintard Taylor, "The Civil Rights Movement in the American West: Black Protest in Seattle, 1960-1970," *The Journal of Negro History* 80, no. 1 (January 1, 1995): 1–14; Thomas J. Sugrue, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (New York: Random House, 2009); Arthur C. McWatt, *Crusaders for Justice: A Chronicle of Protest by Agitators, Advocates and Activists in Their Struggle for Civil and Human Rights in St. Paul, Minnesota 1802 through 1985* (Brooklyn Park: Papyus Publishing Inc., 2009).

fingers working together on the same hand to grapple with changes in the law and social justice that followed the Civil Rights Movement of the 1950s and 1960s.

Conspicuous in its absence, progressivism's historiography had done little to connect civil rights and legal scholarship and advance progressive history overall by the 1990s. However, Gerald N. Rosenberg, a political scientist from the University of Chicago, broke the pattern with of *The Hollow Hope: Can Courts Bring About Social Change?* in 1991. As the social-political debate over whether or not courts *should* play a legislative role continued in studies of the Gilded Age, Progressive Era, and Civil Rights Movement, Rosenberg instead boils the century's arguments down to the essential issue of whether or not the courts *can* produce reform. Through his synthesis of the landmark civil rights case *Brown v. Board of Education* as well as the seminal decision for women's rights in *Roe v. Wade* and other Supreme Court cases, Rosenberg's work pivots away from the accepted scholarship by determining that the decisions had little influence on progressive change. In answering his own question, *The Hollow Hope* concludes that the court system represented a "lure of litigation"[31] for reformers when in fact the optics of a courtroom win only drained a movement's resources. According to Rosenberg, because the courts have no power to implement or enforce its rulings, decisions in favor of a reform agenda created a pyrrhic victory at best and false sense of accomplishment at worst. Rosenberg is thus able to alter the historiographical narrative and maintain that for social activists, the courts do not in fact accomplish more than symbolic judicial victories in lieu of substantive change.[32] Rosenberg is also able to apply the same argument to judicial victories for

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[31] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University Of Chicago Press, 1991), 399.

[32] Rosenberg, *Hollow Hope,* 400.

environmental, criminal rights, and the reappointment of state legislatures and conclude that the perceived advancements have been just as hollow. Rosenberg's *The Hollow Hope* brings together the histories of civil rights, activism, reform, and the law that pushes progressivism into a new era of understanding. Academics have received the arguments Rosenberg posited *The Hollow Hope* with both criticism and support. Since its initial publication, Rosenberg's scholarship set off two decades of deliberation regarding his views of the courts which have since contributed to a growing field of "new civil rights history" with the law and lawyers as "essential intermediaries" in understanding the process of change.[33]

Michael J. Klarman expands on Rosenberg's use of political science conceptions and debates to shed new light on civil rights and legal history with his 2004 publication of *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*.[34] As an American legal historian and constitutional law scholar at Harvard Law School, Klarman enriches the historiographical narrative by handling the history the Constitution and the courts less as "an intellectual history of legal doctrine" and more as "political and social history."[35] Although Klarman's work represents a twenty-first century iteration of law scholars integrating political science accounts into studies of judicial behavior and constitutional politics as first presented by Robert Dahl in 1957, *From Jim Crow to Civil Rights* also advances scholarship within the new era of civil rights and legal history.

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[33] Goluboff, "Lawyers," 2312.

[34] Howard Gillman, "Constitutional History and Political Science: A Review of Michael J. Klarman's *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*," Humanities and Social Sciences Online (December 2004), accessed May 26, 2020, http://www.h-net.org/reviews/showrev.php?id=10083.

[35] Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2006), viii.

Klarman's historiographical utility lies in his assertion of what he called in his 1994 article in the *Journal of American History* "The Backlash Thesis."[36] Before Klarman's thesis, most civil rights scholars agreed that the 1954 Supreme Court case *Brown v. Board of Education* was the catalyst that ignited the Civil Rights Movement of the mid-twentieth century. Klarman instead argues in the reverse; stating that *Brown* was the result of a movement already in existence rather than its instigating event. In Klarman's estimation, it was the Supreme Court's desegregation decision, the national attention to issues of race it generated, and subsequent white opposition to the ruling that invigorated and sustained a movement already underway.[37]

Therefore, *From Jim Crow to Civil Rights* not only refutes Rosenberg's stance that court decisions have little impact on long-term civil change, but also elevates "our general understanding of the Supreme Court's role in American society"[38] across multiple disciplines and waves of scholarly debate. Klarman both opened the door to further inquiry from historians, legal scholars, and political scientists regarding the factors that explain judicial rulings and the influence of court decisions across the larger world of race relations.[39] So too did his scholarship and backlash thesis provide a contemporary space in which to reconsider the roles that the Civil Rights Movement, the law, and the judiciary have played in shaping American civil rights and legal history. As significant, by encouraging revised views of the old paradigm for civil rights and the law, Both Rosenberg and Klarman's work stands as a gateway to classifying a growing

[36] Michael J. Klarman, "How Brown Changed Race Relations: The Backlash Thesis," *The Journal of American History* 81, no. 1 (1994): 81–118.
[37] Klarman, *From Jim Crow to Civil Rights*, 62.
[38] Klarman, viii.
[39] Klarman, 4.

field of what Risa Goluboff, legal historian from the University of Virginia, calls "a new civil rights history."[40]

In the two decades since the first appearances of Rosenberg's antithetical stance and Klarman's backlash thesis, a similar cross-section of scholars built on their early works in civil rights and legal history to identify and define a new field of civil rights history. In her 2013 review in the *Harvard Law Review* of Kenneth W. Mack's 2012 publication of *Representing the Race: The Creation of the Civil Rights Lawyer*, Goluboff structures a growing bibliography of the new field against old works with a limited body of scholarship regarding "developments in legal historical approaches to civil rights history."[41] Goluboff categorizes "old literature" from two vantage points. In the first group, she defines works like those of Rosenberg and Klarman as examples of "court-centered" or "major-case-centered" pieces. For Goluboff, their sole focus on the Supreme Court and major cases like *Brown v. Board of Education* is problematic in that it presents as retrospective and linear approaches to the topic.[42] Rather than expanding treatment of the legal system's role in the Civil Rights Movement, past scholarship limits recognition of the people and legal institutions below the national and Supreme Court level as influential components.

Community studies of civil rights emanating from social historians within the past thirty years is what Goluboff views as the second group of "old literature." She acknowledges that works like William Chafe's *Civilities and Civil Rights* and Charles Payne's *I've Got the Light of Freedom* stand at the opposite end of the old civil rights spectrum. Goluboff asserts that where

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[40] Goluboff, "Lawyers," 2312.
[41] Goluboff, 2318.
[42] Goluboff, 2319.

the main crux of a community-centered civil rights movement pivots around on-the-ground histories of on-the-ground narratives from local centers of activity, the scholarship all but overlooks the law in general, and the Supreme Court in particular. Thereby both groups limit an address of the people, institutions, and legal and non-legal areas where other actors and arguments meet[43] and Goluboff ushers in the next advancement in twentieth-century civil rights and legal historiography.

Goluboff declares that outside a handful of scholars, there has yet to be a comprehensive survey of the growing field. Yet, she hones a working identification by which scholars can situate their work within a new era of understanding. According to Goluboff, scholars of the new civil rights history use sources and analytics of both legal and social history, while taking the law into serious consideration with an expansive definition of "the law" itself. The new civil rights history aims to encapsulate more stories and less linear narratives that have little relationship to the Supreme Courts. It is a more inclusive field of study as it attempts to explain how ideology, social reform movements, and legal doctrines transcend the limits of space, class, race, and time. As a result, the new civil rights history includes a hard look into the connections among professional and non-professional figures involved in changing legal conceptions and civil rights struggles.[44] It is with the decentering of both the major-case and community-grown purviews and incorporation of "lay actors"[45] that a new union of legal and social history is borne. Thus, Goluboff not only outlined the new civil rights history as a space in which to capture significant people, events, ideology, and philosophical beliefs that occurred outside of and below the

[43] Goluboff, "Lawyers," 2319.
[44] Goluboff, 2318.
[45] Goluboff, 2320.

national organizations and the Supreme Court level, but also solidified an ability for a contribution to both legal and social history to also serve in a new civil rights history. As a result, preceding works regarding the significance of the law and local community organizations in civil rights like Tomiko Brown-Nagin's 2011 publication *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement*, Kenneth W. Mack's 2012 authorship of *Representing the Race: The Creation of the Civil Rights Lawyer*, and Susan Carle's 2013 piece *Defining the Struggle: National Organizing for Racial Justice, 1880-1915*, validate the views that a place for the more common actors in legal and social histories is embodied by a new civil rights history. As such, using Goluboff's definition of the field as a historiographical lens further reveals the importance of heretofore unremarkable legal figures and social events as contributors to a "dynamic and multidimensional process"[46] and elevates their role to a new understanding of historical influence.

In accordance with the historiographical interpretations of the Progressive Era, the Civil Rights Movement and social activism and twentieth-century legal reforms, and the rise of the new civil rights history, America's justice system was not left untouched by the growth and politicization of progressivism or the Civil Rights Movement. Once the interaction between politicians and the judiciary increased during the Gilded Age, an era that spanned around 1870 to 1900, they were unable to maintain separate paths forward. As the federal judiciary became more political throughout the mid-nineteenth century and into the twentieth, many judges started to define themselves in partisan terms. By the 1940s, even justices on the Unites States Supreme Court had begun to demonstrate an intended outcome for their decisions in terms of activism and

[46] Goluboff, "Lawyers," 2320.

restraint. Published legal opinions during this period reveal the scope of the judges' underlying political leanings as either a liberal or conservative departure from the moderate middle view. As a result, both judicial activism and the counter term judicial restraint entered the modern legal vernacular as a means for evaluating the actions of a judge and understanding the impact of the intended consequences as either liberal or conservative.[47]

Individuals, grassroots organizations, and social movements of the late-nineteenth and twentieth century stand as examples of transformations that were neither absolute as liberal activism nor conservative restraint. It is from the moderate undertones of change that judicial progressivism, both as a philosophy and path away from the practices of judicial activism and restraint, was born. While there have been a limited number of publications that celebrate Davies' judicial achievements in the decades since the events in Little Rock during 1957, a contextualization of his actions points to an elevated role of the northern plains in twentieth-century civil rights legal history.

The values and temperament reflected in the northern Great Plains social and political history form a regional identity that helped shaped North Dakota's politics and Davies' openness to progressive reform. In the *History of North Dakota*, Elwyn B. Robinson, American historian of the North American Great Plains with a specific focus on the state of North Dakota, uses a theme of "remoteness" to capture the historical character of the state's development as a "colonial hinterland."[48] As Robinson explains, North Dakota's distance from the urban centers of finance, trade, and manufacturing created a necessary dependence and "real degree of control"

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[47] Keenan D. Kmiec, "The Origin and Current Meanings of Judicial Activism," *California Law Review* 92, no. 5 (October 2004): 1449.

[48] Robinson, *History of North Dakota*, x.

from political and economic forces outside the state. Specific to the circumstances that inform state politics at an intersection with Davies' elevation to influence, Robinson argues that among other factors, the federal government contributed to North Dakota's dependent condition as a "plaything for outside forces," citing examples from the federal government's control of the area via the Louisiana Purchase to years of territorial status. Robinson reinforces the significance of remoteness and dependency in forming the state's character by examining the impact of federal assistance during the Great Depression, highway construction, development projects in the Missouri Basin, rural electrification, and farm conservation programs.

Robinson's approach enables him to assert that it was North Dakota's dependence that gave rise to agrarian radicalism and struggle against colonial status and the exploitation that accompanied it. Robinson explains that it was a struggle that began with Indian resistance to white encroachment and continued down to the 1950s with the cooperative movement which illustrates the factors leading to the region's differences with the nation as a whole. By using three main examples of agrarian radicalism with the Farmers' Alliance, the Nonpartisan League, and the many leading residents who took up causes against outside exploitation, Robinson provides a solid bedrock for framing the region's identity and Davies' own character in the twentieth century.[49]

Politicians strengthened their connection to the growing power of the judiciary throughout the twentieth century. What began as efforts to bring North Dakota and the plains region of the northern-Midwest region into the national conversation for protecting agricultural interests became a catalyst for keeping the basic tenets of the Progressive Era alive. Such

[49] Robinson, *History of North Dakota*, xi.

political motivations also created a new category of progressive jurisprudence and progressivist judges while catapulting their actions into a generalized national consciousness. Just as important is the role of the northern plains and its political and judicial contemporaries played in upholding, expanding, and defining the future of the Progressive Movement in the United States. A small cadre of insurgent northern-Midwestern Republican legislators, like United States Senators Lynn J. Frazier and Gerald P. Nye of North Dakota, Henrik Shipstead of Minnesota, Smith Brookhart of Iowa, Robert LaFollette of Wisconsin, and George Norris and Robert Howell of Nebraska, first rescued progressivism from extinction in the late 1910s. Judges, like Davies, went on to secure its legacy by upholding progressive legislation in court and expanding its presence with their decisions and published opinions in both civil and criminal courts.[50]

The twentieth century signaled an upheaval on multiple fronts when growing social movements collided with the conventional boundaries of the law. As various progressive groups began pushing the limits of the law and breaking barriers, the courts had to also make adjustments to the uptick in tempo. Initially filling a more reactionary role, the courts began to echo their history as a legal system with flexibility out of necessity to address the immediate needs of the time. As such, those operating within the legal field became increasingly active in their assertions and held a new awareness of the influence of the courts throughout all facets of life in the United States, local and national. So too was there a visible consciousness on behalf of the judges as to the immediate consequences of their decisions and larger impact within the socially progressive spheres. No longer were they distanced from the everyday populations with

[50] Briley, "Lynn J. Frazier," 440.

whom the government charged them with serving. Their decisions were now even more real and instant, conventional and controversial, personal and far-reaching.

With effects of a single determinism at or below the level of the Supreme Court now able to become a touchstone of progress for an entire nation, the social and political stakes could not be higher. Advocates from opposite ends of the spectrum attempted to protect either the conservative or liberal principles upon which they based their decisions and built their careers. What emerged to serve the respective interests, and the desires of the constituencies for whom the judicial system ultimately served, were two new classifications of jurisprudence: judicial activism and judicial restraint.

Yet, the new dynamics were not on the whole organic in their origins or the results of mere historical coincidence. The paradigm shift in the courtrooms was part of a much larger social, political, and economic pattern as part of President Franklin Delano Roosevelt's proactive response to the profound crises that pervaded throughout the Great Depression following the stock market crash of 1929. In an effort to secure lasting progressive gains in a number of social and political spheres as part of his monumental legislative relief package known as the New Deal, Roosevelt sought to utilize the court system as a means of obtaining favorable rulings if and when Congress or constituents challenged the constitutionality of his initiatives. While Roosevelt's proposal of the Judicial Procedures Reform Bill of 1937 and what became known as the "court packing scheme" both fell short of consensus and implementation, he was nevertheless able to appoint eight well-calculated new members to the Supreme Court and forever change the nature of the judicial system and its servants' behavior.

Arthur M. Schlesinger Jr., first identified the next stage in the Court's modernization and articulated the philosophical alterations of behalf of the Roosevelt Court with his 1947

publication of "The Supreme Court" in *Fortune Magazine*.[51] Born in 1917, Arthur M. Schlesinger, Jr., an American historian, social critic, and public intellectual whose work explored the history of modern American liberalism, first identified the notion of "judicial activism" and "judicial self-restraint" ten years before the desegregation crisis in Little Rock. Schlesinger sought to articulate the dividing line between four sitting New Deal justices, Hugo L. Black, William O. Douglas, Felix Frankfurter, and Robert H. Jackson, and their visible conflict between two theories of the way judges should decide cases. The conundrum was amplified in the wake of the political shift that followed Franklin D. Roosevelt's New Deal Era when the Republican and Democratic parties underwent a substantial transformation in policy, politics, philosophy, and practice. Their respective bases and previously unflappable voting blocs had switched places. Those who identified with the originalist Republican values that stemmed from the "party of Lincoln" filled in the spaces of Roosevelt's Democrat-led coalition with a more liberal and socially progressive agenda. As defined by Don E. Fehrenbacher, Constitutionalism can be thought of as "a compound of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law," but that those responsible for interpreting its meaning, like executives, legislators, and judiciaries are still enabled to take an assortment of approaches to establish either implied or explicit intention.[52] However, it is worth noting that the variety that Constitutionalism or being a Constitutionalist affords stands in contrast to the Originalism or Originalist stance. Originalism and originalists view the Constitution as stable from the time of enactment and maintain that the meaning of its

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[51] Arthur M. Schlesinger Jr., "The Supreme Court: 1947," *Time Incorporated*, 1947, accessed February 2, 2020, https://books.google.com/books?id=zHAxmQEACAAJ.

[52] Don E. Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South,* (University of Georgia Press: Athens, Georgia, 1989), 1.

contents can be changed only by the steps set out in Article V.[53] As a result, there remains little to no variation of interpretation beyond the original understanding of the governing document at the time of its acceptance.[54]

Traditional conservative Democrats, primarily those in the South, eventually flocked to the Grand Old Party and went on to redefine its face as one of caution and convention. As with the introduction of the concepts of judicial activism and restraint, the shifting political allegiances were not absolute. Many politicians and voters experiences blurred sentiments and changes in affiliation continued to occur within and between the two main parties. The politics and practices of the judicial system throughout Davies' rise to a federal appointment were likewise transformed with an effect that still reverberates throughout American society.[55]

Schlesinger, an accomplished historian active in the world of twentieth-century politics that ranged from involvement as an advisor and speechwriter for the 1952 and 1956 presidential campaigns for the Democratic Party's nominee, Adlai Stevenson II to "court historian" for John F. Kennedy administration from 1961 to 1963 to Robert F. Kennedy's doomed presidential bid in 1968. Schlesinger made a name as a social critic on the leading edge of public intellectualism. His curriculum vitae includes in-depth explorations of American liberalism through a litany of highly regarded books, including a 1966 Pulitzer Prize winning biography of John F. Kennedy's days in the White House. "The Supreme Court" and his era-defining categorization of Supreme Court justices as acting with either demonstrated activism or restraint in their decisions set off a

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[53] Bret Boyce, "Originalism and the Fourteenth Amendment," *Wake Forest Law Review* 33 (1998): 909.
[54] Amar, *America's Unwritten Constitution*, xii.
[55] C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (New Orleans: Quid Pro, LLC, 2014), 165.

maelstrom of controversy both inside and outside the legal field of study and practice.[56] Many legal scholars castigated his analysis and assertions regarding the motives behind the decisions of the Supreme Court justices.[57] Those operating in the court system cast aspersions upon the validity of his commentary as someone wholly outside the practiced and educated knowledge of legal expertise.[58] Yet, despite the initial disinclination to accept Schlesinger's premise, a new wave of scholarship, analysis, and intellectual understanding soon followed his groundbreaking work from outside the system. Scholars and a fresh social consciousness of the Court confirmed that Schlesinger had in fact flipped the script on existing academic synthesis and set into motion a contemporary revision of America's jurisprudence and system of justice.[59]

Schlesinger's work founded a reconsideration of the individual and human factors that went into a judge's decision while Roosevelt attempted to expand presidential power through the highest court in the land. Politicians and citizens now recognized the prominence of the Court's power to affect all manner of the nation's affairs. The high degree of political orchestration and judicial calculus could now style a particular Court in a mirror image of a party's platform. Any given make-up of the Court's justices could also reflect the specific desires of any presidential administration to channel the directional flow of the entire system of justice, all while gaining a higher profile in the public eye. The social and political stakes operating behind the scenes had

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[56] William O. Douglas, "Excepts from Schlesinger's 'The Supreme Court,'" University of Massachusetts Library Online, University of Massachusetts, accessed January 18, 2018, http://credo.library.umass.edu/cgi-bin/pdf.cgi?id=scua:mums312-b116-i211.

[57] Kermit Roosevelt III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Haven and London: Yale University Press, 2006), accessed June 28, 2020, http://www.lawcourts.org/LPBR/reviews/roosevelt0207.htm.

[58] Randy Barnett, "Constitutional Clichés," *Georgetown Law Faculty Publications and Other Works*, Georgetown Public Law and Legal Theory Research Paper No. 12-040, 36 Cap. U. L. Rev. 493-510 (January 1, 2008), accessed June 28, 2020, https://scholarship.law.georgetown.edu/facpub/825, 493.

[59] Kmiec, "The Origin and Current Meanings of 'Judicial Activism,'" 1450.

not been higher in the modern era. As a single ruling from any federal judge now held the ability to either push forward or protect against the expressed ideals of the ruling party and their voting blocs by extension, both the political puppeteering and social engineering took center stage and redefined judicial behavior for generations to come.

An obvious pattern of disagreement and non-unanimity became visible among the justices at the Supreme Court during the heyday of the Roosevelt Court in 1941. The new categories of active or restrained jurisprudence traversed their way from the macro scale of Roosevelt's efforts to restructure the socio-political influence of the Court to the microcosms of legal systems at the regional, state, and local levels. In the spirit of Marshall's elimination of *seriatim*, which gave equal weight to each justice's opinion and allowed for the voice of the Court to act as collective whole, rates of opposition increased among the justices. A spike in dissenting opinions pointed to a significant break from the past with their assertion of the individual independence of opinion and first defined the political context within which they now operated.[60]

C. Herman Pritchett wasted no time in dovetailing his scrutiny of the changes within the nation's system of law throughout the Roosevelt administration with Schlesinger's categorization of judicial activism and restraint. By 1948, Pritchett's publication of *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* spearheaded an analysis that argued in favor of an examination of the divergences in opinion and non-unanimous consensus that arose during the Roosevelt era. By enveloping points of view from political science, sociology, and history, Pritchett is able to unpack the psychological origins of judicial attitudes. His work is able to lay

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[60] Simeon D. Fess, *The History of Political Theory and Party Organization in the United States* (Cornell University Library, 2009), 98.

the groundwork for understanding the development and ultimate influence of judicial behavior that Schlesinger first identified as activism or restraint in the Court. The profitability of Pritchett's approach occurs where he identifies the influence of individual predilections on the development of the law. However, his biggest contribution manifests within his assertion that while Roosevelt's Supreme Court, and the lower courts that operate in its shadow, inevitably act within a political context, the greatest danger to America's democracy would be for such practices to unrealized and unchecked. Like Schlesinger, it is Pritchett's desire for there to exist a more informed public understanding of the Court's place in the United States' system of government and politics. Therefore, Roosevelt and his administration not only restructured the politics and social consensus behind the courts and inspired a rethinking of the system, but also helped forge new definitions of judicial attitudes and behavior. The subsequent scholarship likewise solidified the growing recognition of the importance of judicial psychology, philosophy, and ideology as it became increasingly apparent to a larger number of Americans that every judgement, at or below the level of the Supreme Court, has a generative power that can set the directive force of one judge's principles, determinisms, and decisions into motion for decades, if not centuries, to come.

Schlesinger, controversial because of his standing as a non-lawyer historian for *Fortune* magazine, went on to define the judicial factionalism following the New Deal era. He used the opposing sides to show how Supreme Court justices used the court as an instrument to achieve their political goals. The Black-Douglas group on one side looking for "social justice, especially for the otherwise unprotected in society," or the Frankfurter-Jackson group on the other side who sought a means of permitting legislatures to secure results that "for better or worse … a majority

might wish except when statues blocked the channels of self-correction."[61] Despite questions of his scholarly legal authority, Schlesinger's article captured the interplay between the two different paths as a battle between a results-oriented versus a process-centered approach. Schlesinger expressed a new line of political, social, and judicial inquiry that revolutionized the way people think about judges and the roles and influence they have over a case. As a result, "judicial activism" and its counterpart "judicial self-restraint" became part of the modern vernacular in social and legal thought when interpreting the role the judiciary plays in shaping American society and culture. [62]

Randy E. Barnett, a lawyer and the Carmack Waterhouse Professor of Legal Theory at Georgetown University in Washington D. C., further validated the success of Schlesinger for having coined the terms of judicial activism and self-restraint. Barnett solidified Schlesinger's work within the common framework of legal thought, interpretation, and analysis in his 2008 article, "Constitutional Clichés." Barnett posits that the widespread invocation and subsequent overuse of phrases like "judicial activism" have relegated the term to the confines of a common and often-ignored platitude in later decades. Yet, despite the negative connotation of Barnett's thesis, it demonstrates the evolution and malleable nature of American society and politics while illustrating how legal thought began to shift from the margins to the mainstreams. As a result, judges and the judiciary also experienced a substantial shift to the center of focus and influence and began to wield more power within the courts and throughout society[63]

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[61] Schlesinger, "The Supreme Court," 8.
[62] Schlesinger, 9.
[63] Barnett, "Constitutional Clichés," 825.

Once accepted as a central concept, the idea has gone through various waves of political and academic synthesis and continued revision. As a result, there is an enhanced understanding of the impact of the legal decisions made in local, district, and appellate courtrooms on the social changes that happened during the mid-twentieth century. In many cases, judicial activism and restraint continued to manifest in the halls of the Supreme Court where the concept originated. For the purposes of research that incorporates evidence relating to Davies, the judiciary, and twentieth-century social movements and political change, Schlesinger's terms further contextualizes the interwoven relationship between the issues of civil rights, social justice, and the influence of the American judicial system in the development of judicial progressivism. At the same time, the decisions of one individual, like those of Davies, had a long-lasting and progressive impact within the subjective institutions of the law, society, and politics.

A more prominent and powerful presence of the federal court system signals an opportunity to reconsider and revise the existing thinking about judicial activism and its historical trajectory. Like the evolution of the power of the courts from a little-regarded branch of government in the early nineteenth century to a full-fledged institution of authority, so too is the advancement of judicial activism toward a more progressive definition and practice. Although the term was coined eight years before Davies received an appointment to the federal bench, his career breaks with Schlesinger's notion of politics-driven activist judges and the binary of judicial restraint. A consideration of Davies' actions within the context of the larger changes in the United States transforms the established definitions and readjusts the judicial outlook to show how a judge was able to use his position to affect change and without identifiable biases or a polarized opinion.

Where judicial activism and restraint have by tradition referred to rulings with a connotation of bias and a disproportionate influence of personal opinion, rather than one founded upon existing law, Davies' actions instead reflect a judicial spectrum developed in concert with the growth of the court system and rise of progressive principles. Rather than overt activism in the traditional sense, Davies' judicial character projected in his notable civil and criminal cases demonstrates the use of judicial interpretation as not activist or restrained. As a result, a synthesis of his rulings contained in the following character study lands his actions outside his personal or political motivations. The emergence of his own jurisprudence and application of the law signaled not only his willingness to break from restrictive norms, but also to make a progressive push within the federal judiciary.

History scholars, political scientists, and legal experts in academia have published generalized works on judicial activism, but only scant scholarship identifies individual activist judges beyond the big-name figures of the Supreme Court like John Marshall, Earl Warren, William Rehnquist, John Roberts, and their contemporaries.[64] This study of Davies fills a gap in the understanding the political, historical, and legal factors that have shaped culture, society, and the judicial outlook from the lower federal courts in the United States today. As most current studies remain confined to the boundaries of political science and legal studies, viewing Davies' limited biography and judicial activism through a historical lens provides new perspectives,

[64] These works are addressed later in this chapter and represent substantial, but limited scholarship regarding individual activists judges who sat below the level of the Supreme Court: William J. Brennan et al., "In Memoriam: J. Skelly Wright," *Harvard Law Review* 102, no. 2 (1988): 361–74; John Lewis, "Reflections on Judge Frank M. Johnson, Jr.," *The Yale Law Journal* 109, no. 6 (2000): 1253–56; Tomiko Brown-Nagin, "Identity Matters: The Case of Judge Constance Baker Motley," *Columbia Law Review* 117, no. 7 (2017): 1691–1739.

revised interpretations, and new definitions at the intersection of politics, society, and the judiciary.

In an articulation of the court's modern transformation, Benjamin N. Cardozo's *The Nature of the Judicial Process*, first published in 1921 by the Yale University Press, synthesizes the non-standard aspects of judicial philosophy. Serving as a Supreme Court justice from 1932 to 1938, Cardozo contextualizes the nebulous factors that lead a judge to render their own secular decisions within the scope of the legal field. As he explains, it is a stream of subconscious forces that give coherence and direction to thought and action. For Cardozo, judges are no less immune to these intrinsic currents than any other person, but the shear nature of judicial autonomy gives special meaning to the, "inherited instincts, traditional beliefs, acquired convictions…and the resultant outlook on life and conception of social needs."[65] In essence, both centripetal and centrifugal forces that which judges do not readily recognize or cannot even name nevertheless apply continual pressure to temper emotion with detached reason to determine where an objected choice should fall. Efforts to balance one's inner response with outward logic and reason culminates in an underlying personal and philosophical "truth" of life; that which is marked by subconscious forces that often-kept judges consistent with themselves, but inconsistent with one another and even society as a whole. Coupled with an external sense of humanitarian purpose, a singular judge's own judicial outlook holds the potential to effect historic change, even in the face of a dissenting national opinion. Cardozo's assertions make clear that the factors by which a judge develops their philosophy are important to understanding the ways in which a person's upbringing and personal philosophy can become an agent of progressive change.

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[65] Benjamin N. Cardozo, *The Nature of the Judicial Process,* ed. Andrew Kaufman (New Orleans: Quid Pro, LLC, 2010), 12.

Cardozo's explanation of the nature of the judicial process and philosophy further demonstrates the mutually reinforcing interaction of the law and historic social change. For Cardozo, pragmatism and detachment prevent a judge from being able view situations beyond the limitations of their own experiences. Judicial objectivity eliminates seeing things "with any eyes except our own,"[66] where a judge can never achieve absolute impartiality. However, introducing the elements of empathy and agency of historical hindsight does allow a person to see things through a different lens. Rather than secular neutrality, recognizing and acknowledging empathy and agency as part of the judicial process illustrates a new connection that judges could have with their courtroom environment in the twentieth century. The fresh optics described by Cardozo free judges from the restrictive expectations of human transcendence in their roles as arbiters of the law and society. Cardozo's transformative jurisprudence enhanced a judge's ability to transform Lady Justice's eye coverings from a historically biased and permeable bandage into a blindfold. Though not without an increasing number of firestorm events to the contrary, within Cardozo's judicial framework, judges were not bound by the systematic dehumanization of the law of centuries prior. Judges of the twentieth century were now able to better incorporate the social, political, and racial delineations of justice into their own philosophy.

Oliver Wendell Holmes Jr., who was trained at Harvard law and served as an associate justice of the United States Supreme Court from 1902-1932, detailed his legal ideas in *The Common Law*, a book that stands as the bedrock of American legal history. First appearing in 1881 as a published series of lectures given at the Lowell Institute in Boston 21 years before

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[66] Cardozo, *The Nature of the Judicial Process*, 13.

Holmes became a justice of the United States Supreme Court. This work is a treatment of legal philosophy that characterizes the impact of decisions within the logic-based directives of an objective system of law. By stating on the first page, "The life of the law has not been logic: it has been experience," Holmes' piece not only identifies the indivisible relationship between humanity and the law, but also how that force has driven the evolutionary process and progress of the American legal system.

Unprecedented philosophical notions of civil liberties and judicial restraint exist at the core of Holmes' thought. He went on to delineate more than 2,000 opinions that both advanced America's institution of jurisprudence from the post-Civil War era into the twentieth century and modernized a new generation of intellectuals when considering the ways in which the law, its judges, and their decisions have directed and redirected many of the nation's historical forces. Although it does not function as a work of historical scholarship, *The Common Law* provides the footing upon which to build a history-centered synthesis of the social, culture, and political influences that have shaped the progressive nature of the law, its interpretation, and impact in the United States.[67]

Coming on the heels of Holmes' foundational tome in legal philosophy and taking the changes in thought into the twentieth century, John Chipman Gray published *The Nature and Sources of the Law* in 1909. As a professor of law at Harvard University, legal scholar of the Progressive Era, and founder of a Boston-based law firm, Gray acknowledges the human dimension in both the spirit and application of the law. Gray's assertions manifest as a two-pronged approach. He first posits a cautionary view of studying the law in isolation. Rather, in

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[67] Oliver Wendell Holmes Jr., *The Common Law* (Eastford: Martino Fine Books, 2012), 26.

order to guard against a narrowed and exclusionary application of law, he endorses a utilization of common law with a focused reliance on flexible interpretations of statutes, the use of germane cultural tenets, and an adjustable methodology for determining the outcomes of disputes.

Striking even closer to humanity's role in the system of jurisprudence is Gray's attention to sources of the law as his second wave of revisionist rhetoric. Breaking with his conventional contemporaries and the traditional consensus that any judge's job is to only interpret the law as stated in literal black and white terms, Gray takes a provocative stance by asserting that it is actually judges who turn into law; thereby validating not only an unwritten deference to the power of a single judge's determinisms, but also allowing such legal opinions to become law within the interaction of precedence, custom, and interpretation. At the same time, Gray's work suggests similar changes in the training and professionalization of legal education in concert with the expansion of the nation's legal code. Likewise, Gray explores the role of reasoning, morality, and popular will to better define both the legal system and the importance of judges as prominent figures in pushing American culture, society, and politics to new heights of progressive thought and articulation.[68]

Constitutional law scholar Akhil Reed Amar continues to build Holmes' and Gray's nineteenth- and twentieth-century roadmaps of legal scholarship that better inform a collective historical understanding of the power of the law throughout every social, cultural, and political institution in the United States as well as peoples' ability to keep it an often-progressive and malleable instrument of social justice and civil rights. At the same time, Amar combines legal scholarship with historical thought and advances a cross-discipline academic work on a macro

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[68] John Chipman Gray, *The Nature and Sources of the Law*, ed. Roland Gray (New Orleans: Quid Pro, LLC, 2012), 224.

scale. With his complementary works, *America's Constitution* and *America's Unwritten Constitution*, published in 2005 and 2012, respectively, Amar's comprehensive duo accomplishes a legal and historical treatment of America's inimitable story. He uses the Constitution of the United States as a vehicle to reflect the social and political undercurrents that formed the legal landscape and the fluidity, often controversial, of its interpretation throughout history well into present day.[69]

Not without controversy because of his revival of Constitutional originalism or living document interpretive debate, Amar contextualizes his extensive "biography" of the Constitution within the climate of late-eighteenth-century American politics. As a result, he is able to blend a nature versus nurture origin story for the Constitution and show just how "human" the Constitution and the entire legal institution becomes after its inception. Amar then follows up by pulling the interpretation of the Constitution from textual isolation and placing it within a dependent and inherently social framework like early presidential and congressional precedence, common practices of the everyday citizenry, and venerable judicial decisions. Amar likewise draws on the implicit rhetoric within keystone documents like the Federalist Papers, Abraham Lincoln's Gettysburg Address, and Martin Luther King Jr.'s "I Have a Dream" speech for further guidance to understand and interpret American jurisprudence as a whole and the Constitution in particular within a larger social, cultural, and political history. Amar incorporates a consideration of human sensibilities in the changes in the law as a progression. He then carves a space to

[69] Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005); Amar, *Unwritten Constitution*, 358.

evaluate both the macro role of judges in directing social, political, and legal history and the micro impact of a single judge's decisions in instilling progressive change.[70]

The resulting elasticity of judicial interpretation, activism, and restraint all began to stretch the conventional codification the country's jurisprudence and legal standards of conduct and consensus in the twentieth century. With the opportunity, Davies defined a separate, but no less influential, regional contribution to the social, cultural, political, and legal shifts. Driven in part by a civil rights movement that would crescendo by mid-century, Davies' Northern blend of character and comportment helped break the restrictive boundaries of society's majority-consent in the law through a set of unprecedented judicial decisions and redefine a more inclusive and equal law-based code of ethics for an entire nation.

Where historians like Schlesinger first addressed judicial activism as a new line of scholarship and defined a novel avenue of intellectual thought, subsequent work has adhered to sweeping generalized definitions that preclude any consideration of an expanded notion of activism in the history of the United States. However, Davies' life and career, along with a handful of other judges, fit within some of the established framework of thinking, interpretation, and terminology. In other instances, his actions depart from tradition and not only open a new line of inquiry and understanding on a new level of historical thought, but also validate a unique, original, and significant role in a movement that challenges conventional thinking and understanding of judicial activism and civil rights in the twentieth century.

Few major works exist regarding the roles individual activist judges play below the Supreme Court or regional level. Yet, some commonalities emerge with the application of

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[70] Amar, *Unwritten Constitution,* 359.

expanded research and definition of judicial activism. While there are identifiable instances of agreement that some judges stayed above the political fray and characterized an ability to instill lasting change through their decisions as seen in academic scholarship like William J. Brennan Jr.'s 1988 "Tribute to the Honorable J. Skelly Wright," John Lewis' 2000 "Reflections on Judge Frank M. Johnson Jr.", both from the *Yale Law Journal*, and Tomiko Brown-Nagin's 2017 publication of "Identity Matters: The Case of Judge Constance Baker Motley" in the *Columbia Law Review,* no aggregate study has emerged that examines the individual or collective impact of federal judges or judicial activism.[71] By transcending the politics of his day, Davies' choices is a bridge between the established approaches to judicial, social, and political thought of Schlesinger and Schlafly and an echo of the dynamic processes of change.

On a larger scale, foundational legal scholars like Oliver Wendell Holmes and John Chipman Gray helped usher an understanding of American law into a new era at turn of twentieth century. Others, like G. Edward White soon followed, accepted the baton at the twentieth century's middle stage of legal historiographic scholarship, and passed it to their twenty-first century colleagues. Where Holmes and Gray center on the intrinsic humanistic qualities in the advancement of legal philosophy to its far more prominent role in the legal system and society, White curates an anthology of essays that elucidate the development of a patented American legal system and an exclusive standard of jurisprudence.[72]

First published in 1978, *Patterns of American Legal Thought* traces the development of a code of law of which factors like resource allocation, power distribution, and policy making have

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[71] Brennan, "J. Skelly Wright," 361–74; Lewis, "Judge Frank M. Johnson, Jr.," 1253–56; Brown-Nagin, "Judge Constance Baker Motley," 1691–1739.

[72] G. Edward White, *Patterns of American Legal Thought* (New Orleans, La.: Quid Pro, LLC, 2010).

both influenced and affected its growth and progress.[73] White's selection of scholarship explores the more profound social issues and technical ingredients that animated the basic structure of a system of law, order, and justice and shows just how ductile the concepts, processes, methods, debates, practices, criticisms, and public opinions have been throughout the course of the United States' rich legal history. Despite its sweeping scope and coverage of the mechanics of the legal system, the collection does not allot extensive treatment to the judiciary. White does however incorporate works that introduce the concept of the judiciary as a constitutionalizing agent as well as the relationship between jurisprudence and social change, thereby validating the centralized role judges could and did play in altering America's social, cultural, and political status quo and confirming that the human element is rarely a separate issue.

With the benefit of hindsight, twenty-first century counterparts of Holmes, Gray, and White act as contemporary bookends to the narrative of the 1900s. A number of preeminent works provide syntheses that further illustrate the symbiotic relationships among the law, history, and the American capacity for progress throughout the twentieth century and underscore its ongoing significance. Randy E. Barnett's 2014 updated second edition to *The Structure of Liberty: Justice and The Rule of Law* uses the specific American notion of liberty as the backbone of the rule of law in the United States.[74]

What Barnett unveils is a dual architecture of liberty and certain principles of justice and the rule of law. Barnett argues that the tangible structure then enables institutions of government to handle the serious and pervasive social problems of knowledge, interest and power and better

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[73] White, *Patterns*, 21.

[74] Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Oxford University Press, 2000), x.

free citizens to pursue their respective happiness, peace, and prosperity. The utility of Barnett's position lies within the implication that when equipped with the guarantee that the law will handle problems to a large extent, the democratic citizenry transfers power not only justice system, but to judges themselves. Equipped with the freedom from constraint of action and the freedom to make decisions separate from the other branches of government, judicial power was now galvanized at the core of America's legal system and agent of progressive change in the twentieth century. Yet, as Barnett is apt to indicate, human elements, like partiality and the tendency to satisfy subjective preferences, can also create new social and political problems that become minefields of contention. Nevertheless, judicial power maintains an undeniable hold both within and well outside the interlocking systems of government from which it was borne.

From the ebb and flow of its meek foundation to its meteoric rise to prominence and power, scholars, politicians, and ordinary citizens sought to understand the court and its mutable complexion in terms of their times and conditions. New lines of inquiry and debate began to percolate throughout the system of justice. An amalgamation of judicial philosophy, action, restraint, and a socio-political rhetoric and policy all rose to the top as issues the judiciary faced in the modern era. Logic, reasoning, intent, motives, bias, liberal, conservative, and even "judge-made law," among a laundry list of others, all became buzzwords of the day. The renewed line of thinking wove a stronger thread of humanity into the legal fabric and awakened a greater consciousness of the human element in shaping the structure of the law.

It also restructured the framework in which people viewed the court, and its most conspicuous servants, as well as its function as both a public service and a check on the balance of government. The redirection of energy and the next transformative step initially inspired more questions than it provided solutions to the problems of the past and present. But, as many

meditated on the legal system's ongoing changes, judges began using their enhanced position of power to deliver answers to some of the twentieth century's most barbed issues. As individuals and collective whole, judges set a provocative tone and cemented their place at the forefront of American power and influence for generations.

Contemporary sets of personal beliefs and individual philosophy continue to emerge from the individual actors and altered landscapes of progressivism, civil rights, the law, and activist movements at and below the Supreme Court and national organizations within the modern scope of their historiographies. For Hofstadter, the history of progressivism's history is both transitory and political. He uses Turner, Beard, and Parrington to frame the historiography as a series of interrelated solutions through liberal-minded ideology and practices. Whereas Hamby and Flanagan blend politics and society into progressivism's narrative, but little attention is paid to the law in each of their syntheses. In respect to civil rights, Hall, Lawson, and Taylor all bring the account out of its traditional southern trappings while pushing out the timeframe of analysis. They widen the scope of inquiry and invite new consideration of the history, yet they also the leave absent the legal aspects of the civil rights struggles. Rosenberg and Klarman deepen the well of knowledge with thorough treatments of civil rights and legal history, but also leave other significant plays on the periphery. Goluboff seeks to correct the error by introducing the new civil rights history, outlining the framework of the field, and exposing the existing voids in scholarship. Robinson's work emphasizes the importance of Goluboff's call for local, individual attention as Schlesinger defines the essence of activist legal history. Pritchett and Barnett validate Schlesinger, though that all restrict their narratives to Goluboff's "major-case" or

"court-centered"[75] study. Cardozo places a foundational piece in the development of progressive jurisprudence and within the realm of a new civil rights history with his treatment of non-standard judicial philosophy. Holmes, Gray, Amar, and White each provide revisionist rhetoric, yet still fall short in their generalization when taking the nuanced aspects of the development of jurisprudence's history into consideration in an era of new histories.

Still, they have laid the groundwork for fresh inquiries, analyses, and syntheses and contributions to the points of scholarship and lesson of historiography. Despite the copious amounts of work that have created a substantial body of scholarship, academics like Goluboff have made clear the opportunities to explore the lesser-known, but no less influential, actors who existed within the marginalized areas of the politics, society, the law, and history. The concept of struggle acts as a common bond among the historical themes of progressivism, civil rights, civil and activist legal history, and progressive jurisprudence.

Despite the exclusion from the greater tomes of history, no idea, doctrine, movement or ideology is above or below the nation's law, society, or politics. Each history represents the advancements, setbacks, advocates, and opposition that have kept their collective struggles alive. Continued contributions to the scholarship in this vein both add to and improve upon the existing knowledge and stimulate a less-acknowledged dialog. The scholarship encompassed by the historiography help situate a character study of Davies' life and legal career as representative of the collective struggles on an individual level.

His actions, decisions, conduct, and character fit into a continuance of the narratives discussed by scholars in various histories. He rose within the legal profession and came to

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[75] Goluboff, "Lawyers," 2319.

illustrate judicial progressivism within the larger historiographical scholarship. His presence signaled the modern growth of the court system as he and other judges brought new, though sometimes opposing, beliefs and personal philosophy to the halls of justice. As a result, the time, space, and place in which Davies and the law grew made possible for him to become an inheritor of change and progressive activism.

Situating Davies within the ebb and flow of the progressive, legal, activist and civil rights historiography forms a revised definition of judicial activism through judicial progressivism. Politicians, legislators, and the majority of the American public had dictated restrictive and exclusionary legal practices that did little to protect the rights of those who existed outside the scope of mainstream society. However, Davies' rulings challenged the traditional ethics of inequality in the law and kept the arguments, struggles, and advancements of the twentieth-century alive. As illustrated by the scholarship stemming from the social, legal, civil, political, and historical fields, the nature of progress does not have a defined end. Therefore, even the smallest, unintended contributors to their histories aid in the advancement of progressive improvements and greater equality in the recognition of the past, acknowledgement in the present, and action in the future.

The following character study of Davies in this dissertation seeks to build upon the preceding historiographical foundations in American history and the law. The ensuing chapters will guide the reader from a macro overview of the creation of the court system through an exploration of Davies' early life, philosophical development, political networks of the northern Great Plains, and rise to the federal judiciary. The latter chapters provide a micro treatment of specific cases that Davies' oversaw, such as the desegregation of Little Rock Central High School in 1957, notable civil and criminal cases spanning the 1960s, and his handling of a jury

trial that followed the Alcatraz Indian Occupation in 1972 and place him within the greater context of twentieth-century progressivism. A synthetization of his legacy as a progressive jurist form the last chapter with concluding remarks regarding his ultimate role in the transformation of the judiciary, the history of the northern Great Plains, and the larger social movements of the twentieth century providing the final comments.

3. CREATING THE CAULDRON OF THE COURTS

Social, Cultural, Political, Legal Landscape of the Nation and Northern Plains

As the race to balance power, politics, and institutional decisions from all branches of government that began in the late 1790s entered the twentieth century, the nation's social, cultural, and political transitions continued to transform the scope, power, and impact of the judicial system. Few, if any, sectors of the federal judiciary were immune to the transformative capacity of the United States government's institutions. Both individuals, like Chief Justice John Marshall, and the federal judiciary itself, much to the chagrin of Alexander Hamilton and his contemporaries' portent of an anemic role for the judiciary,[76] nevertheless maintained a unique power and influence to shape and reshape the American complexion for another century.

What emerged in the twentieth century after over a century of republican experimentation was an amalgamation of experience, trial and error, success and failure that defined a modern social, political, and governmental power of persuasion. It is against the larger landscape of change and its generative effects that made the American system of justice malleable across multiple generations. The rise of new social movements in the modern age and the opportunities they created for Davies to define his role within the federal judiciary culminated at an inflection point of progressivism.

While each of the United States' governmental institutions and the societal responses experienced an increase in scope, power, and presence in the twentieth century, few paralleled the transformative growth in power and influence more than the judiciary. Because the country's

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[76] Alexander Hamilton, *The Federalist Papers No. 78*, The Judiciary Department of the United States of America, ed. Barbara Bavis, (McLean Edition: New York, 2019), 1788, Library of Congress, accessed November 18 2018, https://guides.loc.gov/federalist-papers/text-71-80.

legal system could adapt to a diversifying set of judicial interpretations regardless of a judge's background or political affiliation, Davies was able to inherit a progressive sensibility and become an agent of judicial influence. The justice system's flexibility created space for a new century of individuals to reshape a modern approach to practicing the law and imprint a sense of judicial progressivism in a modern era of continued change.

The conception of judicial power as a legal strategy stands as a result of the expansion of the institutional might of the federal court since its inception in 1789 as a separate system from the state courts. However, in its nascent form, the judiciary represented little more than a small peripheral check on the balance of power of the executive and legislative branches of government. So inconsequential in the eyes of founders was the judiciary, in fact, that Alexander Hamilton lamented the halls of justice in *The Federalist Papers Number 78* of 1787 as "the least dangerous"[77] branch, while Congress failed to include any space to house the justices upon moving the national seat of government to Washington D.C. in 1800 as further demonstration of the judiciary's second-class standing. An early commentator even once noted of the ad hoc nature of the early judiciary's presence as that of "a stranger [being able to] traverse the dark avenues of the Capitol for a week, without finding the remote corner in which justice is administered to the American Republic."[78] Although now a far more substantial physical and policy-making presence, a similar lack of awareness as to the power of the courts, especially those below the Supreme Court level, remains in a modern purview, often guided by the misguided belief that federal courts sit above the fray of politics when in reality the opposite stands true.

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[77] Hamilton, *Federalist 78*, 78.
[78] Bernard Schwartz, *The Law in America* (New York: McGraw-Hill, 1974), 48.

As evidenced in James Madison's detailed notes from the Philadelphia Constitutional Convention, and because of their belief that a federal judiciary posed little threat of tyranny, the framers devoted minimal time to establishing the judicial branch when writing Article III of the Constitution. Scholars, like Julius Goebel Jr., in his *History of the Supreme Court of the United States,* even suggests that at least some, if not all delegates to the convention adhered to a nominal judicial outlook that a "provision for a national judiciary was a matter of theoretical necessity…more in deference to the maxim of separation [of powers] than in response to clearly formulated ideas about the role of a national judicial system and its indispensability."[79] Such an assertion reveals just how short-sided the framers were in their vision of the court system to become the powerful policymaker that it is today.

A debate among the delegates soon broke out as to whether or not there even existed a need for a federal court system below the Supreme Court or if the states should be responsible for deciding all other cases. The conflict points to a lack of concern that a federal judiciary could not only influence the nation, but that it could also become a powerful force and the definitive standard-bearer in crafting social, political, legal, and economic policies. Despite the argument, the framers paid little attention to the courts. They relegated the role of the federal judicial system to a compromise and allowed Congress to make the final choice. Madison and his contemporaries crafted the federal judiciary in sweeping, yet ambiguous and elastic terms. Article III, section 1 of the Constitution begins simply by vesting, "The judicial Power of the United States…in one supreme Court, and in such inferior Courts as the Congress may from time

[79] Julius Goebel Jr., *History of the Supreme Court of the United States, Vol. 1: Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), 206.

to time ordain and establish."[80] As a result, the framers demonstrated how far the federal court system and its servants would have to go in their collective rise as cornerstone figures of active influence on American policy, politics, society, and culture.

In spite of the founders' intentions, politics were not to remain outside the sway of the judicial branch. They were on a trajectory to becoming mutually reinforcing and inextricably linked American institutions at all stages of governance, but the process proved to be a slow and fluid evolution from its fragile roots into its modern-day presence. Having only "crayoned in the outlines," the framers soon left Congress "to fill up and colour the canvas."[81] In a *grand jete* leap forward in governing the fledgling republic, the Judiciary Act of 1789 emerged as the lone purveyor of the basic three-tiered structure of the federal court system. It included few specifics regarding the size or scope of its presence in the newly-minted American government and increasingly democratic society. The system experienced a number of growing pains as a result. With such little guidance, the Supreme Court did not even have a designated size until 1869. Fewer than half of the initial six appointees attended the first session, which had to be adjourned with only one major case being decided once a sufficient number of justices were seated on the bench. The branch was also hampered by frequent changes in personnel, limited space for its operations, no clerical support, and no system of reporting its decisions. As a result, the early court system did little to impress many people. It remained hamstrung by relative ineffectiveness, which further relegated the branch's standing as second-class in the eyes of most Americans inside and outside of public service.[82]

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[80] United States Constitution art. III. § 1.
[81] Goebel, *History of the Supreme Court*, 280.
[82] Swartz, *The Law*, 86.

However, in the first decades, the Court took actions to mold the new nation and its own role in shaping the legal and political landscape. The first justices sought to solidify the judicial branch as an independent, nonpolitical branch of government by refusing to give President George Washington advice on the legality of some of his early actions. While John Jay consulted with Washington on matters in private setting, the Supreme Court declined to answer questions posed by the president in a public setting regarding matters of crafting international laws and treaties, thereby reinforcing the nonpartisan role of the judiciary in the political demesne of the early republic. Yet, the early Court was resolute in its attempts to advance principles of nationalism and to maintain a federal governmental supremacy over the states. As circuit court jurists, the justices rendered a number of decisions regarding such matters as national suppression. The Whiskey Rebellion stands as an early example were President Washington and Secretary of Treasury Alexander Hamilton rode out toward western Pennsylvania to personally put down the farmers' revolt following the 1794 implementation of a national excise tax on whiskey that many viewed as lacking the egalitarian aims because the government had placed an unequal tax burden on primarily western growers.[83]

A short time later, the justices chose to take on the constitutionality of the Alien and Sedition Acts signed by President John Adams in 1798, which made it a crime to criticize federal governmental officials or their actions. By stepping in to tackle the thorny issues of public and political interests like that of nation or state supremacy, agricultural taxation, and censorship, the

[83] Katy Schiel, *The Whiskey Rebellion: An Early Challenge to America's New Government*, (New York: Rosen Pub Group, 2003), 101.

justices had lowered the flag and ignited a race to balance power, politics, and the institutional decisions from all branches of government that would shape and reshape the nation.[84]

By 1835, Chief Justice John Marshall illustrated the transformative capacity of the judicial branch throughout history. He also proved that one person can make a difference in the development of an institution and its ability to affect national culture, politics, and society. Marshall was able to strengthen the feeble federal system. By bringing a political background as a staunch Federalist, a delegate in the Virginia legislature and appointment as Secretary of State under John Adams to the Court, Marshall embodied more of a political character than that of a lawyer. As a result, Marshall's influence revealed the turning point at which politics could no longer remain separate from the court system.

For the first time since its inception, Marshall took an open, bold, and proactive role that helped found a visible role of the Court with a formal declaration of its power through a series of historical actions. First eliminating the practice of *seriatim*, or "in a series," opinions in which justices delivered their individual opinions in order of seniority and insisting that the Court speak as a collective whole, Marshall had rooted the judicial system's place as an equal branch of government. He outright determined the true authority of the Supreme Court and federal government over the various state jurisdictions with a broad interpretation of the "necessary and proper" clause of the Constitution's Article I, Section 8, in the *McCulloch* v. *Maryland* of 1819. Finally, the *piece de resistance* of the Marshall Court came with the branch's claim to the right

[84] Terri Diane Halperin, *The Alien and Sedition Acts of 1798: Testing the Constitution* (Baltimore: Johns Hopkins University Press, 2016), xii.

of judicial review following the public and political firestorm that surrounded the *Marbury* v. *Madison* case of 1803.[85]

Coupled with Marshall's long-standing commitment to service with a record of over 1,000 decisions and authorship of over 500 opinions, the Court retained the power to review acts of other branches of government and of the states. As part of such historic processes of evolution, the judicial branch now derives much of its day-to-day power and impact on policy development as the final arbiter of constitutional questions, with the sole right to declare various acts and actions void, while lending credence to one judge's ability to instill substantial change and societal progress through the federal legal system as part of an equally political process. Having gone on record as the voice of the Court and stating, "it is emphatically the province and duty of the judicial department to say what the law is,"[86] Marshall both enhanced the ability of the court to serve the public on a national scale and enabled those acting on behalf of the judicial branch to routinely exercise the power of the court system and determine the constitutionality of acts of Congress, the executive branch, and even the states. The federal courts operated as a weak system of judicial governance prior to Marshall's arrival. A single decision or published opinion could now alter the course of history for generations to come.

By establishing the absolute power of judicial review and other sweeping tenets of the Court, Marshall was also able to usher in a new era of respect and prestige on behalf of the court system both at the time and for centuries to come. Historically marginalized and denoted with little initial power, the federal judiciary now stands as a center of focus and as a political and ideological football with American society, culture and legal practices as the playing field. Given

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[85] Jean Edward Smith, *John Marshall: Definer of a Nation*, (New York, NY: Holt Paperbacks, 1998), 345.
[86] Smith, *John Marshall*, 401.

that the president maintains responsibility for making all appointments to the federal judiciary, there exists little question as to the inherent political links to a closed system and instances of partisan politics within the process. Even though a party's political agenda can influence a the president's choice to nominate an individual who they believe will support a political platform and policy,, a judge maintains the right to base their decisions on non-judicial influences or act independent of outside influence and elevate their role past the political du jour. , with or without expressed intention.

As evidenced by the legacies of such courts like those of John Marshall, Earl Warren, William Rehnquist, and John Roberts,[87] the judiciary now embodies a proven track record of touching off substantial debate, influence, and change, while elevating its power within the social and political consciousness of the United States. Yet, by the twentieth century, the governmental and political balance of power remained in flux and the playing field unequal. Seminal civil rights events and public outcry and call to action for social justice tested the true malleability and adaptability of a living system of law.[88]

Social and political conditions thrust the judiciary into the spotlight where politicians and average citizens looked to judges as the final shot callers to advocate or reject the principles of change. In step with the march of growth, a powerful manifestation of revolutionary views appeared and Arthur M. Schlesinger Jr. defined a new dualistic category of judicial influence: judicial activism, as actions taken with an overt liberal bent and judicial restraint conducted in the interest of protecting the conservative platform and originalist purview of the Constitution.

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[87] Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, U.S.A., 1995), 422.

[88] Schwartz, *Supreme Court*, 422.

Given the fluctuating landscape upon which he operated, Davies came to represent a lesser-known, but important figure; who once having the ball in his hands, helped push judicial change down the field of active play. But, as both an extension of and departure from Schlesinger's definition and unintended activist, Davies went a step further as he fomented social and civil change through a set of modern progressive principles.

Judges had always held their power of judgement. But, as the nation and its branches of government grew in size and scope, so too did the impact of the federal judiciary affect the lives of everyday citizens. Efforts to recalibrate the role of government in response to the institutional advancements of the twentieth century generated new ways in which scholars, court servants, politicians, and citizens understood the growing power of the courts as the country entered the modern era. Thoughts regarding nuanced aspects of America's unique legal system, like the tenets of philosophical, ideological, personal motivation, and political influence, became as diverse and contentious. Yet, points of agreement regarding the role and responsibility of the federal court do exist. As part of a general consensus, an outline emerges that fosters a basic structure of a "living" legal system; one that reflect a circumstantial adaptability to the time and social conditions under which it operates.[89] Within such a system judges, with their own opinions and decisions, hold a central power of influence; where judges on any level or any district can make alterations in legal thought, generate action, and stimulate change to the social and cultural fabrics as new category of judicial progressives.

On a larger scale, legal scholars of the late nineteenth and early twentieth centuries, like John Chipman Gray, Harvard-trained and Professor of Law at his alma mater from 1875 to 1903,

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[89] Amar, *America's Unwritten Constitution,* 280.

and Oliver Wendell Holmes, educated at the Harvard School of Law and served as an associate justice of the Supreme Courts from 1902 to 1932, helped usher an understanding of American law into a new era at turn of twentieth century. Their successors, like G. Edward White, distinguished Professor of Law at the University of Virginia, followed their lead, accepted the baton at the historiographical middle stage, and passed it to twenty-first century colleagues.

Where Holmes and Gray center on the intrinsic humanistic qualities in the advancement of legal philosophy to its far more prominent role in the legal system and society, White curates an anthology of essays that elucidate the development of a patented American legal system and an exclusive standard of jurisprudence. White's contributions trace the development of a code of law in which factors like resource allocation, power distribution, and policy making have both influenced and affected its growth and progress.[90] White articulates scholarship that explores the more profound social issues and technical ingredients that animated the basic structure of a system of law, order, and justice and shows just how ductile the concepts, processes, methods, debates, practices, criticisms, and public opinions have been throughout the course of the United States' rich legal history. Despite its sweeping scope and coverage of the mechanics of the legal system, the collection does not allot extensive treatment to the judiciary. White does however incorporate works that introduce the concept of the judiciary as a constitutionalizing agent as well as the relationship between jurisprudence and social change, thereby validating the centralized role judges could and did play in altering America's social, cultural, and political status quo and confirming that the human element is rarely a separate issue.

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[90] White, *Patterns of American Legal Thought*, 12.

With the benefit of hindsight, twenty-first century counterparts of Holmes, Gray, and White act as contemporary bookends to the narrative of the 1900s. Legal education and the professionalization of the law as a profession play no small role in cultural history of the federal judiciary. In his review of Neil Duxbury's 1995 publication of *Patterns of American Jurisprudence*, Thomas C. Grey, Faculty of Law at the University of Manchester, focuses on unity as the purveyor of "modern American legal thought."[91] Grey crafts an appreciation of Duxbury's work around the central theme of the large historical developments following the end of the American Civil War, like rapid industrialization, uptick in urban populations, tightened networks of transportation and communication, increased immigration, and the after-effects of slavery. Yet, according to Grey, it is the establishment of the modern American system of legal education that supplies the means for a substantive professionalization of the study and practice of law. Both Grey and Duxbury situate the modern law school under Christopher Columbus Langdell's model, instituted at Harvard in 1870.

Both scholars make clear that American judges had already been asserting their constitutional power of judicial review prior to 1870. They also acknowledge that judges had also established a "habit of freewheeling common law judicial legislation," which resulted in the federal judiciary playing a large role in the nation's legal transition to modernity. This new association of law professors did not downplay their advice and criticisms of the judiciary's passage into the modern era.[92] As a result, the professionalization of a legal education around the

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[91] Thomas C. Grey, "Modern American Legal Thought," *The Yale Law Journal* 106, no. 2 (November 1996): 493, accessed February 2, 2020, https://doi.org/10.2307/797216, 1.

[92] Grey, *Modern American Legal Thought*, 2.

turn of the century translated into the professionalization of public servants of the law in general and the federal courts in particular.

Likewise, a number of preeminent modern-day legal thought provide several syntheses that further illustrate the symbiotic relationships among the law, history, and the American capacity for professionalization and progress throughout the twentieth century. Randy E. Barnett uses the specific American notion of liberty as the backbone of the rule of law in the United States. What Barnett unveils is a dual architecture of liberty and certain principles of justice and the rule of law. Barnett argues that the tangible structure then enables institutions of government to handle the serious and pervasive social problems of knowledge, interest and power and better free citizens to pursue their respective happiness, peace, and prosperity.[93]

The utility of Barnett's position lies within the implication that when equipped with the guarantee that the law will handle problems to a large extent, the democratic citizenry transfers power not only justice system, but to judges themselves. Equipped with the freedom from constraint of action and the freedom to make decisions separate from the other branches of government, judicial power was now galvanized at the core of America's legal system and agent of progressive change in the twentieth century. Yet, as Barnett is apt to indicate, human elements, like partiality and the tendency to satisfy subjective preferences, can also create new social and political problems that become minefields of contention.[94] Nevertheless, judicial power maintains ahold both within and well outside the interlocking systems of government from which it was borne.[95]

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[93] Barnett, *The Structure of Liberty*, 36.
[94] Barnett, 195.
[95] Peter Charles Hoffer, William James Hull Hoffer, and N. E. H. Hull, *The Federal Courts: An Essential History* (New York, NY: Oxford University Press, 2016), 296.

From the ebb and flow of the federal judiciary's frail foundation to its rise to prominence and power, scholars, politicians, and ordinary citizens sought to understand the court system and its mutable complexion in terms of their times and conditions. New lines of inquiry and debate began to percolate throughout the caldrons of the court. Varying judicial philosophies, actions, and acts of restraint reached a confluence, while the socio-political rhetoric and policy all rose as top issues the judiciary faced in the modern era. Logic, reasoning, intent, motives, bias, liberal, conservative, and even "judge-made law," among a laundry list of others, all became buzzwords of the day. The renewed line of thinking wove a stronger thread of humanity into the legal fabric and awakened a greater consciousness of the human element in shaping the structure of the law.[96]

It also restructured the framework in which people viewed the court, and its most conspicuous servants, as well as its function as both a public service and a check on the balance of the other two branches.[97] The redirection of energy and the next transformative step initially inspired more questions than it provided solutions to the problems of the past and present. But, as many meditated on the legal system's ongoing transformation, judges began using their enhanced position of power to deliver answers to some of the twentieth century's most barbed issues.[98] As individuals and collective whole, judges set a provocative tone and cemented their place at the forefront of American power and influence for generations. The twentieth century signaled an upheaval on multiple fronts when growing social movements collided with the

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[96] William B. Hornblower, "A Century of 'Judge-Made' Law," *Columbia Law Review* 7, no. 7 (1907): 453–75, 453.

[97] Schwartz, *The Law*, 193.

[98] Ronald Suresh Roberts, ed., "Can We Judge Judges?" in *Clarence Thomas and the Tough Love Crowd*, Counterfeit Heroes and Unhappy Truths (New York: New York University Press, 1995), 94.

conventional boundaries of the law. As various progressive groups with demands for labor, social, political, and governmental reforms began pushing the limits of the law and breaking barriers, the courts had to also make adjustments to the uptick in tempo.

Initially filling a more reactionary role to the social and industrial changes brought on by the Gilded Age that began in the late 1860s, the courts began to echo their history as a legal system with flexibility out of necessity to address the immediate needs of the time.[99] As such, those operating within the legal field became increasingly active in their assertions and held a new awareness of the influence of the courts throughout all facets of life in the United States, local and national. So too was there a visible consciousness on behalf of the judges as to the immediate consequences of their decisions and larger impact within progressive spheres. Calls for governmental reform and the growth of legal challenges on behalf of civil, social, and labor disputes in the federal court of the late-nineteenth and early-twentieth centuries' Gilded Age and Progressive Eras had made it clear that both federal judges and justices of the Supreme Court were both servants of the public and an institution check on the balance of power within the three branches of government.

The rise of the "Roosevelt Court" in the 1930s, the impact of the justices' published opinions and dissents, the public and political backlash to the Court's rulings in the 1940s, and the reversal of major civil rights case decisions thought to be established,[100] illustrated an awareness of the judiciary's role in American life. Though with a few exceptions, but unlike the previous centuries of distance from the democratic populace, no longer were federal judges distanced from the everyday populations with whom the government charged them with serving.

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[99] Pritchett, *The Roosevelt Court,* 141.
[100] Pritchett, 160.

By the mid-twentieth century, their decisions were now even more real and instant, conventional and controversial, personal and far-reaching.

With effects of a single case decision, published opinion or dissent at or below the level of the Supreme Court now able to become a touchstone of progress throughout the nation, the social and political stakes could not be higher. By the mid-twentieth century, advocates from opposite ends of the spectrum attempted to protect either the conservative or liberal principles upon which they based their decisions and built their careers. What emerged to serve the respective interests, and the desires of the constituencies for whom the judicial system ultimately served, were two new classifications of jurisprudence: judicial activism and judicial restraint.

Yet, the new dynamics were not on the whole organic in their origins or the results of mere historical coincidence. The paradigm shift in the courtrooms was part of a larger social, political, and economic pattern as part of President Franklin Delano Roosevelt's (FDR) proactive response to the profound crises that pervaded throughout the Great Depression following the stock market crash of 1929. FDR entered the presidency in March 1933 during a time of profound loss and uncertainty. With industry ground to a halt, the highest unemployment rates on record, and the collapse of banking, FDR spent his first 100 days putting through a series of measures to lift the nation from the doldrums of depression called the New Deal. In 1933 workers and businessmen demonstrated their support for the National Recovery Administration (NRA), Roosevelt's agency for industrial mobilization, with a series of public parades while

farmers expressed gratitude for government support with the creation of the Agricultural Adjustment Administration (AAA).[101]

Over the next three years, FDR continued rolling out a veritable alphabet soup of additional agencies, including the Securities and Exchange Commission (SEC), the Rural Electrification Administration (REA), National Youth Administration (NYA), and the Works Progress Administration (WPA), all of which helped buoy millions of desperate Americans. He then unveiled another round of New Deal relief in 1935 with the Social Security Act (SSA), legislating old-age pensions and unemployment insurance. As in indicator of the peoples' affirmation of the New Deal, FDR rode a high tide of popularity and enjoyed another landslide victory signified the people's verdict on the New Deal. According to Arthur Krock, the chief Washington correspondent for the *New York Times*, he had gotten "the most overwhelming testimonial of approval ever received by a national candidate in the history of the nation."[102]

It is worth noting that after a reelection with the largest popular vote in history at the time, FDR had known that four of the sitting justices, Pierce Butler, James McReynolds, George Sutherland and Willis Van Devanter, would vote to invalidate almost all of the New Deal when critics began testing the constitutionality of the New Deal within the high court. In the spring of 1935, a fifth justice, Hoover-appointee Owen Robert, the youngest man on the Supreme Court at the age of 60, began casting his swing vote with them to create a conservative majority.[103]

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[101] William E. Leuchtenburg, "When Franklin Roosevelt Clashed With the Supreme Court—and Lost," *Smithsonian Magazine*, May 2005, accessed October 14, 2020, https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

[102] Leuchtenburg, "When Roosevelt Clashed," https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

[103] Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (W. W. Norton & Company, 2010), 91.

In the five years that followed, the five judges, occasionally in concert with others, especially Chief Justice Charles Evans Hughes, struck down more significant acts of Congress than at any other time in the nation's history, before or since. In May 1935, the court decimated FDR's plan for industrial recovery when, in a unanimous decision, struck down the NRA. In less than seven months, the Supreme Court neutralized the AAA by declaring it unconstitutional in a 6 to 3 ruling. The majority position of the justices held that most of the federal government's authority over the economy derived from a clause in the Constitution empowering Congress to regulate interstate commerce. However, the court construed the clause so narrowly that in another case that next spring, it ruled that not even the largest industries, such as energy and fuel, fell within the executive's commerce power.[104]

Despite a majority agreement, the justices' decisions garnered swift criticism from inside and outside the halls of justice. Justice Harlan Fiske Stone, a Republican who had been Calvin Coolidge's attorney general, denounced Roberts' opinion that had struck down the AAA as a "tortured construction of the Constitution." Many farmers harbored similar reactions. On the night following the dissemination of the Robert opinion, people in Ames, Iowa, reported having seen life-size effigies of the six majority opinion justices hanged by the side of a road.[105]

FDR likewise recognized that a confrontation with the court was nigh as it was slated to rule on the SSA and the National Labor Relations Act (the Wagner Act), regarded by the administration as "a factory workers' Magna Carta." Court-watchers anticipated that neither law would survive the court because it has already established in previous decisions that the state was

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[104] Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (Twelve, 2010), 188.

[105] Leuchtenburg, "When Roosevelt Clashed," https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

"without power by any form of legislation" to modify labor contracts between employer and workers. FDR inferred by published opinion that no advantage lay in his willingness to sponsor any new popular measures, such as a "wages and hours law," because the majority bloc would invalidate that New Deal legislation, too.[106]

Therefore, in an effort to secure lasting progressive gains in a number of social and political spheres as part of his monumental legislative relief package known as the New Deal, Roosevelt sought to utilize the court system as a means of obtaining favorable rulings if and when Congress or constituents challenged the constitutionality of his initiatives. Following the 1936 election, FDR and his administration crafted a plan to reconfigure the court. Other published dissents by other justices, like Louis Brandeis and Benjamin Cardozo, had already convinced the president that seeking a constitutional amendment was futile, because in FDR's view, it was not the Constitution that needed changing, but rather the make-up of its advocates on the bench. In his estimation, naming a few additional justices would justify the means to his greater end. Still, as an experienced politician, FDR knew that he could not openly assert that he sought judges who would adhere to his New Deal agenda and further recognized that he also needed to avoid any direct attacks on the justices or court itself. To best align with public sentiment, he concluded that the most achievable approach was to capitalize on the public's concern about the ages of the justices. At the time of his reelection, the court embodies the oldest ages of justice in the nation's history, averaging 71 years. Six of the justices were 70 or older, which did not escape notice of the public and its servants. On February 5, 1937, FDR stunned Congress, his advisers, and the country on February 5, 1937 when he showcased his Judicial

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[106] Leuchtenburg, "When Roosevelt Clashed," https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

Procedures Reform Bill. The bill asked Congress to empower him appoint an additional justice for any member of the court over age 70 who did not retire. With the court make-up as it stood, he sought to name as many as six additional Supreme Court justices, as well as up to 44 judges to the lower federal courts. Instead of justifying his bill with the contention that the court's majority was both reactionary and restrictive to his agenda, FDR instead maintained that an existing shortage of judges had resulted in delays because federal court dockets had become overloaded.[107]

Roosevelt's proposal that became known as the "court packing scheme" both fell short of consensus and implementation. Yet, in the wake of the FDR's court-packing failure, the court revealed a few surprising pivots of its own. On March 29, by 5 to 4, in *West Coast Hotel Co. v. Parrish*, it validated a minimum wage law from the state of Washington, a statute, which on its face was no different from the New York state act it had struck down a few months prior. Two weeks later, in a number of other 5 to 4 rulings, the court sustained the National Labor Relations Act; a 1936 tribunal that had held that coal mining, although conducted in and across many stateliness, did not constitute interstate commerce. By that point, the court had given so broad a reading to the Constitution that it accepted intervention by the federal government in the labor practices of a Virginia clothing factory. On May 24, the court that in 1935 had declared that Congress, in enacting a pension law, had exceeded its powers, found the Social Security statute constitutional.[108]

The set of decisions came about owing to the fact that one justice, Owen Roberts, switched his vote. Since that time, historians and scholars remain embroiled in debates as to why

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[107] Jeff Shesol, *Supreme Power,* 124.
[108] Jeff Shesol, 265.

he much such abrupt turnaround. What little evidence that exists indicates that he changed his mind on the validity of minimum wage laws before Roosevelt delivered his court-packing message. Therefore, many have concluded that FDR's proposal could not have been the proximate cause. Yet, there is no archival evidence to account for his reversal on the minimum wage cases and scholars have been reduced to speculation. Some intimate that during a visit to Roberts' country retreat in Pennsylvania, Chief Justice Hughes had cautioned the younger colleague that the court was placing itself in jeopardy. Others think that Roberts was impressed by the dimensions of FDR's landslide victories, which indicated that the president, not the court's majority, spoke for the nation. Some believe that he was affected by the persistent criticism from within his own legal community. It is even harder to account for why Roberts, in his subsequent votes in the Wagner Act and Social Security cases, supported such a vast extension of federal power, but the pressure exerted by the court-packing bill may very likely have been influential.[109] Despite the political and legal whiplash, FDR was nevertheless able to appoint eight well-calculated new members to the Supreme Court and play accomplice to changing the nature of the judicial system and its servants' behavior.

But before the new categories of active or restrained jurisprudence traversed their way from the macro scale of FDR's efforts to restructure the socio-political influence of the Court to the microcosms of legal systems at the regional, state, and local levels, an obvious pattern of disagreement and non-unanimity became visible among the justices at the Supreme Court during the heyday of the Roosevelt Court in 1941. In the spirit of Marshall's elimination of *seriatim*, which gave equal weight to each justice's opinion and allowed for the voice of the Court to act as

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[109] Leuchtenburg, "When Roosevelt Clashed," https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

collective whole, increased rates of dissent among the justices pointed to a significant break from the past with their assertion of the individual independence of opinion and first defined the political context within which they now operated.[110]

Still, it was Schlesinger who first identified the next stage in the court evolution and articulated the philosophical alterations of behalf of the Roosevelt Court with his 1947 publication of "The Supreme Court" in *Fortune Magazine*.[111] An accomplished historian, he made a name as a social critic on the leading edge of public intellectualism with his in-depth explorations of American liberalism through a litany of well-received publications and his era-defining categorization of Supreme Court justices as acting with either demonstrated activism or restraint in their decisions set off a maelstrom of controversy both inside and outside the legal field of study and practice. Many legal scholars castigated his analysis and assertions regarding the motives behind the decisions of the Supreme Court justices. Those operating in the court system cast aspersions upon the validity of his commentary as someone wholly outside the practiced and educated knowledge of legal expertise. Yet, despite the initial disinclination to accept Schlesinger's premise, a new wave of scholarship, analysis, and intellectual understanding soon followed his groundbreaking work from outside the system. Scholars and a fresh social consciousness of the Court confirmed that Schlesinger had in fact flipped the script on existing academic syntheses and set into motion a contemporary revision of America's jurisprudence and system of justice.[112]

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[110] Jeff Shesol, *Supreme Power*, 73.
[111] Schlesinger, "The Supreme Court," 12.
[112] Kmiec, "The Origin and Current Meanings of Judicial Activism," 1450.

C. Herman Pritchett wasted no time in dovetailing his scrutiny of the changes within the nation's system of law throughout the Roosevelt administration with Schlesinger's categorization of judicial activism and restraint. By 1948, Pritchett's publication spearheaded an analysis that argued in favor of an examination of the divergences in opinion and non-unanimous consensus that arose during the Roosevelt era. By enveloping points of view from political science, sociology, and history, Pritchett is able to unpack the psychological origins of judicial attitudes and lay the modern groundwork for understanding the development and ultimate influence of judicial behavior that Schlesinger first identified as activism or restraint in the Court. As a result, the profitability of Pritchett's approach beyond a simple sampling of Roosevelt-era doctrine occurs when he identifies the influence of individual predilections on the development of the law. However, his biggest contribution manifests within his assertion that while Roosevelt's Supreme Court, and the lower courts that operate in its shadow, inevitably act within a political context, the greatest danger to America's democracy would be for such practices to unrealized and unchecked. Like Schlesinger, it is Pritchett's desire for there to exist a more informed public understanding of the Court's place in the United States' system of government and politics.

Therefore, Roosevelt and his administration not only restructured the politics and social consensus behind the courts and inspired a rethinking of the system, but also helped forge new definitions of judicial attitudes and behavior. The subsequent scholarship likewise solidified the growing recognition of the importance of judicial psychology, philosophy, and ideology. It had become apparent to a growing number of Americans that every judgement, at or below the level of the Supreme Court, had a generative power that could set the directive force of one judge's principles, determinisms, and decisions into motion for decades, if not centuries, to come.

With the help of Schlesinger's reconsideration of the individual and human factors that went into a judge's decision and Roosevelt's attempts to expand presidential power through the highest court in the land, politicians and citizens both recognized the prominence of the court system's power to affect most manners of the nation's affairs. The high degree of political orchestration and judicial calculus could style a particular court in a mirror image of a party's platform. The ability of any presidential administration to channel the directional flow of the entire system of justice to reflect their goals also gained a higher profile in the public eye.[113] The social and political stakes operating behind the scenes of the Court had not been higher in the modern era. As a single ruling from any federal judge now held the ability to either push forward or protect against the expressed ideals of the ruling party and their voting blocs by extension, both the political puppeteering and social engineering quickly took center stage and redefined judicial behavior for generations to come.

The evolutionary variations from its parochial past to its modern professionalization, the Courts and the public's increased "judicial IQ" likewise ignited change within the realms of twentieth-century politics. With the two systems enmeshed, one could now directly affect the other in an incentivized game of personal, private, and public interest within multiple systems of government and justice. At the same time, civil and social advocates became more explicit in their efforts to instill change and saw both politics and the courts as indispensable tools in a crusade to achieve social, cultural, political, and economic equality. The social movements of the twentieth century paralleled the pendulum swing of liberal activism and conservative restraint of

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[113] Shesol, *Supreme Power,* 453.

the Schlesinger school of thought and the courts and their individual public, yet executively appointed servants, like Davies, held the potential to do the political bidding of their choosing.[114]

Because latitudes of judicial interpretation could replace political platitudes in the twentieth century, the founders had already cast the die where his rulings confronted conventional ethics of the past as dictated by an antiquated majority-consent in the law. Davies' resolve to uphold a legal standard that reflected the same standards of the time validated the ways in which an individual's actions stimulated a fresh, modern national consensus and set into motion renewed considerations of the laws for other public servants and the public itself to see as a hallmark of continued progress and ongoing evolution of the nation's justice system. Despite an entrenched antecedence of opposite action, the structure was in place for Davies' life and career to reflect a sensibility of judicial progressivism within a law-based code of ethics over two centuries in the making. As such, his future determinisms, though not intended as overt civil activism, were able to instill lasting social, cultural, political, and legal change in twentieth-century civil rights and judicial progressivism.

Still, judicial progressivism as part of the greater social movements faced a powerful conservative backlash. Phyllis Schlafly defined the modern conservative movement in 1964 as "A Choice Not an Echo."[115] In her published work by the same name, Schlafly describes the party's proactive involvement in directing voter energy as a choice rather than a reactive response to changes in society and governmental politics. While advocates from both the activists and restraint groups, including a number of federal and Supreme Court judges, were

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[114] Schwartz, *Supreme Court*, 457.

[115] Phyllis Schlafly, *A Choice Not an Echo: The inside Story of How American Presidents Are Chosen* (Alton: Pere Marquette Press, 1964), 5.

operating on the last vestiges of reactionary measures in the wake of the Gilded Age,[116] Davies, inherited the ability to determine his jurisprudence and role within America's system of justice. The founders had created a transformative system that allowed judges to craft a career, make decisions and define a unique role as an unintended activist within the channels of the legal system. By the mid-twentieth century, the manifestation of activist and restrained judges represented a new class of agitators who disrupted the entrenched parochial stability of the traditional socio-political relationship between the public and the legal system. Judges were a part of larger social movements, but remained outside their direct control.

The ways of thinking about history informs a way of thinking about the law itself. Where the people-driven politics that first formulated a living, adapting, and ever-changing legal system highlight the human aspect of the law and its ability to organize, unite, or divide parties, platforms, and the populace, there remains an unstated deference to the judiciary and its public servants as an institution with an undeniable role in history that affects the everyday lives of all Americans. Having just sketched only the outlines of America's legal system in 1787, the founders first left Congress to fill the gaps, who then handed-off the codification and formalization to a living system of elasticity and evolution. As such, a certain flexibility on behalf of its servants became necessary for the law to change via human action and interpretation to best reflect the will of the time's democratic constituents.

The institution gifted judges with the enduring tools of lifetime appointments to ensure their release from social or political retaliation and the ability to set precedence where no formal mandate resides, and yet judges establish few final truths as various aspects of cases get

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[116] Hoffer, *The Federal Courts*, 426.

continually tested and retested. The political maneuverability and rise of "judge-made law" in the twentieth century allowed players from all corners of the judicial spectrum to have a hand in the shaping and reshaping of the court in another century of change.[117] The equal weight given to every federal court in every district in every state erased any notion of disparate marginality and brought every appointed judge to the mainstream of the law's able influence.

Beginning with the judicial branch's meager eighteenth-century inception, the directed flow of judicial power of the twentieth century and influence of the Roosevelt Court era had permeated from the macro, national Supreme Court level through the regional districts to the state and local municipal levels.[118] The new identities of judicial activism and judicial restrained likewise redefined judicial power and politics while becoming indispensable tools of freedom and liberty for both the liberal and conservative social movements of the twentieth century. The constitutional framers' system is unique in that the role of the judge made the law flexible and powerful because society is subject to adheres to their determinisms as part of the greater American societal compact. However, society is equally as powerful when the majority-consent shifts or changes, thereby reversing the flow of influence, or at least making it a two-way street.

Yet, outspoken conservatives, like Schlafly, also defined a modern movement of social, cultural and political restraint as an involved choice, rather than an echo of strict fundamental originalism to invigorate the more gender-inclusive Republican base that was gearing up by the mid to late twentieth century following the polar shift in the wake of the Roosevelt administration.[119] In stark opposition, others like, Margaret Sanger and Betty Friedan, railed

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[117] Hornblower, "A Century of 'Judge-Made' Law," 8.
[118] Schwartz, *Supreme Court*, 390.
[119] Flanagan, *America Reformed*, 242.

against the continuation of an oppressed constituency and promoted the liberal agenda of socialistic principles of activism and keep the torch lit by progressives at the dawn of the twentieth century. Although representing opposite ends of the social and political spectrum, both camps saw the symbiotic relationship between the socio-political arena and the political context under which the legal system now acted. Both movements rallied their adherents in attempts to muster enough political sway to see to the installation of the judges and justices that would pursue a lifetime schema of liberal activism or exercise conservative caution in their opinions as a protectionist device of restraint. The push-pull form of influence would keep the pendulum in motion for the foreseeable future as the makeup of the judiciary and individual appoints swung back and forth between the liberal and conservative agendas.[120] Nevertheless, the people and politics of the twentieth century illustrated the breathtaking scope of the judiciary's evolution from a meek, second-class institution to one of paramount importance and effect still palpable by the turn of the new millennia.

The Roosevelt Court proved that people, scholars, and citizens cannot separate politics from the judiciary. Davies federal appointment included cases that involved the enforcement of desegregation as part of the *Brown v. Board of Education* ruling, the Alcatraz Indian Occupation, and large civil lawsuits with nationally-based pharmaceutical and life insurance companies with unprecedented civil settlements. Based on the modernization of the court and professionalization of those working for the law, there existed a spectrum of approaches, philosophies, choices, and decisions. Historical figures had demonstrated the inclusivity of the court's generative power on behalf of a single judicial servant as part of a larger evolving system and stimulate continued

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[120] Schlesinger, "The Supreme Court," 16.

progress. Davies received his legal training at Georgetown School of Law after the incorporation of the legal education system under the Christopher Columbus Langdell's model was well underway. His life and judgeship rooted in North Dakota also elevated the northern plain's contribution to the social and civil rights movements and underscored a set of values and a sphere of influence outside the confines of a historically southern narrative. Davies, North Dakotan politics, and the northern plains added their own ingredients to the twentieth-century caldron of the court.

In a broader sense of the established history, moving Davies and progressive movements to the center invites a larger consideration of the North and the social, legal, political ramifications as a result of the application of judicial power to activate and enforce protection and advance civil rights. Davies stood at the precipice of the professionalization of public service in the name of the law and transformation in the modern age. As with the instigators of change in the eras before his time, Davies issued legal edicts that helped alter the social, political, and racial fabric of the United States. Like Marshall, he remained unmotivated by either notions of judicial activism or judicial restraint. Instead, he spent the latter part of his career upholding his own interpretation of social justice, which favored the civil equality within a progressive vision, choice of purpose, and echoes from "the people" with call for an egalitarian society.

In preceding chapter, an examination of Davies' upbringing, education, and political networks reveals the places where his career both flow into the transformative narrative of the American legal system and underscore significant departures from the established history. Later chapters explore the cases on Davies' docket that show a continuity that characterized his adherence to enforcing the power of the Constitution through his tactful presence in United States law. The breadth of a Davies-driven study includes attention to the awards and public

recognition he received later in his life and career based on his controversial determinisms of the past. An emphasis placed on the growth of his presence within the federal legal system against the backdrop of wider shifts in American society, politics, and civil rights.is also included. Crafted within the scope of his relevance to the social and civil movements of his era, examples from his career transforms the static definitions of judicial activism and restraint into judicial progressivism as a visible aspect of the social, political, and legal history of the United States in the twentieth century.

A history of the law, politics, and progressivism that includes the work of Davies functions as a conduit between the past and present and also serves as a stand-alone piece within a larger historical account. His place within the social justice and civil rights movements solidifies the influence of the northern plains throughout major social, cultural, political, racial, and legal shifts in the United States. His actions, though not conducted as overt activism, elevated the role of the northern-Midwest region within a greater historical consciousness in American progress. At the same time, scholars, both public and academic, have dealt with the most seminal events, figures, and legal repercussions of the Civil Rights Movement, but often overlook some of the people, like Davies, who created a lasting transformation and places the northern plains within a national movement and transformation. Davies' decisions emphasize the historic connections within the broader legal, political, and social history of twentieth-century school desegregation, civil and human rights, social justice, as a judicial progressive.

4. BANDAGE INTO A BLINDFOLD

Davies' Early Life, Education, and Military Service

Known throughout his career by his small stature, biting wit, affable intellect, and unrepressed idiom in the courtroom, Davies also came to represent the nation's social and political transition to a new century of progressive change. Born in Crookston, Minnesota, raised in the northern plains, and educated at Georgetown Law, Davies committed much of his professional career to a life of public service. In a livelihood that spanned almost five decades, he served in private practice as a municipal judge and as a federal appointee of the United States' Eighth District Court. It is within the federal legal system that he rendered decisions of national legal precedence, which sent ripples throughout the social, cultural, political, and legal institutional waters across the United States.

Throughout his life, he underscored his love of family, a home on the plains, and service to the law. He was a record-setting athlete while in college and veteran of World War II. His upbringing, undergraduate and legal education, and military service all supplemented Davies' experiences inside and outside the region.[121] His actions as a beneficiary of a modernized legal training formalized a set of characteristics that he brought to his career in public service as a progressive jurist. Davies' background, political networks, career, and candor in public service illustrates the next phase of the American legal system's movement into modernity and place in an understanding of the new civil rights history.[122] A character analysis at the juncture of the Progressive Movement and changes in the federal judiciary in the early twentieth century also

[121] Bright, "Ronald N. Davies, My Friend," 15.
[122] Goluboff, "Lawyers," 2312.

show the way in which he contributed to the development of a new classification of progressive judges.

The time in which Davies lived and the legal training he received under the "modern American legal thought" model had created the opportunity for the development of individual system of beliefs, philosophies, and professional jurisprudence. [123] Transformations in America's legal system had also begun to forge new institutional relationships and stimulate different judicial views and action. It is against the backdrop of the nation's shift into a new phase of social movements and political responses that allowed for judges to render unprecedented decisions and redefine a more inclusive and equal law-based code of ethics. Having entered the modern era, the elasticity of judicial interpretation, activism, and restraint began to stretch the conventional codification the country's jurisprudence and legal standards of conduct and consensus in the twentieth century. It is amidst the institutional changes that Davies defined an influential approach and regional contribution to the larger shifts already in play. Driven in part by a civil rights movement that would crescendo by mid-century, Davies' blend of character and professional comport helped break the restrictive boundaries of society's majority-consent in the law.

Most recognized for his role in the Little Rock Integration Crisis of 1957, about which the New York Herald Tribune commented that "at least one person acted with consistent logic and courage," [124] the majority of Davies' life and public work remains an undertreated element of a larger social movement that both paralleled and intersected with his decades-long career. As North Dakota's sixth federal district judge, his practices embodied a steady demeanor and

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[123] Grey, "Modern American Legal Thought," 1.
[124] Bright, "Ronald N. Davies, My Friend," 3.

diplomatic ideals, which he later applied to divisive criminal and civil cases using his own views of Constitutional law. While his life, career, and influence remain largely on the periphery, at times he stood within greater social movements that engulfed much of the country and captivated many within the international community throughout his five decades of service.

Despite the notoriety he received as a result of his decisions in dissolving the crisis in Little Rock, his career was only just beginning. He later tackled other civil cases that bridged his time treating the racially-charged legal issues of Little Rock and the Alcatraz Indian Occupation. The New York Life Insurance Company, Merchants National Bank and Trust, and *Stromsodt v. Parke-Davis and Company* cases further tested his commitment to transcend the political cacophony and forge his own path to permanent change and further rendering a complete illustration of Davies' life, influence, legacy, and lasting effects of his interpretation of the law despite any overt actions that signaled his intention to carve a place in history.

Less than twenty years after the crisis in Little Rock, Davies was again poised to address a racial conflict following the Native American-led occupation of Alcatraz Island. The historical event that began in 1969 sparked a national debate over civil rights and race in twentieth-century America. It inspires an exploration of Davies' little-known time serving in San Francisco and his public admonishment of the federal government's actions during the Alcatraz Indian occupation as further evidence regarding the development of judicial progressivism. He spoke out against the government's handling of events on the island, but showed no intention of pursuing an activist or restrained legal position or a liberal or conservative political stand.. His modern jurisprudence brought many marginalized minority groups into the mainstream and helped to advance civil rights with seminal legal reforms and the enforcement of existing protections.

There existed a stark juxtaposition of opposing beliefs and philosophy within the tumult of the twentieth century's civil conflicts, but it was such opposition that captured the nation's attention and sparked a dialog that helped affect change. For Davies, an upbringing in the northern Midwest region of the United States and its inherent social and political connections exposed him to conflicts of the modern era and shaped an empathetic philosophy and understanding of individual agency. The coalescing of modern advancements of law, jurisprudence, and American innovation with Davies' own agency in creating a personal philosophy all contributed to his future exploits as an unintended influencer and judicial progressive.

His professional career echoed his experiences, social, and political awareness within the Republican network of the northern plains and the national power of the justice system. Changes could not have happened without people like Davies who helped stimulate transformation in progressive and civil rights movements from outside the South and within the legal system and create the space for a significant shift in fundamental civil rights to happen. As an inheritor of judicial progressivism he operated without an expressed agenda, but he nevertheless had the final choice in the decision-making process. The blending, while not liberal or conservative, enabled cases like *Brown v. Board, Blanch Dick v. New York Life Insurance Company,* and the prosecution of occupiers of Alcatraz Island to move forward and create a positive effect and greater agent of change in the complexion of the Civil Rights Movement in the United States.

With the United States' legal system having been in existence for more than two centuries, the development of an individual judge's philosophy, code of ethics, and moral compass became an important component in the history of the law in general and the judiciary in particular. Beginning with the Marshall Court, the judges and their decisions outlined a set of

standards and code of conduct that continued to shape and reshape the externalities of American jurisprudence and its application to the law in the United States. By the early twentieth century in which Davies grew up and honed a legal career, the court system had entered a new era. Stemming from its developmental past to more professionalized standards of training and conduct, structure of the law became one in which a judge's legal acumen, based on a lifetime of human experience, directed the federal court to a renewed age of activism with a progressive outlook for modern change and greater equality.

The philosophical influences on the training for and practice of the law in the United States are many. Benjamin N. Cardozo, lawyer, jurist, and Associate Justice of the Supreme Court from 1932 to 1938 illustrated an articulation of the court's modern transformation. Cardozo's career and published works not only characterized the non-standard aspects of judicial philosophy, but also contextualizes the factors that lead a judge to render their own secular decisions within the scope of the legal field.

As he explains in 1921, it is a stream of subconscious forces that give coherence and direction to thought and action.[125] For Cardozo, judges are no less immune to these intrinsic currents than any other person, but the shear nature of judicial autonomy gives special meaning to the "inherited instincts, traditional beliefs, acquired convictions…and the resultant outlook on life and conception of social needs."[126] Efforts to balance one's inner response with outward logic and reason culminates in an underlying personal and philosophical "truth" of life; that which is marked by subconscious forces that have often kept judges consistent with themselves, but inconsistent with one another and even society as a whole. Coupled with an external sense of

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[125] Cardozo, *The Nature of the Judicial Process*, 9.
[126] Cardozo, 12

humanitarian purpose, a singular judge's own judicial outlook therefore holds the potential to effect historic change, even in the face of a dissenting national opinion. Cardozo's assertions make clear that the factors by which a judge develops their philosophy are important to understanding the ways in which a person's upbringing and personal philosophy can become an agent of progressive change.

Cardozo's explanation of the nature of the judicial process and philosophy further demonstrates the mutually reinforcing interaction of the law and historic social change. For Cardozo, pragmatism and detachment prevent a judge from being able to view situations beyond the limitations of their own experiences. Judicial objectivity eliminates seeing things "with any eyes except our own," where a judge can never achieve absolute impartiality.[127] However, introducing the elements of empathy and agency does allow a person to see things through a different lens. Rather than secular neutrality, recognizing and acknowledging empathy and agency as part of the judicial process illustrates a new connection that judges could have with their courtroom environment in the twentieth century. In its essence, Cardozo's approach functions as an explanation of Davies' approach to the law and role as federal judge. Cardozo shows that when free from the restrictions of having to transcend the status of mere mortals in performing their role of judges, the transformation of jurisprudence in the twentieth century and fresh optics enhanced a judge's ability to transform Lady Justice's covering from a historically-biased bandage into a blindfolded view of the social, political, and racial delineations of justice; though not without a number of contentious events to the contrary.

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[127] Cardozo, 13.

Still, a more contemporary set of personal beliefs and individual philosophy emerged. The time, space, and place in which Davies grew up made it possible for him to become an unintended agent of change and progressive activism.[128] Despite the juxtaposition of opposing beliefs and philosophy within the tumult of the twentieth century's civil conflicts, it was in fact such opposition that captured the nation's attention and sparked a dialog that helped affect change.[129] For Davies, an upbringing in the northern plains social and political network connections exposed him to conflicts of the modern era and shaped an empathetic philosophy and understanding of individual agency. The coalescing of the changes in law, jurisprudence, and American advancement and innovation with Davies' own agency in developing an individualized philosophy contributed to his role as an unintended social activist and judicial progressive.

Davies received an early inculcation into public service with an eye for current events, politics, and a civic-minded consciousness. He was born on December 11, 1904 as the son of a country newspaper editor in Crookston, Minnesota. His father, Norwood Sam Davies, originally from River Falls, Wisconsin, descended from an ancestry involved in publishing throughout the northern-Midwest region. Norwood first moved to Grand Forks, North Dakota, at the behest of his cousin, W.P. Davies, city editor of the *Grand Forks Herald* for many years, who persuaded Norwood join him for work on the newspaper. Once becoming a city editor for the *Crookston Times*, Norwood then moved to Minnesota and started his family with his wife, Minnie M. (Quigley) Davies of Grand Forks. In 1917, Norwood and his family moved to Fargo, North Dakota, and spent two years there while he worked as an editor for the *Fargo Courier News*, a

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[128] Nugent, *Progressivism,* 120.
[129] Klarman, "How Brown Changed Race Relations," 85.

daily newspaper and main competitor of the *Fargo Forum*. Also an active force in state politics in Minnesota, North Dakota, and later, Montana, Norwood Davies was also the editor of the *North Dakota Leader*, an official newspaper publication and political organ of the Non-Partisan League (NPL), which later merged with and became the Democratic-Farmer-Labor Party. In 1918, the family of seven moved to Great Falls, Montana while Norwood assisted with the local newspaper, then they made their final stop back in Grand Forks when he went back to work on the *Herald* as the city editor. It was through his work in the newspaper industry that Norwood was able to establish and grow the family's network and connections with North Dakota's political orbit.[130] During a recorded oral interview with Robert L. Carlson in 1974 as part of a North Dakota History Project collection, Davies remembered that his father was quick to share stories regarding his time with various political figures from around the state that would later become integral to his son's rise through the judiciary to national prominence and influence.[131]

In addition to an exposure to social and political networking while growing up in a rural area, Davies' was also influenced by his maternal grandfather, Hugh Quigley, the police chief of East Grand Forks, Minnesota, who planted an early seed of passion for the law when he took young Davies to witness a municipal court session in person.[132] The allure of the live-action sanctum of the justice system piqued Davies' interest in the court; so much so that he later remembered being, "absolutely fascinated watching that municipal judge and listening to those

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[130] Ardell Tharaldson, *Patronage: Histories and Biographies of North Dakota's Federal Judges* (Bismarck: Northern Lights Press, 2002), 70.

[131] Robert 'Bob' Carlson, "Interview with Judge Ronald N. Davies on November 7, 1974," Audio recording, North Dakota Oral History Project Records, Collection number: MSS 10157, Tape #35, North Dakota Historical Society, Bismarck, North Dakota (Hereafter: Carlson, "Davies Interview," Tape #35).

[132] Nancy Edmonds Hanson, *Bread Basket of the World: Fargo, Grand Forks, and the Red River Valley* (Fargo: Dakota Books, 1987), 53.

lawyers" and knew, "from then on that's all I ever wanted to be."[133] Coupled with an emergent social sensibility, burgeoning taste for politics, and inner drive to follow his intuition to the halls of justice, Davies possessed the unique composition of character traits and outlook for civility at an early age; a formative compilation that, despite his own expressed intentions later in life, helped elevate him to prominence also at an early point in a marked shift in the role of the judiciary and civil rights in twentieth-century America.[134]

As part of his childhood on the northern plains, Davies' primary and secondary education included attendance at St. Mary's School while in Great Falls, Montana, the Sacred Heart Academy, which later become Shanley High School, while in Fargo, North Dakota. After completing the latter two years of secondary education at Grand Fork Central High School, he became a member of their graduating class in 1922[135] (see fig. 1). In concert with his early education, Davies continued to cultivate his family's connections to local politics by taking a job with the NPL at the age of 14 while living in Fargo. Davies recalled that he reported to work at the NPL headquarters in the old Pioneer Life Building, across from the old post office downtown. According to him, his duties included odd jobs, like collecting the mail four or five times a day and "whatever [else] a flunky, a young boy, had to do around headquarters."[136]

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[133] Tharaldson, *Patronage*, 76.

[134] Grand Forks Heritage Committee, *Grand Forks County Heritage Book A History of Rural Grand Forks County, North Dakota* (Grand Forks Heritage Committee, 1976).

[135] Grand Forks Central High School, *Ronald N. Davies High School Senior Picture*, 1922, digital image, 189 x 273 px., Grand Forks Central High School Distinguished Alumni Collection, Grand Forks, North Dakota, accessed November 23, 2020, https://www.gfschools.org/Page/3832.

[136] Carlson, "Davies Interview," Tape #35.

Fig. 1. Ronald N. Davies High School Senior Picture, 1922. From Grand Forks Central High School's Distinguished Alumni Collection, accessed November 23, 2020, https://www.gfschools.org/Page/3832.

Later, the organization tasked him with the responsibility of driving Arthur C. Townley, the founder and president of the league, and close acquaintance of his father, around North Dakota to help raise funds for larger-scale NPL efforts. The task opened Davies to a new world of social and political possibilities. Townley had first joined the Socialist Party of North Dakota and ran an unsuccessful campaign for the state legislature in 1914. He abandoned the Socialists and canvassed the state in a borrowed Model-T Ford to sign up members in a new political party called the Nonpartisan League. His message resonated with the grievances of small farmers against the exploitative big interests: the Minneapolis grain merchants, the railroads, and the eastern banks. In 1916 the NPL candidate, Lynn J. Frazier, won the North Dakota gubernatorial election and in 1919 the state legislature enacted the entire NPL program, consisting of state-owned banks, mills, grain elevators and hail insurance agencies. [137]

[137] Carol A. Lockwood, "Townley, Arthur Charles (1880-1959), Founder of the Nonpartisan League," American National Biography, accessed July 21, 2019, https://www.anb.org/view/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-1500698;jsessionid=BBA23F80805C91C35F28D567E14843B0.

Davies remembered a particular call between Townley and North Dakota's sitting governor at the time, Frazier, as an interaction between two leaders that became ingrained in his mind due to Townley's "abrupt manner in which he summon[ed] the governor of the state."[138] Although without the standard social graces that Davies had expected, Townley's straightforward disposition and zero tolerance for mediocrity showed Davies he was capable of achieving his desired results with a no-nonsense demeanor, confirmed when the governor showed up at the appointed day and time Townley demanded.

It was through the observation of a high-level political machine that contributed to the development of a personal, public, and political character and code of conduct and ethics that only grew when he entered his career in the courthouse. Davies still remembered being around the newspaper office when he was 16 years old with his father and privy to other candid conversations because, "when a boy runs around the office in the knickers, you're not going to be too careful what you say in front of him."[139] Davies capitalized on the opportunity to absorb and learn from being a first-hand witness to the unfiltered politicking of the NPL's inner circle when, "they'd keep on talking," he would keep "right on listening."[140] While Townley and Davies grew closer, the insight that he was able to garner from inside the NPL as an astute, yet observant "flunky" proved to be an invaluable asset in his understanding of people and politics at an early age. Eventually his network of contacts grew from the local chapter, to the state governor's office, and eventually the United States Senate and House of Representatives. His

[138] Carlson, "Davies Interview," Tape #35.
[139] Carlson, "Davies Interview," Tape #35.
[140] Carlson.

initial involvement with political leaders, like Townley, paid dividends later in his career in law and became key to his ascension to the federal judiciary.

The evidence indicates that Davies remained motivated by his commitment to attaining a career in law after graduating high school in 1922. By all accounts, he brought the same amount of vigor and enthusiasm for work on behalf of the public that he first displayed while working at the NPL headquarters as a teenager when he started attending college at the University of North Dakota (UND) in Grand Forks in 1923. The same determination he displayed for his work at the NPL drove him to make the utmost of his time at UND to secure a place in service to the law. Davies hit the campus grounds running—both literally in some instances and more proverbially in others—and kept an active social agenda.

A series of yearbooks from UND show that he participated in the 1923 Founder's Day Carney Song Contest as the single freshman Choregus representative and was a member of the Hesperia Literary Society, a student literary and debating society, as of 1924. He was also a Synergoi pledge, which was the precursor to the Sigma Nu, Epsilon Kappa Chapter Greek social fraternity at UND founded in 1923 of which we became a member. Not one to forget his family's roots, Davies also signed up to work for the UND *The Student* newspaper staff as a special writer and reporter.

Evidence of Davies' achievements while in college indicate that he used his time at UND as a way to build his professional character, career profile, and build upon his successes. In addition to his work on the school newspaper, he enlisted in the Reserve Officers' Training Core (ROTC) and took part in UND's Track and Field athletic program. Coaches took notice as Davies cemented a university record in track and field for having sprinted the 100-yard dash in

ten seconds flat, despite his 5-foot, 1 ½ -inch, 145-pound stature[141] (see fig. 2). Davies would eventually set long-standing records in the 220-yard dash and letter for four consecutive years in track. He had also shown a desire to try his hand at football, but never put on a uniform.[142]

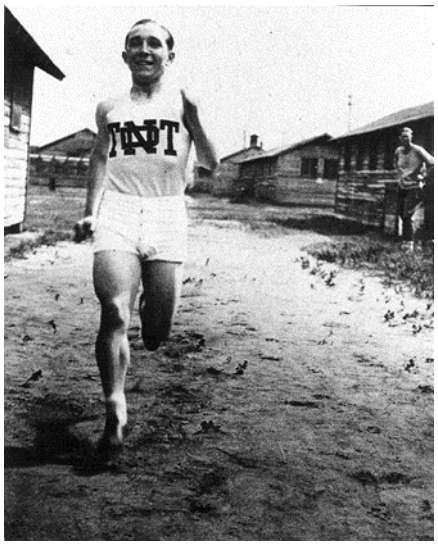

Fig. 2. Ronald N. Davies on the Track Team, University of North Dakota, 1927. Davies training for track as an undergraduate. Photograph provided by Jodi Eidler. From Find a Grave, Judge Ronald Norwood Davies Memorial Collection, accessed November 23, 2020, https://images.findagrave.com/photos/2011/105/4167_130301973374.jpg.

Davies' time at UND showcased him as a person not only invested in an advanced education, but also someone who maintained an active engagement in campus social organizations. One example of his active presence was when his role as the president of the Newman Club, a Catholic ministry centered on a traditionally non-Catholic campus, collided with his duties as a member of the Hesperia Literary Society's debate team. As part of an exercise, Davies and his team drew "purely by lot" a defense of the Ku Klux Klan (KKK or the

[141] Jodi Eidler, *Ronald N. Davies on the Track Team, University of North Dakota, 1927,* black and white photograph, 8 x 10 cm., Judge Ronald Norwood Davies Memorial Collection, Find a Grave Memorial no. 4176, accessed November 23, 2020, https://images.findagrave.com/photos/2011/105/4167_130301973374.jpg.

[142] "Hall of Fame, 1980 Inductees," University of North Dakota Athletics, accessed September 20, 2016, http://www.undsports.com/ViewArticle.dbml?ATCLID=750093&DB_OEM_ID=13500.

Klan) in a hypothetical argument against their rival team, Adaltoria.[143] Because of its post-Civil War era roots and reverberating effects, the subject of the KKK still held a historical stigma of controversy and a singular power to polarize Americans across the country with a rebirth of the organization well-underway by the early 1920s. There existed an active chapter in North Dakota and Grand Forks was no exception.[144]

In fact, in a candid conversation, Davies spoke about the divisiveness he saw driven by Klan activities in the late 1920s in Grand Forks. Unlike much of the nation's history with the KKK, which witnessed a greater percentage of anti-black rhetoric and action, Protestant members formed a Grand Forks chapter as an anti-Catholic crusade.[145] For Davies, he was certain that Klan-inspired allegiance and animosity existed elsewhere throughout the state and country, especially among business owners in Grand Forks, but felt hostilities to be no more acute than within politics. "Businesses were lost, friends were boycotting one another, [all] business was very, very bitter,"[146] Davies later recalled of the social and political climate of the time. His position as an open and devout Catholic made his theoretical position in defense of the KKK at what he believed to be at its height at the time a tense undertaking.[147]

Nonetheless, Davies considered the situation, as a young Roman Catholic standing in defense the Klan, as being just "a little bit awkward," because he believed that his religion had

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[143] Carlson, "Davies Interview," Tape #35.

[144] William L. Harwood, David M Chalmers, and Frederick Lewis Alien, "The Ku Klux Klan in Grand Forks, North Dakota," *South Dakota History* 1: 4 (September 25, 1971), 37.

[145] Patrick Springer, "KKK Once Active in North Dakota, with Grand Forks as Its Hotbed," *Grand Forks Herald*, March 3, 2013, accessed February 3, 2020, https://news/1153238-KKK-once-active-in-North-Dakota-with-Grand-Forks-as-its-hotbed.

[146] Carlson, "Davies Interview," Tape #35.

[147] Voice of the Knights of the Ku Klux Klan, "Announcement of Aims," February 8, 1923, *Chronicling America: Historic American Newspapers*, the Library of Congress, Washington, D.C., accessed October 14, 2020, https://chroniclingamerica.loc.gov/lccn/2019271211/

nothing to do with the task at hand. He recognized that he and his debating counterparts were going to be lawyers and that "we were going to learn to be advocates, no matter which side we had" and took the challenge head-on.[148] He and his team began with research and study of the complexities of the case. As Davies remembers thinking at the time, "If I'm going to defend the Klan…I better go [straight] to the horse's mouth and learn what's going on around here."[149] He wasted no time and contacted the leader and principal spokesman of North Dakota's Klan chapter, F. Halsey Ambrose, a Presbyterian minister, to schedule an appointment to discuss the organization in person. Much to his surprise, Davies secured a meeting with Ambrose "very promptly," which he attributed to his father's first cousin, W.P. Davies, who not only represented the Protestant branch of the Davies family tree, but was also editor of the *Grand Forks Herald* at the time. Davies assumed the network connection and public recognition of the family name was the main reason he found an immediate audience of one with Ambrose and seized the opportunity to better his advantage in the upcoming debate.[150]

According to Davies, Ambrose spoke freely with everyone and gave the team "quite a little dynamite." By the time of the debate, an electric atmosphere still fueled a fire of greater ideological civic discourse between the Klan's ardent supporters and those opposed to its disruptive presence.[151] But, because of his adherence to an objective stance in the face of personal opposition to the Klan, Davies and the team garnered the ammunition needed to win from one of its most outspoken and controversial leaders. Davies went on record stating that they "were the

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[148] Carlson, "Davies Interview," Tape #35.

[149] Carlson.

[150] Voices of the Knights, "Mayor Leach Removes Members of the Klan from the Minneapolis Police Force," April 10, 1923, *Chronicling America: Historic American Newspapers*, the Library of Congress. Washington, D.C., accessed October 14, 2020, https://chroniclingamerica.loc.gov/lccn/2019271211/.

[151] Trevor M Magel, "The Political Effect of the Ku Klux Klan in North Dakota," Master Thesis, University of Nebraska-Lincoln, 2011, 43.

only team to win in the universe that was good at defending the Ku Klux Klan" due to the meeting with Ambrose; though, as became custom to his character, Davies took no credit for having spearheaded the consultation.

The debate was not the last time Davies contended with a member of the Klan. He later had "the great satisfaction" of defeating a Klansman for the municipal judgeship almost a decade later in 1932.[152] Still, the Klan began to fall into decline around the state soon thereafter and lost most of its initial ability to foment dissension in North Dakotan society and politics.[153] Nevertheless, Davies' actions while still a young adult signaled the value of his family's political connections as a form of the influential power of social mobility. It also became evidence of a willingness to confront a challenge regardless of outside pressures to the contrary. In addition, a close college friend maintained a belief that Davies true appetite lay within the realm of politics.[154] Although he would not confirm his friend's suspicions or speak to an inclination to entering the world of politics, Davies, after finishing his undergraduate degree, continued to show an aptitude for utilizing the inherent political channels that lay within the upper strata of the judiciary throughout the twentieth century, whether or not it was his intention.

By 1927, Davies held a Bachelor of Arts degree from UND, a robust activities portfolio, and a reputation as a student leader on campus. Davies next sought to follow his childhood passion to be in courtroom with a career in law. Having visited Washington D.C. in 1927 as a fraternity representative, Davies set his sights on Georgetown Law for a post-graduate legal

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[152] Bright, "Ronald N. Davies, My Friend," 7.
[153] Harwood, "Klan in Grand Forks," 28.
[154] Ancestry Library, "U.S. School Yearbooks, 1900-1990," accessed June 7, 2018, https://www.ancestrylibrary.com/interactive/1265/41349_1421012668_0120-00301/297276841?backurl=https%3a%2f%2fsearch.ancestrylibrary.com%2fcgi-bin%2fsse.dll%3fgst%3d-6&ssrc=&backlabel=ReturnSearchResults.

education. In his own words, Davies described his desire to study law in the nation's capital as nothing out of the ordinary by saying, "like every other young man, I suppose, from out of town I said, 'I'd like to go to school here'." In his own words, Davies refused to concede his dream for a legal education at Georgetown, even though he encountered a number of hurdles along the way.

His first deterrence came when he recognized that because of his family's humble finances, he would have to pay his own way. Once in Washington, he paid a call to the office of longtime family friend and NPL connection, former governor and sitting United States Senator, Lynn J. Frazier. He asked for assistance securing a job to help finance his enrollment at Georgetown Law should he get admitted. Davies appealed to Frazier when he self-identified that he was, "just like every other farm boy that worked on a farm and went out there [to Washington D.C.] and wanted to go to school there," but saw no way possible to go because he could not afford it.[155] Davies was willing to find employment to supplement a pathway to a Georgetown Law degree and asked about any opportunities to work for Frazier. Frazier agreed to the request, although Davies stated that he harbored reservations as he was sure the senator so often agreed to with many others like him when he responded with a resounding, "I will!"[156] Much to his amazement, Frazier sent Davies a telegram that summer telling him to report to Washington so he could take him for a job interview as a uniformed officer with the Capitol Police Force.

However, in spite of his chance to attend and pay his own way at Georgetown, he soon encountered a setback based on his small stature. Davies remembered "quite well" the first day he went into Washington D.C. and reported to his new superior, Stephen Gnash of the Capitol

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[155] Carlson, "Davies Interview," Tape #35.
[156] Carlson.

Police Force. For Davies, his first day was so remarkable because upon having taken one look at Davies' small stature, Gnash stated, "For Christ's sake, what's next?" When speaking of the incident, Davies ventured a guess that Gnash was accustomed to officers who stood five feet, eleven inches or greater, but out of pragmatic necessity had to "take what he got," even though, as his new superior made clear, "he didn't exactly like what he got."[157]

To Davies's detriment, Gnash's initial reaction to seeing him for the first time was portent of what he experienced in his first year of employment in Washington D.C. As he gave detailed account of his time under Gnash's employ, Davies stated that he believed that Gnash campaigned to get him bumped off the force. In his recollection, Gnash used a subtle form of discrimination to restrict him from working in the same capacity as his fellow members of the Capitol Police. Instead of assigning Davies to the usual uniformed officer regiment of four hours working outside on patrol and four hours inside at a desk, Gnash would only station Davies inside for a part-time four-hour shift night he worked. Although a discrete tactic, Davies' own supposition maintained that Gnash doled out the alternative assignment with the intention of keeping Davies hidden; again, because of his height and therefore inequitable standing in both literal and proverbial terms by extension.[158]

Davies later dismissed the notion that Gnash's conduct had bothered him, but still recalled a feeling that nobody except his sergeant respected him due to the fact Gnash had relegated him to desk duty. Davies endured Gnash's passive hostility throughout his first year in Washington D.C. until higher-ranking officials declared that his modest frame did not meet the requirements for the job and absolved him of his position with the force. Although his year as a

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[157] Carlson.
[158] Carlson.

police officer characterized a disappointing exercise of discrimination based on his physical size, Davies' did not abandon his legal studies. Instead, Davies again called on his family's connections to reposition himself for other employment. His focus on the goal of a law degree and determination to overcome challenges kept him on an upward trajectory of personal and public progress. The success in his early career in law that would become key to his ability to affect change in an even larger arena of change.

Davies devised a way to still pay for his legal studies when he revisited Frazier in 1928 and secured a position in his office as what Davies characterized as "sort of his secretary or assistant secretary," under the immediate supervision of the senator himself.[159] Davies described his job as having to read the weekly newspapers from across North Dakota, identify any articles that targeted criticism toward Frazier, check the basis and validity of any public denunciation, and send the senator's written answer to the editor of the offending paper. Although Davies admitted that he did not find the work challenging, witnessing Frazier's methods for navigating the public discourse in response to his political policies exposed Davies' to the relationship between the public, politics, and civil service already rooted in his upbringing steeped in newspapers and political figures. Each piece of his experiences and interpersonal connections began to add up and play an important role in not only shaping the type of judge he would become, but also how he handled public pressure when the harsh glare of the public eye and competing social consensuses focused their attention on him in 1957 and help redefine a new progressive class of judicial activism.

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[159] Carlson.

When Davies sought assistance from Frasier, he arrived in the senator's office during a time of change in the recognition and status of the Native American plight within certain halls of Washington. As chairman of the Senate Indian Affairs Committee, Frazier also found work for Davies within the Washington political group. Not only did his work with Frazier and the Indian Affairs Committee help sustain him through law school, but also exposed him to progressive Indian reform during his formative years as a fledgling legal professional. His penchant for networking and early service within a D.C. political institution illustrates the driving characteristics that helped shape Davies' purview of society, law, national politics, and civil rights. Just as notable, when later speaking about this time in his life, Davies credited his father and Frazier's friendship for having gotten him a law degree from Georgetown.[160]

Upon graduating from Georgetown Law School in 1930, the North Dakota Bar admitted Davies to service within the same year. Davies first thought was to return to Grand Forks to open a private practice. On second thought, he decided to return to Washington and try to get a job at the Federal Trade Commission (FTC) because the prospects were minimal in his hometown since the United States entered the throes of the Great Depression. He therefore cast his eyes back to Washington D.C. he saw his growing list of network connections for the traction he needed to capitalize on his hard-won investments in his education. Davies wanted to work as an attorney examiner for the FTC. As a young lawyer just starting out, Davies viewed a civil service post in terms of both permanent financial and career security and paid little regard to other long-term prospects of settling in Washington D.C., including the changing political climate that accompanied shifts in administration. In a testament to the strength and scope of his family's

[160] Carlson.

web of political ties and evidence it could transcend local and state tide pools, Davies contacted Senator Tom Schall of Minnesota, who arranged for him to meet with Colonel Charles H. March, another family friend from Minnesota and chairman of the FTC, about a career position on the board in Washington. Davies soon met with Colonel March, who assured Davies that a job opening on July 1st was his for the taking.[161]

However, before going any further Colonel March "gave [Davies] quite a little talk" regarding the long-term prognosis for forging a lifetime career in Washington. He cautioned Davies against becoming a "Washington bum" and becoming swallowed up in the ongoing bureaucratic and administrative shake-ups that plagued the nation's capital. Colonel March instead encouraged him to return to his hometown because, "if you can make it there, you can make it anywhere." Colonel March's guidance struck a chord with Davies because after returning home and giving the advice and the job offer some thought, he decided Washington D.C. was never a place he wished to permanently reside. When reflecting on this crossroad, Davies expressed that he was still "devilishly happy" with his choice, especially after seeing some of his fellow classmates that had succumbed to the conditions that Colonel March outlined for Davies. However, he also recalled a few occasions where he regretted taking a non-Washington career path, namely when he returned to Grand Forks with nothing more than $2.50 in his pocket with which to open a law office in the midst of the most severe economic depression in the nation's history. Armed with the "heart of a farmer" and his customary steeled doggedness, Davies settled into the small town atmosphere of Grand Forks and paid a visit to a well-established attorney, C.F. Peterson, with a proposition of his own.[162]

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[161] Carlson.
[162] Carlson.

Even though they had never met, Davies took the initiative to introduce himself to Peterson, who also happened to be the law partner of J.F. Teal Conner, a former Democratic candidate for governor of North Dakota and California, who later became a federal judge out West. Davies had taken notice that the firm's suite included some unoccupied rooms and sought to strike a bargain with Peterson. He proposed taking one of the rooms from which he could practice law and offered the firm half of his takings at the end of each month. While Peterson was not at first sold on the idea, after "a little talking" he relented and agreed to house the ambitious upstart for a portion of his earnings. In the end, Peterson never held Davies to their stated terms, for which Davies was grateful. Had he been on the line for fifty percent of his take-home pay, Davies later admitted he would have been in "real bad shape" as there was not much to split for the duration of the Depression. When Davies arrived in front of Peterson at the end of each month without much money on the books, Peterson asked that he pay only a nominal portion of the operation's upkeep and nothing more; ostensibly carrying him until business began to pick up. Davies also credited Peterson as having been "very good" to him and recognizing that he also had a mother and brother to look after during the hard times[163] (see fig. 3). In a rare admission of personal uncertainty, Davies remembered not knowing what would have happened to her or his career had it not been for Peterson's magnanimity in not sticking with their original bargain. But, because of Peterson's preliminary backing and Davies' ingrained non-defeatist

[163] Cal Olson. *Judge Ronald N. Davies Kissing His Mother Minnie,* August 16, 1955, black and white negative, 10 x 13 cm., Digital Horizons Collection, Institute for Regional Studies, North Dakota State University, Fargo, North Dakota, accessed November 23, 2020, http://digitalhorizonsonline.org/digital/collection/ndsu-olson/id/496/rec/7.

attitude, he weathered the storm of the Depression and his career developed from a lifelong ambition to service as an advocate of the law, civil rights, and social justice.[164]

Fig. 3. Judge Ronald N. Davies Kissing His Mother Minnie, 1955.
A moment captured between Davies and his mother shortly after having taken his oath of office to the federal judiciary. Photographed by Cal Olson, August 16, 1955. From North Dakota State University Libraries Institute for Regional Studies Digital Horizons, Online Catalog. http://digitalhorizonsonline.org/digital/collection/ndsu-olson/id/496/rec/7.

Two years after partnering with Peterson, the opportunity for Davies to bridge the divide between the private and public sectors of legal practice and take a formal seat on the bench as a part-time municipal judge in Grand Forks presented itself in 1932. With the childhood affinity for the municipal court system of which Davies spoke that followed his visit to the courthouse with his grandfather Hugh, a continued appetite for politics that had stayed with him since his days at the NPL headquarters and UND, and he and Peterson's desire to see a lawyer, not a layman, in City Hall "because of a lot of problems," Davies ran for and secured the position as an elected official of the court, defeating an active member of the Klan for the judgeship.[165] He

[164] Carlson, "Davies Interview," Tape #35.
[165] Staff Writer, "Davies Defeats Klan Supporter—Grand Forks Herald Article Clipping," box 2, folder 12, Judge Ronald N. Davies Collection, Elwyn B. Robinson Department of Special Collections, Chester Fritz Library,

gained valuable experience working directly with the public and was also in a position to effect change from within the legal system.

On the one hand, working with and for the public deepened his understanding of the relationship between jurisprudence and the citizenry at large. He discovered the inherent problems that people experienced in and out of the courtroom and the impact each was capable of imparting on the other. He began to see the judgeship itself as an elevated position of power stood as a way to fix existing social, civil, and legal problems and define a new course of judicial evaluation, interpretation, and progressive action for an improved future of the community.[166] His dual standing as both a private and elected *ex efficio* member of the legal system concretized his career that had once been on shaky footing due to the overwhelming circumstances of the Depression. In fact, Davies later noted that Peterson's willingness to carry him until business picked up and the allotment for his work at City Hall made him "fairly affluent" for the time. He brought home a modest $200 a month, but stilled believed it to be a wealth of riches as it kept he and his family out of the breadline and ensured that what little practice he had continued to develop and expand his sphere of influence even during the hardest economic times.

Davies served two successful terms and achieved his goal of asserting a presence in the courtroom. He declined to seek reelection in 1940, stating that he did not want to be pigeonholed with the singular title of police court judge. Reflective of his focused sense of purpose and inner drive to serve beyond the limitations of the local level, he set his sights toward the upper echelons of the legal profession. He maintained his partnership with Peterson until his

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University of North Dakota, Grand Forks, North Dakota. (Hereafter, "Document Title," box, folder, Collection, UND.)

[166] Carlson, "Davies Interview," Tape #35.

appointment to the federal judiciary in 1955 but had to put his immediate goals on hold for the next four years in order to answer a different call to public duty.[167]

The ROTC training he received during his days as an undergraduate at UND came into play with the onset of World War II and the United States' involvement shortly after the Japanese bombing of Pearl Harbor, Hawaii, on December 7, 1941. On January 15, 1942, Davies voluntarily enlisted in the United States Armed Services. Though he was required to secure a waiver to serve due to his slight physical frame, he entered military service first as an adjutant. The reception station and induction center at Fort Snelling in St. Paul, Minnesota, installed Davies as commander for the remainder of the war. The military honorably discharged Davies from active duty on October 7, 1946. Davies had attained the rank of lieutenant colonel, which underscored his ardent sense of determination to commit himself to any task of service to which he was called.[168]

Davies' commitment to his military service also reinforced his personal philosophy and political character. During his four years in the Army, his intelligence and vigor caught the attention of his superior officers. Immediately following his honorable discharge, Davies recalled that those in the Army's upper brass assured him of a job with the Assistant General's office in the Veteran's Administration with the long-term potential of a lifelong career. Yet, for the same reasons he heeded Colonel March's advice, which cautioned him against settling for a lifetime career in Washington D.C. with the FTC. Davies also declined another offer of work for the government, citing his contacts within the administration who indicated that he would most

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[167] Gerald W. Vandewalle, "Legal Symposium on Judge Ronald N. Davies: Role of Judiciary in Enforcing Citizens' Rights," accessed September 13, 2016, https://law.und.edu/_files/docs/ndlr/pdf/issues/87/2/87ndlr215.pdf.

[168] Judicial Conference of the United States Bicentennial Committee, *Judges of the United States*, (Washington, D.C., 1983), accessed February 14, 2020, https://hdl.handle.net/2027/mdp.39015014868254, 119.

likely be stationed in a big city like Minneapolis, Atlanta, or Seattle and not working in the legal field. He found the idea unappealing and the prospects disagreeable because they further distanced him from his small-town roots. Although acknowledging the salary to be "highly satisfactory" and the notion of job security without the struggle of a small-scale law practice back home, the offer was not enough to tempt Davies. He expounded his personal philosophy that having a lot of money "isn't always to life" and that he could not envision himself in that type of environment for the duration.[169]

Likewise, his established insight into the politics of promotion within the governmental patronage system and time in the Army helped him understand that not only would he have been "stuck in a slot somewhere" not of his choosing, but that he would forever be beholden to pleasing those around him and above him with "more [medals] on his shoulder than I had;" for which he expressed extreme displeasure following four years in the military. Even though he found some of his compatriots to be delightful people, all too often many reached a superior higher rank for no other reason than as "gentlemen by act of Congress" because in "no other way were they," Davies declared that he had all he ever wanted of that existence with his time in the military. Having served with honor, integrity, and devotion to his country, Davies decided to go back to Grand Forks to practice law.[170]

As Davies worked to catapult his career from police court judge to a seat on the federal bench, his background, environment, and upbringing affected, shaped, and instilled a different kind of judicial philosophy compared with the philosophies of others in higher levels of the nation's court system still steeped in a restrictive status quo. Having solidified the components of

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[169] Carlson, "Davies Interview," Tape #35.
[170] Carlson, "Davies Interview," Tape #35.

upward mobility and judicial influence, Davies maintained his public and private sector services after the war. He served two terms on the State Board of Pardons and the state athletic association, and taught classes at UND's law school until proceedings began in 1953 to nominate Davies to fill an opening seat in the United States' Eighth Circuit federal judiciary.

With what Davies expressed as more important support than that of even the lawyers, longtime friend and colleague, North Dakota senior Senator William "Wild Bill" Langer threw Davies' hat into the ring and cast a spotlight on who the man who called himself "a simple lawyer" from the Plains. Having already tapped his connections via Townley and Frazier, Davies reaped the political reward of a friendship with Senator Langer and supported the senator by chauffeuring him around to political functions across the northern eastern portions of the state during his reelection campaign in 1951. His success became all the more apparent once he received a nomination to the federal judiciary from President Dwight D. Eisenhower with the appointment confirmed on August 16, 1955. The commission vaulted him to the national stage, where his self-proclaimed simplistic, yet steady presence in politics and the law influenced a generation of legal redresses in civil rights. Yet, progress itself does not automatically assume a positive connotation, neither in politics nor the judiciary; as Davies came to understand both within his political networks and when a hurricane of racial controversy made landfall in Little Rock, Arkansas, in 1957.

Advancements in civil rights and social justice did not occur without the influence of activist and conservatist philosophies, ideals, and actions. Therefore, the role of intention, whether social or political, becomes a vital part of the definition and identification of judicial progressivism. Further examination of the role progressivism played in developing the Republican network within the northern-Midwest region becomes necessary in witnessing the

infusion of progressive principles within the federal court system and the judiciary. In order to validate the rise of judicial progressivism and view Davies as a progressive jurist, an expanded treatment of local, regional, and national politicking from the early twentieth century throughout the 1970s becomes necessary. Later chapters will provide an expanded review of the progressive and legal history and Davies' work within the judiciary at the center of the changes discussed in the study of his career and cases. Included is analysis of his actions as an unintended activist by way of judicial progressivism that began at the local level and reached national influence.

5. A REPUBLICAN RESPONSE

The Republican Network and Davies' Rise to the Federal Judiciary

With long winters that arrive like a roaring lion, vast windswept farmlands stretching for thousands of unbroken acres, and relative isolation from major urban centers, the northern plains in general, and the state of North Dakota in particular, paint landscapes that with a cursory glance appear harsh, unrelenting, and distant from the rest of the United States. Yet, despite the challenges from the physical climate, the northern plains and North Dakota reflect a tapestry of people, cultural, and history that have been anything but isolated from the American mainstream. The culture, social, and political ideologies that stemmed from the national stage and matriculated through the northern plains and North Dakota have crafted political and legal models that influenced larger movements with liberal progressive ideals throughout the twentieth century. As part of such developments, an identifiable ethic emerges in concert with the northern plains' brand of political and legal interaction even before North Dakota's statehood in 1889. Neither did Davies' jurisprudence and legal career manifest in isolation. It is in concert with the rise of progressive change that he connected his early work in public service connected to the federal judiciary and broader areas of judicial influence beyond the northern-Midwest region.

The Progressive Movement inspired, energized, and invigorated Americans from every corner of the country in an era of public reform of the private interests that had put them at a disadvantage. Still, advocates were unable to actualize their full agenda into lasting legislation beyond a handful of notable gains and the energy fueling progressive activism began to wane. By 1916, progressive coalitions became divided and grew unable to agree on a centerpiece program or means to exercise more control in the national government. Unstable and distorted by inner tensions and factionalism, progressivism as a national movement foundered by 1918. Advocates

became even more discouraged as the 1920s roared to life and pushed the movement and its agenda into further decay. The decade embraced the resurgence of a soaring economy driven by a new era of mass consumerism and personal freedom in the public sphere, arts, and culture. However, that often came at the expense of other civil liberties, the revival of nationalism in the face of the threat of Communism, and the restoration of the privileged benefits of big business, corporate industry, and Wall Street financiers. Thus, progressives withdrew from the political scene, became further disorganized, and lacked the leadership and widespread support necessary to keep the movement alive on the national level of the three decades prior.[171]

As progressivism teetered on the brink of collapse, it was under the wing of the political mavericks that the reform-minded ideology remained instilled in their legislative efforts and stoked the social zest necessary for keeping the bygone era's movement alive following a notable post-World War I decline in support of its main objectives that sought to combat the ongoing predatory interests of big business in the United States. Although the early twentieth-century progressive stalwarts never came to dominate the political arena, they stayed committed to initiating and promoting the ideology that which federal judges could later use as a vehicle for carrying the movement forward and uphold the basic civil rights and social justice objectives embedded within the larger progressive platform.

Each elected representative shared a collective concern for the plight of their individual farming communities that stemmed from the Populist Movement of the 1890s in concert with the rise of progressivism.[172] Posited and paralleled in Lawrence Levine's detailed examination of

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[171] Flanagan, *America Reformed*, 113.

[172] With the infusion of Populist vigor, progressivism began to lean further to the political left, but still cannot be taken in the same light as a modern-day understanding of its far-left position by contemporary standards.

William Jennings Bryan's transformation from a late nineteenth-century agrarian populist to an unchanging early twentieth-century progressive in his 1987 work, *Defender of Faith*, many progressives from rural districts rallied around a shared history of an association with the Farmer's Alliance. First organized around 1875 as an agrarian movement that promoted collective economic action by farmers the Farmer's Alliance transitioned into politics by the 1890s by laying the foundations for the People's Party or Populists. Though short-lived in popularity and collapsing following the nomination of Democrat William Jennings Bryan to the presidential ballot in 1896, the Populist Movement had brought together otherwise disparate and underrepresented rural agricultural populations and helped them become a more influential force in national politics with a more leftist tone.[173]

In addition to the left-of-center liberal progressive bent of their Populist background, northern-Midwestern congressmen also maintained senatorial endeavors aimed at obtaining agricultural relief for their constituents during a time of economic growth driven by a marked period of corporate expansion in the 1920s.[174] Still, their mutual efforts on behalf of farmers reflected a developmental milestone under the larger umbrella of progressivism's comprehensive political doctrine. Not limited in scope, the small group of congressmen held an assertion that it was the government's duty to protect the economic security of all classes of Americans and the depressed ones in particular; an assertion that shaped and set the people and politics of the northern-Midwestern plains apart on the national stage.

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[173] Lawrence W. Levine, *Defender of the Faith, William Jennings Bryan: The Last Decade, 1915 – 1925* (Oxford University Press, 1965), 186.

[174] Briley, "Lynn J. Frazier," 438.

Most adherents to the progressive playbook agreed that they labored to mitigate the impact of business monopolies and the emergence of a plutocracy with democracy at all levels of government.[175] In fact, Davies commented that the leading North Dakotan politicians with whom he had become more acquainted and closely worked, like Non-Partisan League spearheads Townley, Frazier, William Lemke, and the father-son duo Usher, the United States Republican representative for North Dakota's at-large district and Quentin Burdick, also a Republican at-large district representative and senator from North Dakota, all thought they were "leading the way to a new movement and better country, and better lot for the farmers;" so much so that Davies' impression was that they believed in their cause because not one of them worshipped money or acted in public favor to garner personal wealth.[176] Some people speculated that, the Burdicks cultivated a sloppy manner of dress and adopted poor grammar for their speeches as a means to appeal to "the common man" for they believed the pair to have been well-educated and sophisticated in all actuality. Davies, however, refuted the supposed tactic to curry political favor among the average voting bloc.[177]

He instead suggested that the slovenly images the congressmen projected were simple characterizations of both Burdick father and son's chosen lifestyles and nothing more. Davies further inferred that their ambivalence for well-coiffed fashion and speech beyond basic neat and tidiness of their appearance revealed their true strengths as lawmakers for "the people" of their districts and state. As Davies observed, because of their clear and gifted legal abilities, both men held the potential to excel in private practice and garner a "great deal of money" in a singular

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[175] Nugent, *Progressivism*, 60.
[176] Carlson, "Davies Interview," Tape #35.
[177] Carlson.

quest for wealth or political party notoriety. Yet, in Davies' estimation, the need, desire, or choice to commit to the trappings of a lucrative role in the private sector never eclipsed their true priority to service to the public, even at the expense of their personal image.[178] Similar choices became indicative not only of his own courtroom candor, but also a reverberating echo of a North Dakotan brand of progressivist lawmakers and judicial philosophy.[179]

Yet, it was Frazier, under whom Davies had worked while completing a law degree at Georgetown, who first distinguished the progressive politics and practices borne of the northern-Midwest plains regions when he extended the tenuous principles as he sought to relieve and reform the long-troubled conditions of the American Indians. Deficient in any innovative contributions to the ideology by the 1920s, Frazier, motivated by the Populists' decline and the Progressive Movement's stagnation, assumed the mantle of course-correction proffered by Senator Robert M. LaFollette of Wisconsin. In LaFollette's summation, the expansive authority of business monopolies had become a bastion between the people and their government.[180] Therefore, according to the Wisconsin senator, the supreme aim of progressive politics was to protect the rights of "the many" from the encroachment of the powerful few and return the government to the "common people."[181]

LaFollette was born before the outbreak of the American Civil War in 1855 and having spent much of his youth working on his family's farm in Wisconsin, he developed a strong opposition to corporate power and political corruption at an early age. After graduating from the

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[178] Carlson, "Davies Interview," Tape #35.

[179] Robert L. Morlan, *Political Prairie Fire: The Nonpartisan League, 1915–1922* (Minneapolis: Minnesota Press, 1955), 200.

[180] Nancy C. Unger, *Fighting Bob LaFollette: The Righteous Reformer* (Madison: Wisconsin Historical Society Press, 2008), 14.

[181] Robert M. LaFollette, *Autobiography* (Madison: University of Wisconsin Press, 1968), 321.

University of Wisconsin in 1879, LaFollette embarked on a political career that took him from district attorney to Congress, the Wisconsin governorship, and finally United States Senator.[182] Although a career Republican, Lafollette also became a staunch reformer following the offer of a bribe from a Republican state senator, Philetus Sawyer, to stage a court case against several former state officials. Incensed that a high-level Republican leader attempted to sway the legal system with money, LaFollette repudiated Sawyer's bargain and condemned the use of back-channel monetary influence to subvert the will of the electorate. He then took to the Wisconsin political circuit for the next decade and spoke out against the influence of corrupt politicians and the powerful corporate lumber and railroad interests that had come to dominate the Republican Party. Elected governor in 1900, LaFollette pledged to institute his own brand of political reform by embracing progressivism and developing a coalition of other disaffected Republicans.[183] By the turn of the century, due to his outspoken and zealous advocacy of corporate and political reform, LaFollette enjoyed national recognition as an influential leader of the Progressive Movement in the United States.

For Frazier however, achieving the revised goals also meant a departure from the Progressive forces that outlined North Dakota's experience following the turn of the twentieth century. Like others across the nation, North Dakota farmers struggled to combat depredations in the railroad industry, grain elevators and exchanges that led to inadequate returns on their crops for decades. But as contempt for corruption grew, state progressivism in practice, like the Populist Party of the 1890s, foundered despite electoral success of both populist and progressive

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[182] Jonathan Kasparek, Bobbie Malone, and Erica Schock, *Wisconsin History Highlights: Delving into the Past* (Madison: Wisconsin Historical Society Press, 2004), iv.

[183] "Retro Member Details: Robert Marion La Follette," Biographical Directory of the United States Congress, accessed July 19, 2019, https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=L000004.

elements in North Dakota. Because proponents of progressivism emphasized political rather than economic reform, the absence of any tangible relief further compounded farmers' difficulties, which many viewed as a signature of progressivism's failed promise. Still, since the state recognized him as someone who was "for the farmers first, last, and all the time,"[184] Frazier resuscitated the state's faltering progressive banner. Through his position as a Republican at the nation's highest legislative level, Frazier first demanded aid for depressed farmers and denouncing railroads, monopolies, and Eastern financial interests as threats to American's democracy. The senator's largest vindication of North Dakotan progressivism accompanied his appointment as Chair of the Senate Committee on Indian Affairs. As Frazier worked to address issues that faced the national native population, he redoubled the progressive interests beyond the traditionally depressed farming groups and the economic problems of the agricultural field.[185]

As a result, he expanded the secular focus from the agricultural world to include other depressed, and now minority, Americans who subsisted beyond the periphery of a negligent government eye. Likewise, his efforts not only reinvigorated the progressive cause, but also broadened its elements of national inclusivity as an advocate of tribal interest. From the margins of the nation's northern plains to the mainstreams of Washington D.C., Frazier outlined a social and political path forward that ensured the future of progressivism in the twentieth century following the movement's fractionalization in 1916, faltering by 1918, and notable decline in power by the 1920s.

With their platform secured for the time being, the Progressives' work was far from complete. As jazz, prosperity, and a newfound personal liberalism consumed much of the

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[184] Charles N. Glaab, "The Failure of North Dakota Progressivism," *Mid-America* 39 (October 1957): 200.
[185] Briley, "Lynn J. Frazier," 441.

country, Progressives retained their steadfast commitment to fighting corruption and protecting the social and economic sanctity of all classes and creeds of Americans.[186] To help shore up the progressive goals and an activist agenda in all levels of government and lawmaking, LaFollette also encouraged the election of those with "the highest standards of integrity and the highest ideals of service" for by doing so, in LaFollette's estimation, "all our problems, however complex, will be easily solved."[187] That struck a strong chord in the progressive long-game to restrain the power of business monopolies and return government to the common people and restore the honor of democracy. His rhetorical sensibility of honor in progressive-oriented public service also provided a natural outcropping that stimulated the movement's reach into new social and political arenas. When applied to the judicial institution and the appointment of federal judges, progressivist ideals could prosper and reformist principles upheld when tried and tested under the watchful eye of carefully chosen shepherds of the law. Afforded the opportunities by the new, more open era, progressive-minded legislators now saw the courts as potential sanctuaries for sheltering a democracy and the desires of the average citizen from the storm of monopolistic corporate corruption of big business that had heretofore utilized the courts to protect their own interests.

While the small group of northern-Midwestern congressmen's vocal efforts stoked the coals of grassroots progressivism in the early 1920s and fanned the embers back into the fire of national consciousness that kept progressivism on political life support by mid-decade, they could not surpass the machinations of the Republican and Democratic parties that dominated all branches of government. Not even former president Theodore Roosevelt's Progressive Party

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[186] Flanagan, *America Reformed,* 228.
[187] LaFollette, *Autobiography*, 171.

founded in 1912 harnessed enough energy to break the lock on the nation's two-party system. Yet, as demonstrated by their efforts to reform the corrupt aspects of the legislative institution, the senators recognized that they could turn toward the halls of justice as a way to redefine and carry forward the movement, uphold its gains, expand even the smallest reforms, and secure its social, cultural, economic, and political influence and define its legacy for generations yet to come.[188] Office holders who pivoted away from a single-minded focus, like Frazier and his inclusion of American Indians in the forward-thinking narrative of a true American democracy forged new conduits between the congress and the courts.

They also opened the door for judges like Davies to depart from the standard liberal-conservative spectrum and include a more equitable and human-centered tone in the justice system. Davies' later decisions, guided by the inherent ties from his North Dakotan taproots, took the progressive focus from business corruption to a human application of equality, civil rights, and social justice throughout the civil, criminal, and political facets of the American legal system. Then on a larger scale, the courts soon entered a modern phase in their evolutionary process of marked power, influence, and consequence where Davies and the social and political influence of the northern plains unintentionally defined a new category of "judicial progressivism" and progressivist judges.

With most public offices, the road to a federal position encompasses a complex series of professional jockeying, political maneuvering, and precise social navigation for support. Signs of political patronage emerged early in the nation's history and become more overt as the republican experiment marched forward. An array of colorful instances, which included bitter

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[188] Briley, "Lynn J. Frazier," 453.

presidential elections whose outcome was determined by individuals within the House of Representatives and Andrew Jackson's overt allotment of government jobs to supporters and allies regardless of their qualifications, soon painted the picture of a well-developed spoils system in American civil service sector and exorbitant increase in the personal and political stakes by extension.

The runaway train of unalloyed nepotism only began to slow with the assassination of President James A. Garfield in 1881 by Charles J. Guitreau, who was driven to act by his perceived slight in not receiving an appointment after campaigning in support of Garfield's election. In light of Guitreau's radical extreme, Congress soon passed the Pendleton Civil Service Reform Act in 1883 and mandated a defined and legal pathway to a federal government position based on merit through a series of competitive exams.[189] While the Pendleton Act accomplished an evident curbing of the excesses of political favoritism and realigned the nature of federal government jobs, it was not a catch-all piece of legislation. More than halfway through the twentieth century, Congress again addressed personal and political ties to the appointment of a public office holder following the John. F. Kennedy administration. In response to President Kennedy appointment of his brother, Robert F. Kennedy to the post of attorney general, lawmakers passed the Postal Revenue and Federal Salary Act in 1967[190] in an attempt to absolve the government of accusations of nepotism in the modern era, despite Robert Kennedy's actual

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[189] "An Act to regulate and improve the civil service of the United States, January 16, 1883; Enrolled Acts and Resolutions of Congress, 1789-1996 [collectively known as the "Pendleton Civil Service Reform Act of 1883"]," General Records of the United States Government, Record Group 11, Enrolled Acts and Resolutions of Congress 1789-2013 Series, United States National Archives and Records Administration, accessed November 12, 2018, https://www.archives.gov/historical-docs/todays-doc/?dod-date=116.

[190] United States Congress House Committee on Post Office and Civil Service, *Postal Revenue and Federal Salary Act of 1967: Together with Individual and Minority Views* (Unites States Government Printing Office, 1967), accessed July 18, 2019, https://www.archives.gov/historical-docs/todays-doc/?dod-date=116, 28.

qualifications to serve as attorney general. Still, neither act could expunge a personal inclination toward the means of using a federal nomination as a tool to justify political ends, nor were they able to vanquish an individual or administration's desire to reward supporters with political favors to help maintain any given party's power and control.

However, for the better part of the nation's early history the federal judiciary persisted as an exception to the rule. Since a judge's role was of little consequence to the work of most Washington bureaucrats and their constituents, few paid attention to either a nomination or an ensuing appointment. But as the power of the judicial branch increased, so did the political stakes. With every lifelong appointment and an uptick in the activist-restraint polarization in the courts, a president could shape both the federal courts and the political climate at the sole discretion of his executive authority of appropriation. By the twentieth century, a new judicial consciousness arose and noted that a single judge's decision held the power to either uphold or strike down cases testing the political viability of contested legislation. The federal court was no longer a passive reactionary institution to the political whims of the time, but an active body with the command to support or restrain partisan lawmaking. The federal courts and the judges at their helm were now entities of clear social and political consequence. Party-driven political networks now pushed the judicial appointments to the center of their liberal or conservative platforms of equal historical consequence.[191]

At the same time, the history of the federal district court in North Dakota and the political networks of the northern plains manifests as one not dissimilar to what becomes distinct on the national stage. With the North Dakota courts existing for the better part of 140 years from the

[191] Lawson, "Progressives and the Supreme Court," 419.

congressional creation of the Dakota Territory in 1861, through statehood in 1889, and well into present day, the history of the state's judiciary is chock-full of political strategies and pivotal personalities that directly connect the judicial appointments to the larger waves of state and national politics.[192] The political and judicial figures who first shaped the federal court in North Dakota also helped guide and redefine the national system during Roosevelt's time of transition and the crystallization of federal judges' ability to serve as either judicial activists or with restraint; all of which further underscored the vital elements that linked the social movements to the political institutions and politicians to the legal systems for achieving their liberal, conservative, or progressive agendas.

Because the Appointment Clause contained within Article II, Section 2, Clause 2 of the United States' Constitution provides an ambiguous mandate that enables the president to nominate and appoint federal judges "by and with the Advice and Consent of the Senate" and serve during their good behavior, it only offers a simple outline for beginning the process of federal judicial appointments.[193] Actually obtaining a federal judgeship involves more intricate steps that are necessarily political in practice. For example, Judge Charles F. Amidon, who served as North Dakota's second federal judicial appointee from 1896 to 1928, recalled an interaction with President Grover Cleveland following his appointment to the federal judiciary where Cleveland stated that "I had very little to do in your selection." The president went on to say that it was upon a united endorsement by "all the judges whose opinion should be controlling in such a matter…" that, for all intents and purposes, secured Amidon's commission. Upon reading the ringing unanimity of the recommendations, Cleveland immediately directed his

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[192] Tharaldson, *Patronage,* xi.
[193] United States Constitution art. II. § 2, clause 2.

secretary to make out the appointment without a personal introduction or further inquiry into the judge's background.[194]

Not all judges enjoyed uniform support. Intense competition between social and political factions soon pervaded the process at times. In fact, modern legal scholars agree that the presidential distancing illustrated by Amidon's experience morphed into the customary role of a state's senator and the Senate Judiciary Committee's in wielding a substantial amount of influence, if not playing a decisive part, in determining a nominee.[195] While others invested in a judicial appointment, like party leaders, bar associates, and even retiring judges also act as influential variables in the elevation of a judge to national prominence, the considerable political vestiges in reaching the federal bench remain clear. The appointments process therefore not only straddles the gap between the sterility of a rote bureaucratic task and a pitched party-line battle, but is also part of a political process of policymakers attempting to address a variety of local, state, and national constituencies. A judge thus became the vehicle of political purpose and those at the wheel with a personal or party-driven interest steered suitable candidates on the road from state and regional boundaries to national influence.[196]

It is within the complex web of adapted networking that brought different local characters into the national realm. As the shared power of federal authority matriculated into the halls of justice, a judge's political alignment and surrounding network became important determining factors not just in terms of an elevated career path, but also in an individual's social, political, and legal consciousness. Regions grew and became more interconnected to each other and the

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[194] Tharaldson, *Patronage*, x.
[195] White, *Patterns of American Legal Thought*, 23.
[196] Thomas J. Miceli, "Legal Change: Selective Litigation, Judicial Bias, and Precedent," *The Journal of Legal Studies* 38, no. 1 (2009): 159.

federal government while a judge's cast of supporters fostered a more diversified national outlook when it came to disagreement over how to respond and resolve some of the country's most controversial topics of debate.[197] Provincial interests solicited the government in national problem-solving from differing viewpoints and took what had once been isolated problems and transformed them into national debates. Political networks fractured into disparate entities of stylized personal and political connections of the local fare. But instead of diluting themselves into ineffectual obscurity, many local, state, and regional networks vied to affect policy and legislative development and became centers of power in persuading and installing advocates of specialized interests into positions of national influence. The twentieth-century federal judicial appointments process contextualized how an ambiguous judge from a far-flung rural community affected legal questions of national importance.

The network of Republicans in the northern plains shot Davies into national prominence. His supporters also enabled him to infuse the spirit of North Dakota and his character and distinctive marque of jurisprudence reflective of a regional upbringing into the federal judiciary and foment change in the progressivist vein. The relationships fostered by his family connections to the media and politics early in his life in the 1910s and 1920s enabled him to later hone his legal career in the 1930s and lay the foundation upon which the country built progressivist principles in civil rights..

Few other connections were more vital to shaping Davies' consciousness from outside the confines of the Southern socio-political narrative than his exposure to and subsequent

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[197] Walter F. Murphy and Thomas E. Baker, *Congress and the Court: A Case Study in the American Political Process* (New Orleans: Quid Pro, LLC, 2014), 114.

emersion in North Dakota's network of Republicans and the NPL.[198] Both the Republicans and the NPL formed a cornerstone piece to Davies upward mobility and ultimate rise to the federal judiciary and national influence as the country struggled with legal solutions to the civil rights and social justice inequalities in multiple American institutions, such as housing, education, and employment opportunities. Few of Davies' experiences that contributed to his career were more critical than his network connection to and activities within the NPL.

As an outcropping of Republican factionalism built from the remnants of the Progressive Era on the heels of the movement's precipitous dip in 1916, the NPL grew in rapid response to the larger transformation and the beginnings of a national political party realignment in 1915. Described by many journalists, scholars, and supporters as a militant farmer organization,[199] the NPL benefitted from its makeup of active and high-profile politicians. A number of Republican senators and representatives had become disenchanted with the direction of North Dakota's Republican regime and sought to establish a separate wing to better address the needs of the farming community and agricultural industry interests. While political factionalism sparked intense competition among the various interests, it helped North Dakota politicians, like NPL leaders Frazier and Langer, become ever more active and creative when courting constituents and crafting a Northern-minded policy base. With three prominent groups vying for votes and the federal judiciary's enhanced role in legislative policy, North Dakota's Republican Network concretized a symbiotic system of political and judicial influence and support.

According to his own recollections, Davies had enjoyed connections to the Republican Network via the NPL in the late 1910s that predated his personal and professional relationships

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[198] Carlson, "Davies Interview," Tape #35.
[199] Lansing, *Insurgent Democracy,* 217.

with the prominent politicians, like Frazier and Langer, who later help propel his rise to the federal judiciary following his return from service in World War II.[200] With a well-connected family of journalists, Davies had access to the inside track of state politics like few others. He had a first cousin who edited the *Grand Forks Herald*, W.P. Davies, an uncle who was the publisher of the *Minot Daily News*, Hal Davies, and a father, Norwood Davies, who held positions as editor for the *Crookston Times*, the NPL newspaper and as a city editor for the *Grand Forks Herald*, Davies' family ties to newspapers afforded him a natural association to, and later within, the influential forces of state politics with national implications in the judicial nomination and appointment process by mid-century.

Davies cut his teeth in the political sphere as a young teenager alongside his father at the NPL headquarters in Fargo, North Dakota, just before the turn of the Roaring Twenties. He established his place in the NPL and Republican Network by extension via a close relationship with the NPL's founder and president, Townley. At 14 years old, one of Davies' jobs at the headquarters entailed the responsibility of driving Townley to various events, fundraising campaigns, and political obligations throughout the state. Davies forged a deeper bond with the NPL founder during their travels and he praised of Townley's character and honest leadership. Davies even credited the NPL's original leader as having been a "remarkable man for his time" and a responsible visionary who held an ardent belief that the NPL was leading the way to a better life for the farmers. Davies remembered that Townley was often gruff and hard to talk to, but that nevertheless, "he knew what he was doing."[201]For Davies, Townley and the NPL's success was reflected by his ability to mesmerize crowds and inspire a collection of farmers into

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[200] Carlson, "Davies Interview," Tape #35.
[201] Carlson.

action.[202] Davies found Townley's open frankness, like the abruptness in which Townley once demanded a meeting with Governor Frazier just as astounding. That Frazier obliged without complaint showed Townley's effectiveness in growing the NPL's membership base and channeling its progressive mission to the nation's capital. By the tumultuous 1920s, Davies had not only solidified his place in North Dakota's political inner-workings and pathway to the national arena, but he had also come to view the NPL as "the state's original league institution", both an experience and insight that led to the formation and implementation of his unintended activism as a judicial progressive.[203]

Likewise, his seminal relationship with the NPL and Townley had brought Davies into the orbit of other prominent politicians within the core network responsible for his rise to the federal ranks. Although first governor, and later a United States senator, Frazier stood as a controversial figure in state politics, due in large part for becoming the first and only state governor to be recalled from office by popular vote, he was an NPL leader who, as part of North Dakota's Republican Network, provided Davies with an progressive outlook toward civil rights. Recalling that Frazier had taken Davies under his wing in 1928 after Davies' firing from his job on the Capitol Police force, Davies understood the benefits of his close ties to the senator for they had come as the result of a long-standing relationship with the Davies' family. So too had his network filled a practical need for employment while also raising Davies 'professional profile among Washington political elites.

Best known for taking a progressive stance on behalf of his agrarian constituents, Frazier also applied a more progressive stance in addressing similar issues of inequality within

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[202] Carlson, "Davies Interview," Tape #35.
[203] Carlson.

governmental treatment of Native American tribal civil rights.[204] Although Frazier never delivered a decisive victory for the Progressives through his work with the tribal community, he nevertheless provided Davies with another lens through which to view Americans and their rights as a comprehensive whole, rather than segregated segments of the population. Without expressed intention, the family friend, NPL activist, progressive advocate, and United States senator had exposed Davies to the business principles of progressivism and provided him with another stepping-stone for his climb to the federal judiciary. By the mid-1950s, Davies occupied the position in which he then applied a new facet of progressivism through the federal judiciary. Judicial progressivism thus emerged as both a goal and consequence of his entrenchment in the Republic Network, time with Frazier in the legislative branch of government and rise to the federal judiciary as an unintended activist.

Yet, the pathway from the northern plains to a federal appointment had not always been as clear-cut. Preceding Davies' completion of law school and navigation to his federal judgeship at the behest of Langer, intense lobbying for a federal judicial appointment from North Dakota pervaded the state's Republican Network. The high-water mark for factional infighting arrived in 1922 when different delegations engaged in an intense political battle for the auspices of President Warren G. Harding for a North Dakotan Republican to occupy a vacated seat on the federal bench. As evidenced at various points within the history of the nomination process, the political sway that party officials, members of state and local bar associations, and even judges themselves maintain a grip on the powers of influence in the overall process and scope of the

[204] Briley, "Lynn J. Frazier," 454.

federal judiciary within both the lower and upper circuits.[205] Still, wholesale backing of any candidate was not guaranteed.

The history of North Dakota's judicial appointment crystallizes one example of early political factionalism within North Dakota's Republican Party. Preceding Davies' nomination by over thirty years, Judge Andrew Miller's appointment process demonstrated the fluid and divisive nature of the party's regional politicking and the real-world impact of party-specific targeting of individuals for the nomination and lifetime appointment to the judiciary. Miller's rise to the seat became the manifestation of extreme jockeying between political boss Alexander McKenzie's machine, members of a growing Progressive movement, and the organized farmer-centered Nonpartisan League; all of which came to represent the three major Republican factions in North Dakota politics for the first half of the twentieth century. The factions and their leaders' opposing motivations had simultaneously carved the political channels through which Davies would have to begin to navigate and negotiate a decade later in the 1930s. The political machine of Alexander McKenzie edged out progressive and NPL efforts for attention and Miller, replete with a membership in McKenzie's inner circle, walked away with the nomination, but had fixed the new twentieth-century tone and goal post for the direction of the socio-political relationship with the newfound power of the judiciary.[206]

The McKenzie-Miller era laid the foundation of North Dakota's Republican Network and set the tone for Davies' ground game when it came to ascending the political ladder to secure a seat on the federal bench. The emergence of intense competition characterizes the appointment process in early twentieth-century North Dakota as not one of a sterile perfunctory bureaucratic

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[205] Joseph Isenbergh, "Activists Vote Twice," *The University of Chicago Law Review* 70, no. 1 (2003): 160.
[206] Tharaldson, *Patronage*, 27.

necessity or a singular party-line battle, but rather a multifaceted political process driven by each campaign's desire to cater to a variety of constituencies. As a result, the political football, now fully seated within the confines of the judicial sector, began to move down the field of play in response to not only outside political pressures, but to the electorate itself.

Still, while the political figures concretized a structure that responded to the public and helped negate the concerns over the appointed, not elected, lifetime position of a judge, they had also wed politics to the process, which raised the specter of conflict and controversy for the remainder of the twentieth century and well into the new millennia. No longer did the two areas operate without either implicit or explicit influences upon one another. Few figures were better suited to market their local, state, and regional interests than those with strong, well-connected, and deep-rooted political networks ready-made for the Washington D.C. field of play.

Even by Davies' own direct admission, it was Langer who was the keystone figure of the Republican Network who put the final plank in place in Davies' stairway to national judicial prominence. When reflecting on his appointment to the federal bench, Davies admitted that, "We [judges] like to be coy about it and think the President of the United States appointed us, which is technically true, but I'm sure when the President of the United States appointed me, had never heard the name before." In Davies' precis and statement that "I make no bones about it and everyone knows it…,"[207] because the president manages sundry of United States' judicial, attorney, marshal, and ambassador, among many other appointments, Langer was most responsible for his career-long seat at the national table of influence, even though Davies was already the first choice of North Dakota's attorney's in a 1955 preference poll.

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[207] Carlson, "Davies Interview," Tape #35.

Davies' relationship with Langer developed in an organic, grassroots fashion that marked the overall flavor North Dakota politics and the regional Republican Network of politicians. While Davies worked as a municipal judge in Grand Forks, North Dakota, in the early 1930s, aides for Langer, then a Republican candidate for governor, approached Davies and asked if he would introduce Langer for a campaign speaking engagement in Grand Forks. Later in his own account, Davies hinted that politics played at least a part in his consent when he mentioned that he had "been watching the newspapers and every time [Langer] appeared, you'd find it…on the back page somewhere."[208] Davies then concluded, "there must be some good in this man; they're keepin' [Langer] down like this." He agreed to help Langer's campaign and assist the Republican Party with a public introduction and an implicit hometown endorsement by extension. Their relationship, like their respective careers and political dealings, continued to develop from a fortuitous meeting in Grand Forks based on common Republican interests. Davies continued to support Langer first through his tenure as governor of North Dakota and later during Langer's campaign for a United States Senate seat, even though Langer defeated Frazier in his bid for reelection and ended the sitting senator's political career in in the 1940 Republican primary.[209] As part of North Dakota's Republican Network, Davies promoted Langer's NPL echoing and progressive agenda in radio spots and even spent countless hours driving Langer around to 18 political functions to reach voters in the most remote parts of the state.

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[208] Carlson, "Davies Interview," Tape #35.

[209] Agnes Geelan, *The Dakota Maverick: The Political Life of William Langer, Also Known as "Wild Bill" Langer* (Self-published, 1975), 82.

Davies even advocated for Langer on a personal level when he arranged for a group of Langer's detractors to meet him during a game of bridge hosted by Davies at his home. Davies lauded the event as a success for it allowed the skeptical voters to "consider that [Langer] just might be just another human being" and make a more empathic connection to the man beyond the political fray that surrounded the public person. Davies facilitated similar outreach until Langer "carried the county in Grand Forks," as he believed that meeting Langer translated into votes, because even when you did not agree with him, "you couldn't dislike the man' once your paths crossed."[210] Governor-turned-Senator Langer spared no favor when he later reciprocated Davies' personal, political, and professional support beginning the moment a vacated seat appeared and President Eisenhower's ears were open to senatorial influence.

Davies' exploits with North Dakota's Republican Network in his rise to the judiciary was not an isolated or unique series of events. The history of the judiciary shows that most, if not all, of the judges were politically active before their appointments and a number of them, like Davies with his time in the municipal courtroom, had held elective office.[211] Yet, despite their political backgrounds, many of the North Dakota judges took actions that were administratively unpopular at the time they handed down their decisions with some remaining controversial.

Their cases show that, although the appointments process is eminently political, and the judges appointed all have had substantial political ties, the decisions they have reached on the bench are not politically motivated, but as in Davies' case, can inspire a special quality of activism, though unintended because, "The are pronouncements of the law, not politics," as best encapsulated in 2002 by Judge Richard S. Arnold when reflecting on the history of North

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[210] Carlson, "Davies Interview," Tape #35.
[211] Tharaldson, *Patronage*, vi.

Dakota's federal judges. Moreover, as Ardell Tharaldson notes in his 2002 work, *Patronage: Histories and Biographies of North Dakota's Federal Judges*, the judges of North Dakota's federal district court have made significant and lasting legal contributions and that their history both reaffirms a faith that the rule of law can exist in a democratic system in which judicial appointments are based partly on politics and that they in fact lessen the tension between the judicial decision they make and the democratic values and provide stability in the socio-political-judicial relationship.

If nothing else, the stability of the North Dakota's federal judiciary through the long tenures of almost all of its members, regardless of how they initially arrived at their appointment, has aided the stability of the law even beyond the customary stability provided by *stare decisis* or determining points of litigation by legal precedent. Institutional stability in turn led to the stability of the expectations of America citizens; one of the law's principal aims even in the face of political or social uncertainty. The founders envisioned a country based republican ideals, a democratic process, and the judiciary as an independent bedrock for a nation built on laws rather than the ambitions and rule of man.[212] Yet, it has only been through the actions of individual people that life is breathed into the founder's aspiration. As a result, the framers of the Constitution created the stability they desired with the a judicial check to the executive and legislative powers and, with as much lack of intention and consequences of later judicial decisions, crafted the space for judges like Davies to not just exist, but to affect change and progress despite volatility of their decisions.

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[212] Alexander Hamilton, *The Federalist Papers No. 1*, The Judiciary Department of the United States of America, ed. Barbara Bavis, (McLean Edition: New York, 2019), 1788, Library of Congress, accessed November 19 2018, https://guides.loc.gov/federalist-papers/text-1-10#s-lg-box-wrapper-25493264.

Few other events of the twentieth century were more socially capricious and politically consequential than the Civil Rights Era. Even though the Southern-based narrative remains the largest base for the overall historical account of events, regional, state, and individual figures from outside the South, like Davies and a northern plains Republican Network made substantial contributions to progress and outcome of a national movement. The role of state politics and the law now affected the national purview of the social, cultural, legal, and political agendas, events, controversies that had once been restricted the isolated regions or locals. However, the significant growth in the judiciary's power and its nomination process now brought local, state, and regional figures from obscurity and in to spotlight of national influence.

Davies' position in North Dakota's Republican Network and subsequent rise to the federal judiciary unveils new insight into the intersection between popular democratic pressures and the rule of law under which the judges of the twentieth century issued their binding decrees[213] (see fig. 4). Sworn in on August 16, 1955 in a joint ceremony with George Scott Register, Davies secured a formal seat and lifetime appointment as a federal judge within the United Stated Eighth District Circuit Court[214] (see fig. 5). The ceremony arrived a little more than a year after Langer first announced his public support of Davies' own ascension.

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[213] Cal Olson. *Judges Ronald N. Davies and George S. Register at Induction to the Federal Bench, Fargo, N.D.*, August 16, 1955, black and white negative, 10 x 13 cm., Digital Horizons Collection, Institute for Regional Studies, North Dakota State University, Fargo, North Dakota, accessed November 23, 2020, http://digitalhorizonsonline.org/digital/collection/ndsu-olson/id/496/rec/12.

[214] Cal Olson. *Federal District Judges Ronald N. Davies and George S. Register Receiving Oath, Fargo, N.D.*, August 16, 1955, black and white negative, 10 x 13 cm., Digital Horizons Collection, Institute for Regional Studies, North Dakota State University, Fargo, North Dakota, accessed November 23, 2020, http://digitalhorizonsonline.org/digital/collection/ndsu-olson/id/496/rec/10.

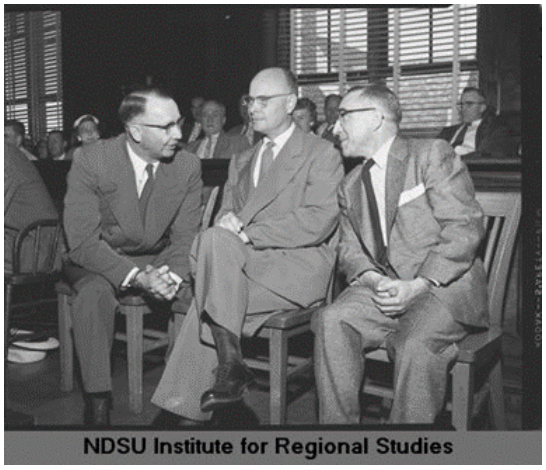

Fig. 4. Judges Ronald N. Davies and George S. Register at Induction to the Federal Bench, Fargo, N.D., 1955. An unidentified man, George S. Register and Ronald N. Davies seated on chairs inside courtroom in the United States District Court in Fargo, N.D. Photographed by Cal Olson, August 16, 1955. From North Dakota State University Libraries Institute for Regional Studies Digital Horizons, Online Catalog. http://digitalhorizonsonline.org/digital/collection/ndsu-olson/id/496/rec/12.

Fig. 5. Federal District Judges Ronald N. Davies and George S. Register Receiving Oath, Fargo, N.D., 1955. Judges Ronald N. Davies (left) and George S. Register (right) take their oath to the federal district court from Judge Charles J. Vogel. Another man is visible standing behind Judge Davies and an American flag is visible in the background from inside the federal courthouse, Fargo, N.D. Photographed by Cal Olson, August 16, 1955. From North Dakota State University Libraries Institute for Regional Studies Digital Horizons, Online Catalog. http://digitalhorizonsonline.org/digital/collection/ndsu-olson/id/496/rec/10.

In anticipation of being asked to make a brief speech once sworn-in to office, Davies had already been mulling over what to say for some time. Following the ceremony, after a careful rumination and with a puckish, yet retiring candor, Davies began by saying, "I thought I might open to you people, I'm just a simple lawyer, but I discarded that, feeling that perhaps too may I the courtroom would agree with me." He then chose to disclose a personal anecdote of having talked to "a very crusty old lawyer" who a few hours after receiving the nomination said to him, "I have been watching judges in this state for fifty years. The first five years they're afraid of being reversed. The next five years they think they know all there is to know. The last five years they think of little but retirement." Davies thus concluded by saying, "I only hope that, agreeable to the oath which I have just taken, I shall have the courage to meet and honorably discharge the responsibilities which are now mine."[215] Davies now sat on a bench of considerable influence and was poised to administer decisions from a center of social, political and legal power[216] (see fig. 6). The first significant test of his inaugural statement arrived sooner rather than later as racial agitation boiled over and demanded a federal resolution in Little Rock, Arkansas when Judge Archibald Cox sent Davies into the hornet's nest little more than two years after his swearing-in ceremony.

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[215] "Transcript Ronald Davies Induction Ceremony, August 16, 1955," box 3, folder 1, Davies Collection, UND.

[216] Cal Olson. *Judges Seated on the Federal Bench, Fargo, N.D.*, August 16, 1955, black and white negative, 10 x 13 cm., Digital Horizons Collection, Institute for Regional Studies, North Dakota State University, Fargo, North Dakota, accessed November 23, 2020, http://digitalhorizonsonline.org/digital/collection/ndsu-olson/id/498/rec/11.

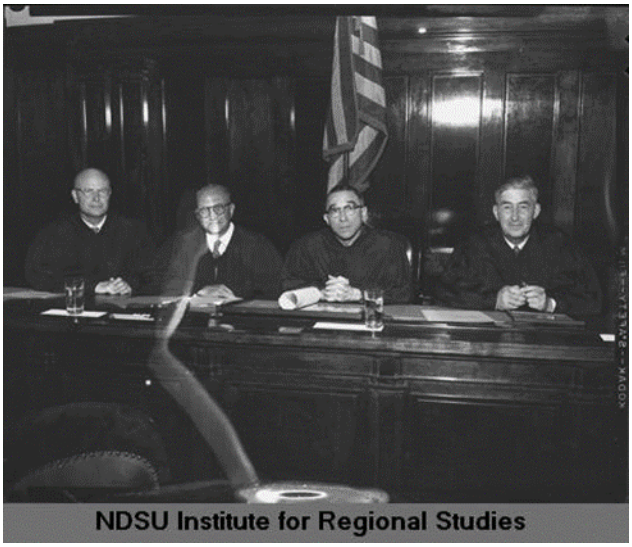

Fig. 6. Judges Seated on the Federal Bench, Fargo, N.D., 1955. Four judges seated behind the federal bench with an American flag behind them. Left to right are, George S. Register, Charles J. Vogel, Ronald N. Davies and Thomas J. Burke. Photographed by Cal Olson, August 16, 1955. From North Dakota State University Libraries Institute for Regional Studies Digital Horizons, Online Catalog. http://digitalhorizonsonline.org/digital/collection/ndsu-olson/id/498/rec/11.

Despite the presence of political pressure in the judiciary, a middle ground still existed for judges to benefit from a political network in the nomination and appointment process and still project a public persona of diffidence to party alignment once on the bench. Davies' cases and those stemming from the other nine federal judges from North Dakota revealed that the appointments process shares a direct link to the Unites States' Senate and the Senate Judiciary Committee holds a decisive role in the confirmation process. So too have the judges appointed in recent history had substantial political ties. Yet the decisions they reached on the bench were not necessarily motivated by the political networks responsible for their appointment.

In fact, as demonstrated by Davies' management of racial desegregation in Little Rock, Arkansas, in 1957, many of North Dakota's appointees chose paths that defied popular politics and the majority consent and remained controversial even after they rendered their final decisions. Judge Richard S. Arnold, Chief Judge of the United States' Eighth Circuit Court of Appeals from 1992-1998, encapsulated a Constitutional approach to the law when he

pronounced that history of North Dakota's federal judges, their handling of cases, and their ultimate opinions, "are pronouncements of law, not politics."[217] But, even though socio-political capital was not a main motivating factor for North Dakotan judges, their decisions resulted in an influential brand of unintentional activism that both influenced a modern civil rights movement and infused Progressivism into the American judiciary.

[217] Tharaldson, *Patronage,* vi.

6. THE LITMUS IN LITTLE ROCK

The Crisis at Little Rock

With urging from Langer in June of 1955, President Dwight D. Eisenhower had appointed Davies to the United States District Court Judge for the Eighth Circuit for North Dakota. Having elevated to the federal court, Davies ceased any formal political party affiliation and became a federal public servant and a Constitutionalist[218] (see fig. 7). By bringing a moderate approach to the law in his private practice, as an elected official in municipal court, and with a presidential appointment, Davies solidified an early record of having administered court proceedings and handed down rulings with measured, fair, and tactful consideration for all parties in the cases that appeared on his court's calendar. Once placed on temporary assignment on August 26, 1957, again by Eisenhower, to the Eastern District of Arkansas with the expressed purpose to help clear an overloaded docket, the *Aaron vs. Cooper* case soon tested Davies' judicial resolve in a legal situation wrought with racial tension, volatility, and direct opposition from the citizens and local governing institutions, including the state's governor, Orval Faubus.[219]

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[218] Cal Olson. *Judge Ronald N. Davies Receiving a Plaque, Fargo, N.D.*, August 16, 1955, black and white negative, 10 x 13 cm., Digital Horizons Collection, Institute for Regional Studies, North Dakota State University, Fargo, North Dakota, accessed November 23, 2020, http://digitalhorizonsonline.org/digital/collection/ndsu-olson/id/498/rec/13.

[219] William R. Wilson Jr., "Little Big Man—United States District Judge Ronald N. Davies," *University of Arkansas at Little Rock Law Review* 30, no. 2 (January 1, 2008): 303.

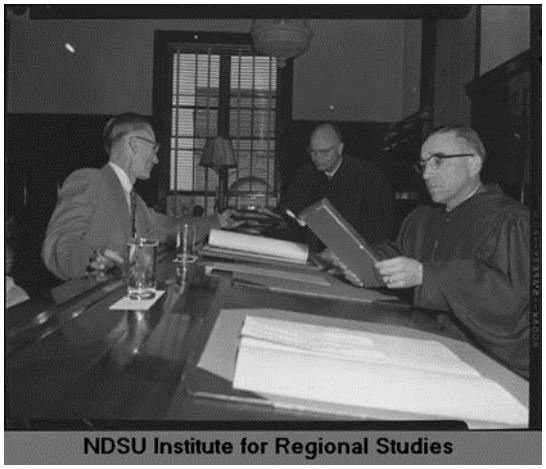

Fig. 7. Judge Ronald N. Davies Receiving a Plaque, Fargo, N.D., 1955. Davies seated at federal district court bench reading a plaque in commemoration of his oath. Visible in the background in Judge George S. Register, receiving his plaque from an unidentified man. Both judges are dressed in robes. Photographed by Cal Olson, August 16, 1955. From North Dakota State University Libraries Institute for Regional Studies Digital Horizons, Online Catalog. http://digitalhorizonsonline.org/digital/collection/ndsu-olson/id/498/rec/13.

Although Davies is not on record as having sought the federal commission, the appointment nevertheless became both an advancement in his career and in the application of his progressive judicial philosophy. Federal judges' decisions informed and affected public policy on a national scale. They possessed a singular power to both shape and respond to the socio-political conditions of the moment and either direct or redirect the course of Americas legal system. As lifetime appointees, the history of the judiciary dictates an independent system of justice, free from interference from the executive and legislative branches of government. As such, federal judges have experienced few instances of impeachment and removal and have therefore been able to perform their duties as social and political sovereigns.[220] As first debated in the 1940s by Schlesinger in response to the developments within the Roosevelt Court, federal judges could also assist with either maintaining the traditional practices of restraining a liberal

[220] Barnett, *The Structure of Liberty,* 186.

directive or push an activist agenda and bend the courts in favor of the political left. Yet, despite the opportunity to utilize the power of the appointment to promote either an activist or conservative role in the federal legal system, Davies did not expressed the desire to fulfill his duties as a public servant as anything but a Constitutionalist. In the moments that culminated as a litmus test of national desegregation legislation, Davies' actions demonstrated the distinct difference between "Constitutionalism" and "Originalism" in judicial interpretation.

As a pledge of judicial independence, the words of his oath were put to the test under a harsh national glare over the desegregation of public schools in just under two years after his induction as a federal judge of the United States' Eighth District. Like what Thomas Paine noted on the eve of the American Revolution, patriots had not sought the time for declaring independence, but that "the time hath found us,"[221] Davies had not tried to find a landmark moment of change. A case instead found him and enabled him to set a precedent of judicial and racial progressivism in the national halls of justice.

By the 1950s, few legal situations better illustrated the modern narrative of the conservative or activist court and the national significance of the federal judiciary than the issue of desegregation of public schools in the United States. The 1954 Supreme Court ruling in *Oliver Brown, et al. v. Board of Education of Topeka, Kansas* became a centerpiece debate topic over either the court's preservation of conservative social values or its facilitation of a new liberal political agenda. Following the Supreme Court ruling in the cases of *Brown v. Board of Education* and its general lack of enforcement within many of the nation's all-white schools, the Supreme Court, rendered another decision of national importance with *Brown v. Board of*

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[221] Thomas Paine, *Common Sense: The Origin and Design of Government* (Dublin, Ohio: Coventry House Publishing, 2016), 43.

Education II, which ordered all public schools to be integrated with "all deliberate speed."[222] All federal districts courts received the responsibility to oversee and enforce compliance with the court's decision. Even Supreme Court Associate Justice Felix Frankfurter had drafted his own decree to enforce the Brown decision on April 8, 1955.[223] Yet, it was Central High School in Little Rock, Arkansas, in 1957 that became the first flashpoint over federal enforcement of state and local integration plans.

Davies entered into the firestorm after Chief Judge of the Eight Circuit Court of Appeals, Archibald K. Gardner, sent him to Arkansas a few days earlier to help clear a retired judge's overloaded docket. Given the high-stakes outcome of the judicial litmus test of *Brown v. Board of Education* that ascended out of Little Rock either in favor of a restrained or activist decision of enforcement, questions and controversy arose quickly after Chief Judge Gardner's appointment of Davies to the federal seat in Pulaski County came to include the integration case exploding on a national social, political, and legal scale; all within a few days of his arrival in Arkansas.

What became Davies' now-famous ruling in September of the same year not only ordered the racial integration of Central High School in Little Rock at a precipitous moment in racial equality, but also cast him as a pivotal figure that embodied the significance and influence of the northern plains on civil rights in the United States. Despite overt oppositional defiance from many local and regional social and political figures, including Governor Faubus and senators and representative from other southern states over his ruling, Davies held steady in his interpretation of federal law as he believed best upheld true and equal rights for all citizens regardless of race,

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[222] *Oliver Brown, et al. v. Board of Education of Topeka, et al.,* 349 U.S. 294 (1955) [*Brown v. Board II*].

[223] "Felix Frankfurter's Draft Decree to Enforce the *Brown v. Board of Education* Decision*,"* April 8, 1955. Manuscript/Mixed Material, Library of Congress, accessed August 22, 2020, https://www.loc.gov/item/mcc.073/.

economic class, or educational background. At the same time, he maintained a low public profile and declined any opportunity to offer his personal sentiments of his role in the crisis.

As a result, the circumstances that surrounded both Davies' professional life and time working in two different regions of the country aid in the understanding of complex social, cultural, and political, developments in civil rights and Davies and the northern plain's role in shaping lasting changes in America's civil and progressive movements. Davies received multiple letters of personal correspondence, appeared widely in news publications across the country, ordered FBI investigation into the Arkansas governor's actions, and became the target for public and political debate both locally and nationally and therefore represents both an original and significant opportunity to contribute to the wider cultural discourse on race.

As a part of twentieth-century intellectual methodology, a discourse of Davies' constitutional approach and humility when dealing with direct opposition from the Arkansas government supports the historical navigation of the complex racial tension within the enforcement of the law, which were coupled with deep fissures in state and federal racial and educational policy at the time of his appointment. Davies stood at the precipice of racial integration. Despite his small physical stature, Davies was far from diminutive in neither his jurisdictional decisions nor the enforcement of his constitutional duty.

By the turn of the twentieth century, many people had come to view race as a means for understanding their place in American society, politics, and culture and articulate who belonged in what public space and who did not. With its geographic location as a western bloc of the southern region of the United States and situated just north of Louisiana and northwest of Mississippi, Arkansas shared a strong connection with its cultural counterparts and southern sympathizers in America's extensive history of sectional tension and ideological divide. Upon

first gaining statehood in 1836 and benefitting from a plantation economy reliant on slave labor, Arkansas later became one of the first states to follow South Carolina in secession at the outbreak of the American Civil War in April of 1861 after the capture of Fort Sumter.[224] As with other southern states that followed South Carolina's lead, Arkansas asserted that it was the state government's right to break with the Union once their ability to protect slavery came under threat from the federal government. Anti-Union Arkansans raised 48 infantry regiments, 20 artillery batteries, and more than 20 cavalry regiments for the Confederate cause. Sharing many of the same war aims that centered on the conflict over the Confederate states' rights to make independent decisions and the Union government's Constitutional right to quell any state in rebellion, a number of Arkansas' militants, like the 3rd Arkansas Infantry Regiment combined their efforts and served with distinction with the Army of North Virginia and contributed to the Confederacy's efforts to uphold the legality and practice of the institution under the Confederate constitution. After the Confederate defeat and Union occupation of Little Rock in 1863 and reintegration into the United Stated by 1868, Arkansas, like most other southern states found the abolition of slavery a bitter pill to swallow and formalized legislation into the new state constitution that controlled the lives of black American citizens.[225] As many came to call the legislation, Jim Crow laws codify the movement of black American in public by restricting and prohibiting access to the same public facilities occupied and used by whites.

Few black Americans and their allies had the ability to resist the popularity of the law discriminatory laws and the legal inequities proliferated and strengthened throughout the

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[224] S. Charles Bolton, *Arkansas, 1800-1860: Remote and Restless* (Fayetteville: University of Arkansas Press, 1998), 114.

[225] G. W. Johnson, *Bloody Ozarks: A History of the Civil War Years in Northwest Arkansas* (North Charleston, South Carolina: CreateSpace Independent Publishing Platform, 2014), 119.

American South, including Arkansas as areas outside the region participated in more subtle forms of public segregation.[226] However, as the country evolved, advanced, and many started to reevaluate the tools at their disposal in the twentieth century, so too did the law also underscore adaptive changes of circumstance and racial undertones. Shifts in the national civil discourse helped bring change to Arkansas' long-standing commitment to protect the rights of whites at the expense of black Americans. But although signaling a similar ability to break with a tradition of racial disparity, a permanent move away from the practices of the past did not come without controversy or protracted battles with supporters from both sides tapping the social, political, and legal resources and institutions necessary for upholding their cause. As legislative efforts to combat race-based discrimination and inequality in the public sphere began at the federal level, so too did state-level action arise to resist a national mandate of integration. Public schools soon became the twentieth-century battleground equivalent for the same sentiments that drove the nineteenth-century Civil War and the Arkansas public school system entered the debate and took center stage in a renewed battle over states' rights in the face of enforcement of federal law.

First established in 1870, the Little Rock School District had maintained a well-practiced policy of segregation. Yet, before Davies' 1955 appointment to the federal judiciary on the northern edge of the Eighth Circuit with over 900 miles separating him the district's southern boundary, Virgil T. Blossom, superintendent of public schools in Little Rock, Arkansas, crafted a plan for gradual or "phased-in" integration based on the Supreme Court's milestone ruling in *Brown v. Topeka Board of Education* in 1954, which declared racial segregation in public schools unconstitutional, legally ended school segregation and ordered national integration

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[226] Jeannie M. Whayne, et al., *Arkansas: A Concise History* (Fayetteville: University of Arkansas Press, 2019), 318.

"forthwith."[227] Five days after the Supreme Court's decision, the Little Rock School Board issued a policy statement that outlined its intentions to comply with the federal court ruling once the Court outlined a method to follow. At the same time, in *Brown II*, the Supreme Court further defined the standard of integration enactment to be "with all deliberate speed" and charged the federal courts with establishing guidelines for compliance.[228] By August 23, 1954, chairman of the Arkansas National Association for the Advancement of Colored People's (NAACP) Legal Redress Committee, Wiley Branton of Pine Bluff, directed a petition to the Little Rock School Board for immediate integration.[229]

As some districts across the nation began integration in elementary schools, Blossom, who had served as superintendent for under five years but had 28 years of experience in education, instead believed his plan beginning with the high school level in September of 1957 and matriculating through the lower grades over the next six years, could be fully implemented by 1963. At the same time, blacks represented approximately 20 percent of the district's total student body with a ratio of 5,484 blacks to 16,242 white students city-wide. The Little Rock School Board approved Blossom's measures on May 24, 1955.[230] With the intention of complying with the federal mandate, Blossom and Little Rock's school board set into motion a series of legislative policies that altered Arkansas' entrenched and widely-accepted system of racial inequality in public education. However, Blossom's plan embodied a protracted approach to legal integration. Therefore, bringing seminal changes into actualization proved slow in the

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[227] *Oliver Brown, et al. v. Board of Education of Topeka, et al.,* 347 U.S. 483 (1954).
[228] *Brown v. Board of Education II*, 349 U.S. 294 (1955).
[229] Judith Kilpatrick, *There When We Needed Him: Wiley Austin Branton, Civil Rights Warrior* (Fayetteville: University of Arkansas Press, 2007), 111.
[230] Elizabeth Huckaby and Harry S. Ashmore, *Crisis at Central High, Little Rock, 1957-58* (Baton Rouge: Louisiana State University Press, 1980), 89.

immediate wake of both the Supreme Court's decision in 1954 and Blossom's subsequent blueprint for desegregation in 1955.[231]

A month later on June 25, 1955, Superintendent Howard Vance of Hoxie School, located over 120 miles northeast of Little Rock in the small town of Hoxie, Arkansas, and serving approximately 1,000 white students, saw his school board move to integrate School District 46 with a unanimous vote against separate schools, citing three specific reasons for their decision: "It was right in the sight of God, it complied with the Supreme Court Ruling, and it was cheaper for the school system."[232] Like Blossom's plan constructed for the desegregation of Little Rock schools, Vance and the Hoxie school board's pro-integration movements indicated concerted efforts toward more progressive practices to balance resources and opportunity for all children within the Arkansas public education system. Yet, neither plan came seamlessly nor without controversy.

As twenty-five black students entered the halls of Hoxie schools in District 46 a month later on July 11, 1955, representatives of *LIFE* Magazine were there to capture the events and showcase the students as leaders of integration in the state. Reports appearing in *LIFE* indicated a flawless process with little resistance or pushback. However, by the end of the summer, while school officials were withholding an undisclosed number of white students from attending the integrated classrooms, the Hoxie School Board was seeking legal counsel and calling on the Arkansas Council on Human Relations for assistance in handling reported instances of intimidations, harassments, and ongoing conflicts with the Jim Crow laws, namely those that

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[231] Ben F. Johnson, "After 1957: Resisting Integration in Little Rock," *The Arkansas Historical Quarterly* 66, no. 2 (2007): 259.

[232] Faith Hill Washington, "Hoxie: The Road from Hell Is Paved with Little Rocks," *University of Arkansas Digital Exhibit*, accessed December 3, 2018, https://ualrexhibits.org/desegregation/hot-spots-of-progress/hoxie/.

dealt with the usage of shared resources such as desks and chairs, bathrooms, drinking fountains, and textbooks which had heretofore fallen under the separate-but-equal policy, but practices of segregation were still prevalent in the state. Coupled with *Life*'s portrayal and the subdued nature of the events both inside and outside the schools, desegregation in Hoxie garnered little national attention.[233] Yet, the disputes ignited by the school district's first steps toward complete integration and the subsequent need for legal reinforcements to concretize the Supreme Court's resolution helped the push for a mid-century transformation in public education.

Seven months later on February 23, 1956, and for the first time since the *Brown v. Board of Education* ruling, the Federal Justice Department openly entered the Hoxie dispute on behalf of the integrationists, thereby backing the Supreme Court ruling and reinforcing the school board's decision to integrate schools from kindergarten through twelfth grade within two years of the original decision. Still, due to its rural location and lower population density compared to the larger urban centers around the state, integration in Hoxie proceeded with little local uproar and obscured the district from significant national attention. Nevertheless, the litigation stemming from the events at Hoxie set the legal precedent that allowed access to direct federal involvement in public education and civil rights issues within a state prior to the Civil Rights Act of 1964. Not only does Hoxie serve as a legal benchmark for both equal education and the role of the state and the federal government in decisions regarding race and equality, but so too does its history stand juxtaposed against the volatile events a year later as the people and students of Little Rock faced a similar situation. Yet, with different leadership, government involvement,

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[233] *LIFE* Magazine, "Copy of Hoxie, Arkansas, Integration Coverage," box 498, file 13, MS F27: 301, Little Rock Integration Collection, Research Center, Arkansas Studies Institute, Little Rock, Arkansas.

and a growing grassroots movement, integration of Little Rock's larger and more diversified school district marked a different and adverse event with conflicting public reactions across the state and nation.

As rapid as Vance's decision initiated change and challenges to public school segregation in Hoxie, alterations in Little Rock's public education policy proved slower in acceptance and implementation. The city's white school districts did not see not see its first black students until over two years after Hoxie's twenty five black students broke the color line. Still, like the black students of Hoxie, several young black students in Little Rock had also seized opportunity to integrate and access a quality education from which the separate-but-equal conditions of *Plessy v. Ferguson* had kept them excluded but that *Brown v. Board* had overturned. Unlike Hoxie, the students' willingness to lead by example by becoming first enroll in a white public school and help desegregate Little Rock's schools came with more dramatic results that vaulted the city, state, governor, and United Stated federal court, including Davies, to international consciousness. With an extensive history of racial discrimination dating back to the early decades of statehood and slavery in 1836 and with the sectional ideology reinforced by court rulings and Jim Crow laws until the *Brown v. Board of Education* decision in 1954, the ripples of public opposition to the desegregation of Arkansas' schools that began in Hoxie turned into waves by Davies' appointment in Little Rock that further augmented mounting racial tensions with the *Aaron v. Cooper* case.

Unlike Hoxie and with a larger urban population and public sentiment against integration as the state's capital city, support to further delay Blossom's plan was far from muted. In fact, in January of 1956, twenty-seven willing black students attempted to cross the color barrier enroll in Little Rock's traditionally white schools, but were refused admission by the registration

offices. Following the NAACP's Legal Redress Chairman Branton's lead, representatives of the association filed a suit on February 8, 1956, charging that Little Rock school officials from four separate institutions denied a total of thirty-three black students admittance based solely on their race. On the same day, Federal Judge John E. Miller, having declared that the Little Rock School Board has acted in "utmost good faith" in creating a method of gradual integration, dismissed the NAACP's *Aaron v. Cooper* suit against continued race-based discrimination in public schools. In April, the Eighth Circuit Court of Appeals at St. Louis upheld Judge Miller's dismissal, thereby further delaying a desegregation of public schools in Little Rock with "all deliberate speed" as prescribed in *Brown v. Board of Education II*, while the city maintained a fastidious grip on the status quo.[234]

However, despite the legal setback for those eager to integrate, the federal district court retained jurisdiction over the case and made the school board's enactment of the Blossom Plan a court mandate that could not escape indefinite implementation. At a time of heightened judicial activism and restraint influenced by the growing divide of political liberalism and conservatism, the pervasive discord and outspoken public discontent with integration magnified the impact of his forward-thinking interpretation of the Constitution in favor of equal education in Little Rock. Davies' role as representative for the federal justice system while in Arkansas showcased progressive jurisprudence with the enforcement civil rights law in upholding racial equality in front of a national audience. The case in Hoxie characterized one of the first reactions to the integration of Arkansas' schools and laid the initial groundwork for the Federal Justice Department. It was Davies who asserted the law which set a new antecedence for enforcing

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[234] Huckaby, *Crisis at Central High*, 138.

integration under the scrutiny of the public eye, and whose ultimate decision that upheld and directed the flow of federal legislation and civil rights in education in the Southern region.

Constructed in 1926 at a cost of $1.5 million and opened in September of 1927 as what the *New York Times* called the most expensive school ever built in the United States up to that time,, Little Rock Senior High School, later renamed in 1953 as Central High School, embodied a high level of public education for white students in the city. Originally constructed to accommodate 2,500 students, Central High boasted an enrollment of approximately two thousand students by 1957.[235] Standing in stark contrast, less equipped structures like Paul Laurence Dunbar High School, opened in September of 1929 at the cost of $400,000, of which the Rosenwald Foundation donated $67,000 with an additional $30,000 from the Rockefeller General Education fund, served around 1,163 black students in the segregated sectors of the city by the fall of 1930.[236] Although a number of black students lived only blocks away from Central High School, laws prior to *Brown v. Board of Education* mandated that they travel further distances to the segregated districts that were, in theory, separate but equal. In reality, the separation subjected black students to the economic and educational disadvantages that accompanied under-funded public institutions of their communities. Students and their families were left with little legal recourse to contest the clear disparities between white and black schools. As the Supreme Court's monumental ruling in 1954 broke the accepted practice of "separate-but-equal" and the inherent racial ideology entrenched since the 1896 ruling in the *Plessy v. Ferguson* case, Blossom's plan for gradual integration lifted the barriers to an

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[235] "Central High History," Little Rock Central High School National Historic Site, United States National Park Service, accessed October 14, 2020, https://www.nps.gov/chsc/learn/historyculture/school-history.htm.

[236] Faustine Childress Jones, *Traditional Model of Educational Excellence: Dunbar High School of Little Rock Arkansas* (Washington, D.C: Howard University Press, 1981), 36.

egalitarian education in the Little Rock and offered black students access to better school and complied with the revisions in federal law. The Blossom Plan set Little Rock high schools to integrate in September 1957, and classes were scheduled to begin at 8:45 a.m. on September 3, 1957 at Central High School.

In 1955, as Davies' settled into his new role as a new appointee to the federal judiciary for the Eighth Circuit in Fargo, North Dakota, Orval Eugene Faubus began the first of six consecutive terms as the governor of Arkansas. Born in 1910 in Greasy Creek, a small community in Arkansas' Ozark Mountains, Faubus taught school throughout rural areas of the state while laboring as an itinerant farmer and lumberjack from 1928 to 1939 and briefly attended Commonwealth College, a radical labor school in Mena, Arkansas, in 1935. In 1939, Faubus began rising to prominence in public service when he was elected to the first of two terms as Madison County circuit clerk and recorder. Thereafter, he held a number of other civic positions including postmaster in Huntsville, Arkansas, and director of highways as a member of the Arkansas Highway Commission. He also served in the United States Army, first as an enlisted man and later as a commissioned officer at the rank of major in the Army Reserve in European theater from 1942 until 1946. Upon returning to Arkansas from his military duties, Faubus edited and published the *Madison County Record* that appeared weekly from 1947 until 1967.[237]

Contention, controversy, and volatility marked Faubus' transition into the public sphere through his rising political career and his stances against racial integration of public schools proved paramount in shaping the Crisis in Little Rock in 1957. Political firebrands in other

[237] Orval Eugene Faubus, *Down from the Hills* (Omaha, NE: Pioneer, 1980), 281-94.

southern states, like George Wallace of Alabama, also were outspoken opponents of federally mandated integration as the Civil Rights Movement began to gain traction in the mid-1950s following the *Brown v. Board of Education* decision, Faubus' rise to the governorship during the same time period reflected his continuants' desire for top-down leadership that that favored the protection of white rights over a forward-thinking dismantling of discrimination for black Americans. However, despite the popular consensus and support of his voting base, Faubus' actions were later the subject of multiple investigations conducted by the FBI, including his involvement in the integration of public schools in Little Rock, contempt of court, and two separate extortion investigations.[238]

As the summer of 1957 waned, both Davies' and Governor Faubus' social, political, legal, and educational ideals collided and set the stage for an unprecedented clash over desegregation. The intersection of their differing roles as government representatives and public servants further slated the nation for a contest between the federal court system and the Arkansas state government. An anti-integrationist group, the Mothers League, spearheaded the cataclysmic event that turn the nation's attention to Arkansas' capital city.

With the passing of the Judiciary Act of 1789, Congress has held the authority to create lower federal courts as needed beyond the Supreme Court established in Article III of the Constitution of the United States. Since that time, districts courts have expanded to include 94 federal judicial districts organized under 12 regional circuits with each including a court of appeals with the Eight Circuit having its foundation in 1891. With hundreds of federal judges active within multiple districts across the country at any given time, some even serving on more

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[238] Huckaby, *Crisis at Central High*, 356.

than one court at the same time, the need for a codified order for their case assignments established a generalized procedure for allotting a judge's individual workload.

According to the written statutes of the United States Federal District Court system, fundamental consideration is given to ensure an equal distribution of caseloads and circumvent "judge shopping" by those seeking to file their civil or criminal case with a judge under whom they believe will decide in favor of their case, but the methods for the assignment of judges can still vary. Even though each court has a prescribed plan, the majority of courts employ a variation of a random drawing, while others use a simple name rotation of available judges or make assignments based on a judge's expertise in a specialized aspect of the law. Still, other judges receive their cases based on geographic locations in the best interest of assigning cases within a large area to a judge that sits near the site of the case filing. Just as important, the courts have also maintained a protocol for preventing any conflicts of interest that would render it improper for a judge to preside over a particular case.[239] Despite the basic rules for a fair and equitable order for making case assignments, the chief judge in each district have retained responsibility to impose the rules of the court and maintains sole discretion for final orders for case assignments.

The 1957 litmus test of the Supreme Court's integration ruling in Little Rock revealed the pliability of judicial assignments at play within the federal court system. In an order filed on August 21, 1957, Archibald K. Gardner, chief judge of the United States Court of Appeals for the Eight Circuit acknowledged that the courts in Arkansas had become overloaded. He declared

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[239] "Judicial Assignments," United States Court Records, The Federal Judiciary, Administrative Office of the United States Courts, Judicial Branch of the United States Government, accessed December 3, 2019, https://www.uscourts.gov/about-federal-courts.

that he was temporarily reassigning Davies to the Eastern District of Arkansas from August 24, 1957 until February 24, 1958.[240] Gardner, born in Ontario, Canada, and having practiced law privately in Missouri and South Dakota from 1893 to 1929, received his commission to the newly created United States Court of Appeals for the Eight Circuit from the United States Senate on May 23, 1929, and served as chief judge from 1948 to 1959. Having handed Davies an assignment that "shall extend to cover disposition of any matters submitted during the above period of assignment,"[241] and after only two years of service as a federal judge, Judge Gardner signaled a confidence in Davies' ability to handle any case appearing before him with tact and speed regardless of the geographic location.

Shortly after Gardner's orders that took Davies to the bench in Pulaski County, Arkansas, the Mothers League, a collection of local segregationists sponsored by the Capital Citizens' Council (CCC) held its first public meeting on August 27, 1957. The league had been organized just three weeks earlier by a local salesman, Merrill Taylor. The Mothers League developed as an offshoot of the CCC for the purpose of opposing the Blossom Plan with a less strident tone and softer feminine appeal than their more outspoken and volatile edge embodied by the CCC. With an air of maternal concern for the physical and emotional welfare of innocent white children that, according to its members, were stressed and sickened by the "unspeakable" conditions under which they were being "forced to struggle for an education,"[242] the Mothers League combined traditional segregationist attitudes with modern enthusiasm for upholding the

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[240] Warner, "From Fargo to Little Rock," 17.

[241] "Judicial Assignments," https://www.uscourts.gov/about-federal-courts.

[242] Graeme Cope, "'A Thorn in the Side?' The Mothers' League of Central High School and the Little Rock Desegregation Crisis of 1957," *Arkansas Historical Quarterly* 57 (Summer 1998): 170-183.

current system while blocking racial progress with a renewed focus on states' rights and anti-miscegenation platforms.

Only approximately one-fifth of its 165 members were mothers of Central High students as of October, 1957. Yet, because members of the league expressed concern for their children's wellbeing and safety in an integrated environment never before experienced in the city or county, they believed that they had suitable right to contest forthcoming integration.[243] The advocates for the league's appeal to act in the protection of their children came as a reference to the late nineteenth-century white men's perceived fears that white women's virtue was under an increasing threat of a black men's desire to violate the sanctity of white womanhood.[244] The white-male dominated perception drove efforts to protect white women and justified racist ideology and actions they took against black men, which led to not only the creation of one of the country's first popularized films, *Birth of a Nation*, a pro-Ku Klux Klan propaganda narrative that débuted in 1915.[245]. Like the NAACP's *Aaron v. Cooper* suit and in the spirit of protecting their children, recording secretary of the Mothers League, Mrs. Clyde Thomason filed a motion on behalf of the group that sought a temporary injunction against school integration in Pulaski Chancery Court the same day of the first meeting in late August of 1957.[246]

Two days later, on the grounds that integration could lead to violence, Chancellor Murray O. Reed granted the league's request against admitting blacks at Central High School. Having arrived in the state capitol three days earlier to begin clearing an overloaded docket with his

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[243] Cope, 171.

[244] Wyn Craig Wade, *The Fiery Cross: The Ku Klux Klan in America*, (New York: Oxford University Press, 1998), xiii.

[245] Melvyn Stokes, *D.W. Griffith's the Birth of a Nation: A History of the Most Controversial Motion Picture of All Time* (Oxford University Press, 2008), 15.

[246] "Thomason v. Pulaski County Public Schools, August 27, 1957," box 2, file 12, Special Collections, University of Arkansas, Fayetteville, Arkansas.

secretary Zona MacArthur, Davies moved quickly and stepped into his charge post-haste. He faced a loaded calendar with several varying cases scheduled throughout each day. At the same time, because the federal district court retained jurisdiction over the case and made the Blossom Plan a court mandate as a result of the NAACP's suit the prior year, Davies' nullified the Pulaski Chancery Court injunction the following day when the case appeared on his schedule on August 30, 1957 and ordered the School Board to proceed with the plan for gradual integration beginning with the opening of schools on September 3, 1957.[247]

Despite mounting tensions visible throughout newspaper and television reports, further prodded by members of the CCC and Mother League as a result of Judge Davis' decision to enforce the federal mandate, the first day of school approached only three days after his ruling. Blossom, still serving as Superintendent of Little Rock Public Schools, maintained support for federal enforcement of his plan, but Faubus did not express enthusiasm for integration and set into motion a series of orders that defied Davies' first ruling in the Little Rock integration case. On the evening of September 2, Faubus called up the Arkansas National Guard and State Police. He ordered law enforcement to surround Central High's campus and keep the peace and order of the community, announcing his plans in a televised speech. Under the command of Colonel Marion Johnson, approximately 270 Army and Air National Guard troops created a veritable human bastion that stretched along the two city blocks in front of Central High.[248]

On the morning of September 3, 1957, nine black students prepared to enter Central High and enroll as the first minorities to attend the traditionally all-white institution. Armed only with

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[247] "*Aaron v. Cooper* Court Document," folder 7, box 3, Judge Harry Lemley Collection, Research Center, Arkansas Studies Institute, Little Rock, Arkansas. (Hereafter, "Document Title," box, folder, Collection, Arkansas Studies Institute.).

[248] Huckaby, *Crisis at Central High,* 188.

a federal mandate, they arrived against the backdrop of state military presence around the school. The Mothers League, including members of the CCC, parents, and students in attendance held a "sunrise service" meeting at Central High to further protest Davies' decision. In addition, around 300 onlookers gathered in the streets in front of the school. The Arkansas National Guard then closed all roads surrounding the school to all traffic and stationed groups of uniformed soldiers at each entrance on all sides of the building with orders to admit only current students, teachers, and administrative officials in an effort to bottle further escalation and defuse an outbreak of violence. Confusion and tensions were further compounded by the presence of Arkansas guardsmen and reached a fever pitch at Central High as the nine black students made no attempt to enter the school until after Davies again ordered an immediate integration to proceed at another hearing, which lasted less than five minutes, on the evening of September 3.

On the second day of school and with Davies' legal backing of the letter of constitutional law, the "Little Rock Nine"[249] arrived at Central High to formally enroll, but were turned back by the National Guardsmen, who, according the Faubus, still maintained the military presence due to the ongoing threat of systemic violence because of Davies' insistence on desegregation. Nonplussed by the governor's overt political postulations and brazen use of military action to maintain segregation in Little Rock's public schools, Davies ordered an investigation by all offices of the Department of Justice to identify who was responsible for interfering with the court's order to continue with Blossom's plan for integration. Knowing that the state-sponsored militia had turned away all nine black students, Davies indicated that he would seek a full investigation, conducted by the FBI, to determine whether there had been a violation of the

[249] Michael J. Klarman, *Brown v. Board of Education and the Civil Rights Movement* (Oxford ; New York: Oxford University Press, 2007), 221.

federal court order.[250] Still, the Arkansas National Guard remained on duty under the command of Governor Faubus and the black students remained outside the halls of Central High.

As an attempt to defuse the local public's volatile response to the execution of the Blossom Plan, the Little Rock School Board filed a petition on September 7 that sought for a stay of Davies' integration order on the basis that it was in the best interest for the stability of the city's education system. Davies denied the petition the same day. He further insisted the issue be dealt with at the present time and issued an order that prevented Mrs. Thomason, the Mothers League, and all other persons from interfering with the Little Rock School Board in carrying out court-approved plans for integration.[251]

On September 10, 1957, a week after Central High's doors first opened for fall classes, Faubus received a federal court summons to assist Davies in determining if the governor's actions in calling up the Arkansas National Guard were in fact to protect against the threat of violence and preserve law and order or to instead maintain segregation. Davies also ordered that Faubus and the Arkansas National Guard be made defendants in the case. Davies scheduled another hearing for September 20 and further asserted the federal jurisdiction over the incident and lawfully superseded the local and state insistence that the issue of integration belonged to Pulaski County's local authorities.

Meanwhile, FBI agents began gathering statements from members of the Mothers League, parents, students, including the nine black students, local officials, Arkansas National Guard troops, and members of the Arkansas political and representative body to better determine

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[250] "Initiation of FBI Investigation," box 1, folder 3, Little Rock Integration Collection, Arkansas Studies Institute.

[251] *John Aaron, et al. v. William G. Cooper, et al.,* 243 F.2d 361 (1957).

the climate and threat level posed by Davies' enforcement of the Blossom Plan. The investigation also sought to establish whether the governor's methods to prevent integration were an earnest attempt to protect the public or an illegal and racist measure to deny black students the court-mandated equal opportunity to an equal public education. In a show of support for Davies' handling of the events, Eisenhower issued a telegram to Faubus informing him that at the request of Davies, the Department of Justice was collecting facts in regards to the failure to comply as well as interfering with the district court's order. With guard troops stationed outside Central High, Eisenhower further asserted that it was the role of the president to support and defend the Constitution of the United States and stated that he would uphold federal law by every legal means at his command.[252]

Two days before the next hearing on September 20, Faubus signaled his adherence to a belligerent position by filing a statement with the clerk at the office of the United States District Court in response to a subpoena to appear in court. In his statement, Faubus declared, "While I have the utmost respect for your Court and its valid processes, I must point out that almost from the very beginning of our republic it has been uniformly held that the chief executive is not compelled to comply with a subpoena unless he chooses to do so."[253] Faubus justified his plans to ignore the subpoena by positing that "…because of the obvious ulterior motives of those who obtained the subpoena, I do not choose to comply with it."[254] Despite his postulations, Arkansas' governor accepted the summons and held a press conference which asserted that the troops

[252] "Telegram from President Eisenhower to Governor Faubus," folder 3, box 3, Davies Collection, UND.
[253] "Governor Faubus to Grady Miller," box 3, folder 3, Davies Collection, UND.
[254] "Governor Faubus to Grady Miller," box 3, folder 3, Davies Collection, UND.

would remain at Central High and further discourage any black students from enrolling at the school until after the hearing.

In the days leading to the Friday, September 20 hearing, Davies, spent substantial time reviewing the results of the FBI investigation, whose findings proved that Faubus had no basis for calling the Arkansas National Guard to arms. According to FBI officials, Faubus had stated that his actions were to maintain law and order and to protect the peace. FBI investigators saw it differently. "It appears he may have been inclined to rely on rumor, generalities, or sources whose reliability he had not fully established."[255] In fact, the investigation showed that "Governor Faubus used the National Guard in a manner which maintained segregation,"[256] in spite of the federal directive to proceed with integration.

Davies therefore ruled that the governor had not used the troops to preserve the law and peace and ordered the immediate removal of the guardsmen. He went on record to declare that Faubus' actions were unlawful and in violation of the United States' Constitution. Because the governor still refused to remove the troops, Davies then issued an injunction against any collective actions that prevented integration. Davies deemed Faubus' actions necessary to "protect and preserve the judicial process and proper administration of justice and protect the constitutional rights of the minor plaintiffs and other eligible Negro students on whose behalf this suit is brought."[257] With Davies having maintained his judicial resolve and ordering the removal of the National Guardsmen, the Little Rock Police Department moved to comply. They would provide police presence in the still-tumultuous streets around the school on Monday,

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[255] "FBI Conclusions," box 1, folder 4, Little Rock Integration Collection, Arkansas Studies Institute.
[256] "FBI Conclusions," box 1, folder 4, Little Rock Integration Collection, Arkansas Studies Institute.
[257] "Davies Statement to Federal Court," box 1, folder 2, Davies Collection, UND.

September 23, and allow the nine black students to enter, enroll, and be the first students of color to attend what had always been an all-white school in the state's capital for generations.

With authority of the federal court, Davies insisted that Little Rock schools move forward with the integration now set into motion by his actions before a national audience. When Monday morning came, the city's police force showed up as promised. However, by the time the nine black students prepared to enter the school, over 1,000 people formed an angry mob out front, and the Little Rock Police had to provide escort to get the students inside the building. Within a few hours the police removed the students from the school following a dramatic increase in concerns for their safety. As images of rioters proliferated throughout local and national media outlets, Eisenhower called the actions of the mob "disgraceful" and ordered federal troops into Little Rock to enforce Davies' orders to continue with immediate integration.[258]

A day later, 1,200 members of the 101st Airborne Division, the "Screaming Eagles" of Fort Campbell, Kentucky, entered the streets of Little Rock and headed toward Central High. On the same day, Eisenhower placed the Arkansas National Guard under federal directive of compliance with Davies' order that allowed the nine black students to return to Central High for their first full day of classes the next day, though not without turmoil and with federal troop escort. Thereafter, federal troops maintained their presence throughout the transitional period of desegregation within the high school. Still, integration under federal protection did not occur without opposition from some members of the public. In fact, Mrs. Margaret Jackson, vice president of the Mothers League of Central High School, filed a suit on October 17, 1957 against

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[258] "Little Rock Central High School Crisis Timeline," United States National Park Service, accessed March 13, 2012, http://www.nps.gov/chsc/historyculture/timeline.htm

Colonel William A. Kuhn and others asking the court to order a withdrawal of the federal troops and restore local and state police and military presence. With confidence in his interpretation of the law, Davies issued a dismissal order upon the grounds that it raised "no substantial Federal constitutional issue"[259] and upheld a continuation of federal military protection for the students in and around Central High.

During the incident in Little Rock and in the months following the integration crisis, numerous articles appeared with a gamut of discourses, opinions and editorials of Davies, Faubus, and Eisenhower's actions. The tone of the press ranged anywhere from laudable to accusatory to racist, all of which reflected the contentious national climate regarding desegregation within the public education sphere. Regional and national divides appear as the implication of each man's decisions became clearer in the days of an undeniable racial shift. At the same time, Davies received numerous letters of both support and criticism for his decisions in Little Rock that further illustrated the influence of a man from the northern plains on a mid-century crisis regarding race, civil rights, and the power of the federal court.

On June 3, 1958, to the vexation of all that Davies accomplished with each carefully weighed decision in the *Aaron v. Cooper* case and the less volatile race relations after the crisis, including the graduation of Central High's first black student, Ernest Green on May 25, 1958, the Little Rock School Board, after Davies' return to Fargo in February, again asked the court for permission to delay any further plans for desegregation as established in *Aaron v. Cooper*. The filing cited numerous discipline problems, which the petitioners claimed had occurred as a direct result of integration. On June 21, Judge Harry Lemley granted the delay of integration until

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[259] "Court Document Re: *Jackson vs. Kuhn*," folder 3, box 1, Little Rock Integration Collection, Arkansas Studies Institute.

January 1961, stating that while the black students have a constitutional right to attend white schools, the "time has not come for them to enjoy [that right]."[260] Lemley's reversal of Davies' original orders revealed not only how entrenched racial ideology was within the social, cultural, political, and educational sectors in Arkansas, but also underscored how progressive Davies' decisions were less than a year prior.

Under appeal on September 12, 1958, the United States Supreme Court ruled that Little Rock schools must continue with its desegregation plan first enforced by Davies in September of 1957. In compliance with the Supreme Court fixed by Davies' standing order, the Little Rock School Board ordered the high schools to open on September 15. Yet, Faubus again stepped in and ordered four Little Rock high schools, including Central High, to close as of 8 a.m. September 15 pending the outcome of a public vote, thereby truncating federal authority on the matter. Despite the formation of the Women's Emergency Committee to Open Our Schools (WEC) and their solicitation for support to reopen Little Rock's high schools, citizens voted 19,470 to 7,561 against integration and the schools remained closed until August 12, 1959, as segregationists rallied at the state capitol. Also present was Faubus, who stated that it was a "dark" day. He encouraged those at the capital to not give up the struggle and fight the federal mandate first executed by Davies. In an effort to underscore the deep veins of ongoing malcontent, the group then marched to Central High School where police and fire departments disperse the mob and making twenty one arrests.[261]

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[260] "*Aaron v. Cooper* Court Document," folder 7, box 3, Judge Harry Lemley Collection, Arkansas Studies Institute.

[261] U.S. National Park Service, "Crisis Timeline," http://www.nps.gov/chsc/historyculture/timeline.htm.

Davies' ruling in September of 1957 had nonetheless ordered the racial integration of an all-white high school in Little Rock at a tenuous time during twentieth-century race relations. His efforts showcased him as a progressive figure with an uncommon judicial philosophy being exercised in the South. His stance while serving in Arkansas embodied the significance and influence of his upbringing on the northern plains with a willingness to uphold an unpopular position on civil rights in the United States. Despite obstinacy from local and regional social and political figures, including Faubus over his ruling, Davies did not waver in his interpretation of federal law as he determined it to best uphold equal rights for all citizens regardless of race, economic class, or educational background. His work in Little Rock stimulated racial progress from within the judiciary and raised a national awareness of the modern civil rights issues still facing the country; all while helping to maintain federal authority on future matters within any state in the nation.

Davies demonstrated a progressive willingness to depart from the established practices of many of his predecessors and contemporaries. According to J.W. Peltason in his 1961 reflection of integration's path through the public school and legal systems in the first half of the twentieth century, desegregation was underway in Little Rock, but not because of the federal district judges. In Peltason's estimation, judges in the South followed the path of least resistance and provided no leadership setting any legal directives for enforcing the Supreme Court's ordered integration when first challenged in court. In fact, Peltason notes that with the exception of Davies, federal judges "consistently back down in the face of pressure" for fear of being ostracized by their communities and labeled traitors as they were under constant pressure to speak for the white South. Other judges across the South and in Arkansas even participated in state legislatures' and local school boards' efforts to develop delaying tactics to truncate the

Supreme Court's decisions for decades.[262]Davies instead served to protect public interest by enforcing the rights of all citizens as prescribed by the law. Without intention, he had revealed a pathway from the accepted social and political standards of the southern reaches of the Eight District to the enforcement federal law not as a conservative or activist, but as a judicial progressive and Constitutionalist. The crisis of integration that emerged in Little Rock public schools as an extension of the social and political problems surrounding *Brown v. Board of Education* represents the first major break in both *de facto* and *de jure* segregation. As such, Davies' actions in a progressive spirit function as a conduit between the past to inform a present-day understanding of the development of judicial progressivism. Yet, the *Aaron v. Cooper* case also serves as a stand-alone piece within a larger historical account and offers a fresh lens through which to view the legal developments as part of the twentieth-century Civil Rights Movement. A character study of Davies' role leads to more questions as other elements influenced the growth of Davies' professional character and career on civil rights and judicial progressivism.

Reflecting upon Davies' actions in Little Rock elevates his decisions within the broader racial and political history of twentieth-century school desegregation and civil rights. His time as a central figure during the integration crisis not only raised new questions regarding the development and advancement of a national civil rights policy by presidential action, but also the role of the state government in addressing issues of racial equality at the intersection of judicial enforcement. Though he had not requested a seat on the federal bench in Arkansas, his decision to enforce the desegregation of Little Rock public schools resulted in a prominent example of the

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[262] J. W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* (Urbana: University of Illinois Press, 1971), 26.

unintended consequences of his judicial progressivism. At the same time, his decisions gave Eisenhower the platform on which to act and enforce federal law in the face of state interference. He maintained a low public profile and declined any opportunity to offer his personal sentiments regarding his role in the crisis despite a number of provocative media and political pundits who sought to undermine his resolve. Nevertheless, Davies enforced the Constitution's structure of equality and protections of civil rights with a jurisprudence that was a progressive departure during a time when many still who continued to hold power sought to maintain a grip on segregation under the guise of the greater good.

By 1957, there existed no shortage of questions and controversies regarding the appointment of a judge from the northern plains to preside over what was widely regarded as a strictly Southern issue at the time. Davies did not shrink from his sworn duty to the law and the public. He executed his responsibilities and interpreted the Constitution without hesitation—even making one of his decision in four minutes—absent of political partisanship, or concern for self-preservation in the court of public opinion. Despite severe backlash, including death threats, from local residents and a showdown with the state's governor and the Arkansas National Guard, Davies' concerns remained rooted in the equal protection provided by the legal system that he had committed to serve. As a result, his work in Little Rock not only secured a step forward for integration in future instances absent of popular support, but also cemented a cornerstone achievement in the protection of civil rights through judicial enforcement.

Because Davies' work in Arkansas and the Crisis at Little Rock represents only a fraction of a much larger history surrounded by similar cases since the *Brown v. Board of Education* ruling, a deeper understanding and working knowledge of the events continue to develop. A greater recognition of the larger racial ideology at play in the modern legal system by mid-

century emerges at the confluence of the public and the law, but also reveals that some may have overlooked the significance of Davies' role in Little Rock due to his measured public presence before, during, and after 1957.

Davies later refused to accept accolades or civic honors for his decisions to enforce the Supreme Court's decision without hesitation. Confident in his training and experience, he maintained a steady demeanor under the scrutiny of the public eye as the white social majority pressured him to act on their behalf. Davies held to the steadfast position he took in Little Rock throughout the rest of his career, even later citing his own judicial actions as "humdrum" when reflecting on his time in the federal judiciary.[263] His actions within the context of the Crisis in Little Rock highlight the significance of his decisions at a crossroads of the law and civil rights and underscore his character as a significant stimulus to social justice beyond the local stage and limited time frame with his adherence to a progressive jurisprudence.

However, Davies refused to accept recognition for his actions while in Little Rock, signaled his commitment to the law; that for him the law was blind to race, class, or other social constructs and consented distinctions. According to Davies, under such beliefs, anyone could have, and would have made the same steps forward. Those candid thoughts marked him as a progressive activist, though that was not the intention behind his choices in Arkansas.

Davies later hailed cases that came later as the most important legal decisions of his career with an impact that went, again, as high as the Supreme Court in the 1960s. Still, a Catholic periodical, *Catholic View*, when awarding him the title of "Catholic Man of Year," best summarized Davies' accomplishment in Little Rock by stating that he had, "made integration a

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[263] "Man of the Year: Judge Ronald N. Davies," *Catholic View* (January 1958): 9.

fact rather than a theory."[264] Yet, Davies had not laid to rest the greater issues of race, integration, state power, and federal constitutionality, but his role and decisions did clarify the purpose of the law and legal procedure in the modern era neither as a liberal or conservative. In practice, Davies had applied both the law and his individual jurisprudence to uphold and enforce the civil rights of all American citizens. Having stimulated a progressive ideology within the legal system, Davies was equipped to carry forward the lessons of the litmus test in Little Rock and expand his influence beyond the nation's racial injustices and into those within some of the country's largest corporations.

[264] "Man of the Year: Judge Ronald N. Davies,"8-10.

7. THE LABORATORY OF LAW

Davies' Civil and Criminal Cases

By the end of 1957, Davies had upheld contemporary legal tenets while also weaving stronger threads of progressivism into the highest levels of the law in a moment of social and political uncertainty.[265] With his litmus test of *Brown v. Board of Education* and the desegregation crisis in Little Rock, Davies applied federal precedence to the immediate needs of minority students and addressed the persistence of racial inequality in the national public education system.[266] Despite the politically-charged situation that pitted state government against federal power, Davies relied on the controversial and heretofore little-tested statute to validate a proactive use of the law for progressive means to a progressive end to uplift racial minorities from the historical trappings of oppression.

Yet, even in Davies' own words when offering a rare comment on the results of the case in the Arkansas capital, his actions were nothing remarkable nor did they require "much judicial acumen" with a Supreme Court-vetted ruling to guide the way.[267] According to Davies, any personal fame stemming from the integration case was only a matter of being in the right place at the right time. He was resolute that any other judge would have arrived at the same conclusion based on the constitutionality of the law already in place, thus making his activist actions in the *Aaron v. Cooper* case an unintended consequence of his progressive purview in upholding the

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[265] Although having demonstrated a progressive sensibility in the court by the standards of the time, his decisions do not necessarily equate to the contemporary liberalism associated with those who identify as progressives in modern-day.

[266] Bright, "Ronald N. Davies, My Friend," 9.

[267] Staff, "Interview with Judge Ronald N. Davies," reprinted in part by *Fargo Forum*, April 19, 1996 and August 21, 2011; accessed March 29, 2012, https://www.inforum.com/news/education/2996604-definitely-separate-not-equal-members-little-rock-nine-discuss-desegregation.

established standards of American jurisprudence in the twentieth century.[268] Instead of hanging his hat on his part in Little Rock and resting on the laurels of presidential support, he believed a civil case that followed the firestorm of Pulaski County in 1957 to be among his most important.

Rather than a single, career-defining case, a trifecta of civil cases and one criminal case bookended the decade between his time in Arkansas in 1957 and San Francisco, California, in 1967 for the aftermath of the Alcatraz Indian Occupation; all of which defined his career as an unintentional judicial progressive. The collections of cases without existing or settled statute, afforded Davies the freedom to experiment with the unknown boundaries of the law. By setting legal precedence in the realm of civil settlements and criminal punishment that involved the federal court, he expanded his judicial progressivism throughout two more decades.[269]

The first case that tested Davies' willingness to break rank with the tacit agreement between America's business, governmental, and political culture came in 1955 with *Blanche Dick v. New York Life Insurance Company*.[270] The case centered on the issue the double indemnity clause in the insurance giant's policies, which bound the company to pay a specified multiple, which is doubled, tripled, etc., of the stated contractual settlement amount if the claim was an outcome of death by accidental means. Following William Dick's passing as a result of an incident involving a shotgun, Blanche Dick, the deceased's widow, filed for the double indemnity benefits as entitled within the issued policy, claiming that her husband's death had occurred by accidental means from two separate, but equally fatal, shotgun wounds, with the first

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[268] *John Aaron, et al. v. William G. Cooper, et al*., 143 F. Supp. 855, 861 (Ark. 1956), 858.

[269] "Precedent Case Files, 1918-1959," Record Group 118.32, Records of United States Attorneys, North Dakota Judicial District, National Archives, Washington, D.C.

[270] *Blanche Dick v. New York Life Insurance Company,* 359 U.S. 437, 445 (1959).

in the chest, and the second in the head. When settling the case however, New York Life Company denied her claim to a double indemnity benefits totaling $7,500, asserting that William Dick's death came by "means of external violence" and that he had "died by suicide or self-destruction" and therefore nullified the double indemnity clause of the contract, though the company had paid the existing face value of the policy of $7,500 to Blanche Dick. Given the circumstances and evidence that surrounded her husband's passing, she refused to accept the company's conclusions and levied a civil lawsuit against New York Life for failing to honor the double indemnity clause in their agreement. While her grievance as a single, individual policyholder intent on taking on an industry giant first reached the federal district court and landed on Davies' docket in Fargo, North Dakota, the plaintiff and Davies also unwittingly elevated the case to the highest court in the land as attorneys for the insurance company controverted the facts and rulings each step of the way.

In another case, Davies had the opportunity to define his career within the larger wave of judicial expansion and evolution. With the *Merchants National Bank and Trust Co. of Fargo v. The United States* (1965-1967), Davies maintained his forward-thinking standards and unintended activism by upholding his responsibilities to the public first established in the Dick case.[271] Unlike the Dick case, Davies had to manage a case on behalf of a family estate in the face of a purported government violation of the Federal Torts Claim Act and their subsequent opposition to the accusation. Like the Dick proceedings however, the Merchants National Bank case lacked the same level of national notoriety as Davies' handling of *Aaron v. Cooper* of Little Rock fame, but more than made up for an absence of general recognition in its presentation of

[271] *Merchants National Bank & Trust Co. of Fargo v. United States,* 272 F. Supp. at 418 (1967).

several novel and new issues to be resolved by the court.[272] In fact, because the legal issues were less clear, more complex, and of lasting significance, the Merchants National Bank case had made Davies more proud than what many considered the most prominent historical case of his career after settling the integration crisis in Arkansas' capital.[273] What began as a situation of legal opacity between two executive institutions later became one of three cases identified by Davies as being of special importance and another demonstration of progressivism's judicial endurance and elasticity within the laboratory of the law.

Another case from the same decade became an example of Davies' judicial progressivism. In the 1967 case of *United States v. Irvin Warfield, Jr.*, the criminal case involved an insurance salesman for an Iowa company doing business in North Dakota, Irvin Warfield Jr., who while in his early twenties engaged in the falsification of applications and forged checks in order to boost and maintain a high standing with his manager. Although no policyholder sustained any damages, the company had paid Warfield a monetary commission based on the false records that he had completed the business he claimed on official company records. The United States proceeded to indict him on thirteen counts of interstate transportation of forged documents for having committed the crimes across state lines.[274]

Like the *Merchants Bank v. United States*, *Shane Stromsodt (a minor) v. Parke-Davis and Company* (1969) was a case tried to the bench and came to Davies' docket without a model path for a straightforward ruling.[275] The case brought on behalf of a young child called into question

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[272] Bright, "Ronald N. Davies, My Friend," 10.

[273] Ralph R. Erickson, "Remembering Judge Ronald N. Davies: A Giant Among Us," *North Dakota Law Review*, Vol. 87: 207, 2011.

[274] Erickson, "Remembering Davies," 208.

[275] *Shane Stromsodt, a minor, by Robert M. Stromsodt, his guardian ad litem v. Parke-Davis and Company,* 257 F. Supp. at 993 (1969).

the ethics of the pharmaceutical manufacturing process, testing, and administration of childhood vaccines and came as part of the emerging field of product liability law. Based on the notion of strict liability, it was up to Davies to decide whether or not Parke-Davis was responsible for the life-altering effects suffered by Shane Stromsodt following the administration of one of the company's vaccines, Quadrigen. Even though the facts of the case were clear, both the Stromsodt family and Parke-Davis engaged in a heated contest at trial as the implications of the outcome were to have national consequences regarding the debate between the guarantee of individual rights and the protection of large corporations.

Although separate and distinct in their own right, each case and Davies' subsequent published opinions confronted the socially-detached practices of large-scale life insurance, banking, and pharmaceutical industries and the ever-present question of governmental mitigation or protection for striking a balance between the interests of the public and those of conglomerate business entities. The four cases, one of which withstood the ultimate test in the highest court when the United States Supreme Court upheld his ruling on behalf of the Eighth District Circuit, all empaneled a series of cases that set legal precedent in the realm of civil settlements and criminal sentencing involving the federal courts.

Beginning with President Rutherford B. Hayes' administration at the end of the Reconstruction Era in 1877, American society had started to transition away from rural sectors and toward the urban-industrial centers. By 1900, fifty percent of all Americans lived in cities, a substantial increase from the sixteen percent recorded in 1860. Industrialization that had begun in the antebellum period before the outbreak of civil war in 1861 prompted much of the transformation and helped to create a strong relationship between corporations and politics. Yet,

it was the evolution of the federal courts and their interpretation of the Fourteenth Amendment's due process clause that affirmed the laissez-faire policies of American business.[276]

One result of the growth of American manufacturing and business enterprises was the attempt by various state legislatures, often in the Midwest where the farm economy had suffered the most, to pass statutes against harmful business practices. In *Munn v. Illinois* (1877), for example, the Supreme Court upheld the state legislature's right to regulate as the justices ascertained the state's power to police the operations within their own borders. Still, business leaders in the Gilded Age had a negative reaction to regulations passed by state legislatures, often because special interest groups like the farmer's Grange movement had elected their own to state assemblies, leaving large-scale corporate interests immobile in local affairs. On the national level however, and with the exception of Grover Cleveland, post-Reconstruction presidents were Republicans and the Republican Party was deeply tied to the interests of big business.[277]

As such, the trend became for Republican presidents to appoint pro-business judges, many who practiced as corporate attorneys, in an effort to align their politics with industrial policy. Not even Cleveland was immune from the pro-business leaning and the new judges began to sway the Court's position on state regulation of businesses. In response to the Grange movement, Cleveland formed the Interstate Commerce Commission (ICC) in order to control railroad rates, but its board members were tied to the railroad industry while the ICC itself had no enforcement power. With gains being made in the court system, businesses also increased

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[276] Page Smith, *The Rise of Industrial America: A People's History of the Post-Reconstruction Era - Volume Six* (New York: McGraw-Hill, 1984), 174.

[277] Herman Belz, Winfred Harbison, and Alfred H. Kelly, *The American Constitution: Its Origins and Development* (New York: W. W. Norton & Company, 1991), 443.

lobbying efforts on the state level as added means of securing their agenda. Even some newspapers, like the *New York Times*, shifted toward a pro-business tenor. By portraying the agricultural movements like the Grange as socialism with a focus on wealth redistribution, the pro-business propaganda validated many Americans' existing fears of an authoritarian government intent on intruding in the lives of its citizens.[278]

By the 1880s, a new Supreme Court with different faces who sympathized with corporate America became defenders of laissez-faire. The Court soon reversed former court opinions by asserting that state legislatures were limited in their ability to regulate business practices. Justices further determined that any state whose regulations deprived enterprises violated the due process clause of the Fourteenth Amendment. In a groundbreaking shift, courts applied the due process clause contained in the Constitution's vested rights to businesses and corporations. The transition to "substantive due process" freed business from heady laws that interfered with the fundamental rights of an industry to reap profits from their practices. In effect, corporations were treated as people, a significant deviation in ideology and public policy.[279]

At the turn of the twentieth century, many Americans supported the politics of the Gilded Age and the implementation of pro-business policies. Because middle-class Americans accepted the propaganda that populists were a danger to the nation's democracy and prosperity, there existed a consensus in support of the Supreme Court's decisions. In addition, by 1900, the United States was producing more iron and steel per annum than Great Britain and Germany combined. Even though the industrial boom created a class of elite millionaires, its rippling economic effects also aided the growing middle class. More Americans began to enjoy an uptick in their

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[278] Smith, *Industrial America*, 180.
[279] Belz, *American Constitution*, 445.

quality of life, which encompassed access to more varieties of fresh meats and produce, clothing, household labor-saving devices, and leisure time and recreation. The rising benefits for an increasing majority eclipsed the problems of the western farmers and the Southern sharecroppers, while their attempts to combat the groundswell of change were not substantial or effective enough to warrant changes.[280]

In the moment, the Court's establishment of substantive due process prevented unreasonable state interference with private property including corporations and many of which were railroads, utility, and manufacturing businesses. Within a historical context, the judiciary was acting in response to the rapid advancements in American society not unlike other legal challenges that had gripped the nation over the previous century. Interpreting the Constitution through the prism of an industrialized society, the courts gave the go-ahead to business and freed industry from oversight and regulatory measures. Not until the Progressive Era did renewed calls for the government to redress the grievances of the past arise and demands for officials to strike a balance between the rights of the individual actors and the interests of big business begin in earnest.[281]

In response to the systemic corruption that emerges and empowered the Gilded Age between the 1870s and 1900, the nature of the spirited Progressive Era that spanned the 1890s to the 1920s called attention to big business interest that had come to dominate and obscure those of the average individual citizens. The imbalance and growing inequality raised the question of the role and responsibility of government. Few lawmakers and even fewer politicians were quick to

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[280] Smith, *Industrial America*, 198.

[281] Alan Trachtenberg, *The Incorporation of America: Culture and Society in the Gilded Age* (New York: Hill and Wang, 2007), 10.

take a provocative stance against the large-scale corporations that yielded a substantial amount of economic power and political influence.[282] Because of the general tepid attitude and collective reservation to be the party responsible for creating a showdown between the rivaling sentiments either for or against national government intervention in the social and economic sectors, a proverbial "David versus Goliath" scenario materialized. Changes pervaded the dialog regarding the American peoples' relationship to their big-business economic counterparts. While a single individual still enjoyed the protections guaranteed in the Constitution, the same axiomatic circumstances likewise protected the rights of corporations, thereby tipping the balance of power in favor of a corporation's welfare when challenged by an individual complaint. Further emboldened by decades of political and governmental backing, big business remained impervious to the cost of litigation or any substantial consequences of engaging in a courtroom clash, leaving those seeking remittance from the industrial juggernauts with little to no power, resources, or advocacy, public or private, to overtake their foe.[283]

The system of partiality was especially persistent before the passing of FDR's New Deal legislative package. Awash in its forward-thinking aims to become the solution to the compounded problems that predicated and sustained the Great Depression, FDR and his Brain Trust deployed the basic doctrines of relief, recovery, and reform to lay the foundation for an upward course correction in America's downward spiral in the 1930s. Millions of fraught Americans were desperate for any form of reprieve and were willing to ignore the hints of socialism that the New Deal introduced into America's dogmatic adherence to capitalist values. However, many also questioned whether or not the government should have such an expansive

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[282] Flanagan, *America Reformed*, 26.
[283] Trachtenberg, *The Incorporation of America*, 10.

reach and the long-term consequences of permanent intervention, arguing that an expanded scope in even a single area threatened all private interests for the future and exposed every citizen on their property to a potential government onslaught.[284]

Those hesitant to embrace the New Deal further insisted that executive and legislative powers be curbed by the Constitutional checks and balances. Critics also believed that it was Congress' responsibility to rein in FDR's overstep for fear of a high-octane presidential authority with the power to subvert the democratic principles and will of the American people. So too was there renewed emphasis on the promises contained within its Bill of Rights to protect both public and private interests against government interference and overreach in the natural cycles of capitalism. But, given the Depression's persistence with no end in sight, many scholars, economists, and lawmakers supported the president's efforts to instill an activist government during a time of crisis, undergirded by the belief that it was the government's moral and ethical responsibility to respond to the needs of the people in dire circumstances.

The New Deal had drawn a veritable line in the sand between governmental activism and restraint while dividing the citizens in their beliefs on top-down authority and the government's role in absolving the various crises spurred by the Great Depression. Politicians on both ends of the spectrum likewise took the constituents' misgivings to heart and refused to budge in their representative positions. Falling well short of a compromise, lawmakers reached an ideological and legislative impasse. Having failed to provide any form of assertive action that either secured or restrained the socialistic leanings undergirding FDR's progressive push away from the

[284] Hamby, *Beyond the New Deal,* 63.

conventional socio-political wisdom of decades past, legislators kicked the controversy to the courts to break the deadlock. [285]

With the courts left to determine the proper balance of power, economy, civil rights, and social justice when an ordinary denizen disputed the legalities of the policies and practices of big businesses, the judicial branch underwent another transformation in breadth and power as the only avenue in which to break legislative attrition. There was no absence of opportunity for motivated parties to have their agendas aired out in court and arguments acknowledged by the judge and jury. Courtrooms became a laboratory of the law, where lobbyists brought, tried, and tested cases without precedence in order to mitigate the stalemate of determinism reached between the executive and legislative branches of government. By bringing cases that served their particular social and political goals, the courts shifted from reactionary institutions of law and order to proactive halls of social and civil justice where a judge's published opinion had the power to shape and direct various facets of society and politics.[286]

Over the course of the 1930s and crossing into the latter decades of the twentieth century, the New Deal became a mixed-bag of successes and failures, The Supreme Court had struck down most of FDR's plan by 1935, but many of its progressive remnants left a DNA trail for others to follow. Rising in the wake of the Roosevelt administration and World War II, many lawmakers, lobbyists, and social activists continued to conduct their legal experiments the laboratory of the law and renew their push for greater equality and social justice between civil society and the corporate economy enshrined by big venture capitalism. With the uncertainties of

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[285] Eric Foner, *The Story of American Freedom* (New York: W. W. Norton & Company, 1999), 346.

[286] Akhil Reed Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic* (New York: Basic Books, 2015), 118.

global war in the past and the imprint of the progressive tenets of FDR's New Deal still fresh in their minds, grassroots-advocates renewed their pushback against the conventional protections of big business that came at the expense of the average person.[287]

Viewed by many as a threat to individual economic and personal equality, progressives sought to challenge the privileges of corporate conglomerates in an attempt to balance the scales of justice and equalize the basic civil and economic rights of all. They likewise eyed the courtrooms as the conduit for mobilizing their own experiments in expanding the definition of progressivism in American jurisprudence. Like the framers of the Constitution over a century before, FDR and the New Deal had only sketched an outline for progressivism in the legal system of justice. But instead of Congress, judges held the brush for filling up and coloring the canvas of a new era of civil rights and the modern legal landscape with progressivist principles.[288]

The tide also rose for those fomenting a national civil rights movement and a new chapter with new demands for social justice. Advocates and activists protested a continuation of a blinkered view forward with business as usual, ignorant of inequality and holding onto a blatant disregard to race-based violations of existing law. They implored both lawmakers and the courts to establish definitive reform and produce comprehensive legislation that secured the promises made within the nation's founding documents for every citizen regardless of race, economic class, geographic region, or majority-consent of a tradition of de facto oppression. Congressional precedence did exist that upheld a more inclusive and forward-thinking interpretation of civil rights, like the Civil Rights Act of 1866, the Enforcement Acts of 1870-1871and Senator Charles

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[287] Flanagan, *America Reformed*, 92.
[288] Pritchett, *The Roosevelt Court,* 201.

Sumner's Civil Rights Act of 1875 that prohibited racial discrimination and guaranteed equal access to public accommodations. But by 1883, the Supreme Court declared various parts of the acts unconstitutional.[289] Following the setbacks, *Plessy v. Ferguson* (1896) and its counter-case, *Brown v. Board of Education* (1954), proved national civil rights legislation and laws were fluid and did not necessarily reflect societal progress at any given time.[290] The modern era was no exception. Despite a handful of notable advancements and President Truman's Executive Orders 9980 and 9981 of 1948 prohibiting discrimination in the military and government agencies, laws protecting every citizen's civil rights, their application, and the responsibility of their enforcement were still slow to respond to some of the progressive changes already advancing by mid-twentieth century standards of living and the age of America's affluent society of the 1950s.[291]

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[289] "Act of April 9, 1866 (Civil Rights Act), Public Law 39-26, 14 STAT 27, which protected all persons in the United States in their civil rights and furnished the means of their vindication," General Records of the United States Government, Record Group 11, Enrolled Acts and Resolutions of Congress 1789-2013 Series, United States National Archives and Records, Washington, D.C., accessed November 6, 2019, https://catalog.archives.gov/id/299820#:~:text=NATIONAL%20ARCHIVESTHE%20CATALOG&text=MENU-,Act%20of%20April%209%2C%201866%20(Civil%20Rights%20Act)%2C,the%20means%20of%20their%20vindication; "An Act to enforce the Right of Citizens of the United States to vote in the several States of the Union, and for other Purposes, 1870-1871," General Records of the United States Government, Record Group 11, Enrolled Acts and Resolutions of Congress 1789-2013 Series, United States National Archives and Records, Washington, D.C., accessed November 6, 2019, https://catalog.archives.gov/id/299820#:~:text=NATIONAL%20ARCHIVESTHE%20CATALOG&text=MENU-,Act%20of%20April%209%2C%201866%20(Civil%20Rights%20Act)%2C,the%20means%20of%20their%20vindication; "An act to protect all citizens in their civil and legal rights, 1875" General Records of the United States Government, Record Group 11, Enrolled Acts and Resolutions of Congress 1789-2013 Series, United States National Archives and Records, Washington, D.C., accessed November 6, 2019, https://catalog.archives.gov/id/299820#:~:text=NATIONAL%20ARCHIVESTHE%20CATALOG&text=MENU-,Act%20of%20April%209%2C%201866%20(Civil%20Rights%20Act)%2C,the%20means%20of%20their%20vindication.

[290] Supreme Court of The United States, *U.S. Reports: Plessy v. Ferguson, 163 U.S. 537*, 1895, Periodical, accessed January 21, 2020, https://www.loc.gov/item/usrep163537/; Earl Warren and Supreme Court of the United States, *U.S. Reports: Brown v. Board of Education, 347 U.S. 483*, 1953, Periodical, accessed January 21, 2020, https://www.loc.gov/item/usrep347483/.

[291] Xi Wang, *The Trial of Democracy: Black Suffrage & Northern Republicans, 1860-1910* (Athens, Georgia: University of Georgia Press, 1997), 55.

The courts already had their work cut out for them in managing a groundswell of renewed appeals based on existing laws and historical precedent. The system and its judges were put to the test in areas of social and civil rights for which there was no history or published opinion. Taken together with the post-New Deal shift, Davies' most notable civil and a singular criminal case form an anthology of importance for he had no torch of legal precedent to light the way. He relied on his Georgetown legal training and penchant to spend hours researching and acquainting himself with the unfamiliar contours of federal law as the need arose. In Davies' own words in recounting the federal judicial learning curve he endured when he transitioned from one side of the bench to the other in 1955, he had not tried even half a dozen federal cases in his career as a North Dakota attorney. He admits he "knew nothing about federal law" and that he "had to learn it, the hard way," on the fly as he encountered each individual case[292] (see fig. 8). For Davies, his commitment to rendering justice with a careful and watchful technique meant spending, at first weeks, then "two or three years" with his "nose in [federal law] books." Although the rigors of learning federal law made for an arduous journey on the outset, Davies took a pragmatic philosophic attitude indicative of his courtroom characteristics and enthusiasm to learn the law by commenting that the challenge was "like anything else, if you can learn and practice, then take it!" And take the opportunity he did to craft, manage, and meet the demands of service to the public.[293]

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[292] Photographer Unknown, *Davies in Chambers, circa 1971*, black and white photograph, 8 x 10 in., box 6, folder 27, Davies Collection, UND.

[293] Carlson, "Davies Interview," Tape #35.

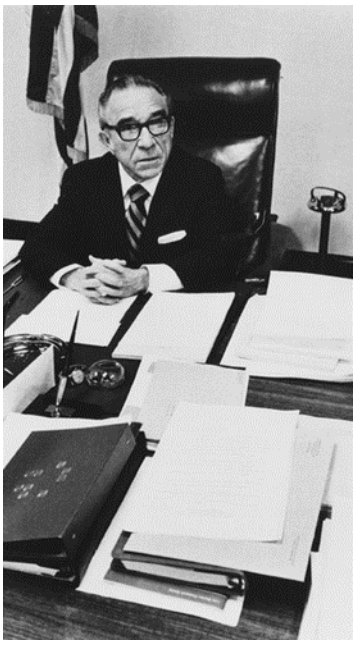

Fig. 8. Davies in his Chambers, circa 1971. Photographer unknown. Elwyn B. Robinson Department of Special Collections, Chester Fritz Library, University of North Dakota.

Davies later discussed his approach and preparations for complex cases. He spoke with passion for not just looking at the books, but said that he would "go into them!"[294] He also admitted that starting out he may not have possessed advanced training or experience in every nuance of managing federal law, nor did he hold an acute working knowledge of the thousands of legal book contained in the general law library at the federal courthouse. Yet, he was confident in his education so that he knew where to go to find what [he had] to learn to handle a particular law suit…!"[295] It was the zeal with which he confronted his absence of experience or legal precedence in federal civil cases that enabled him to rise to the occasion and become the competent, assertive, and progressive judge. As a federal judge who was confident in his ability to reach the best decision in any given circumstance and stand by the results as a product of

[294] Carlson.
[295] Carlson.

systematic procedure, Davies' own professional growth illustrated a new era for the judiciary[296] (see fig. 9). His work in the civil and criminal realms also promoted a renewed sense of trust in the nation's legal system as some of the smallest cases went toe-to-toe with the country's biggest businesses at the mid-century mark.[297]

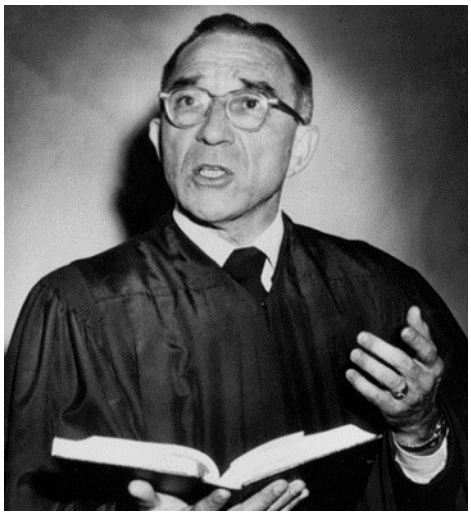

Fig. 9. Davies with Book. Ronald N. Davies speaking with a law book in hand while dressed in his robe. Date unknown. From Grand Forks Central High School's Distinguished Alumni Collection available online. https://www.gfschools.org/Page/3832.

As significant, Davies also turned to his early exposure to the NPL's nonconformist political path and progressive-oriented background to help him grapple with the absence of statute as a means of departing from the parochial status quo of the nineteenth century. Having worked side-by-side with the political provocateurs, like Townley, Frazier, Langer, and others hailing from North Dakota's Republican Network, and witnessing their willingness to break with the traditional rank and file, Davies recognized that with positional power also came opportunity for innovation. Therefore, within the laboratory of the law, Davies utilized his standing as a

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[296] Photographer Unknown, *Davies with Book*, date unknown, digital image, 170 x 513 px., Grand Forks Central High School, Grand Forks Central High School Distinguished Alumni Collection, Grand Forks, North Dakota, accessed November 23, 2020, https://www.gfschools.org/Page/3832.

[297] Carlson, "Davies Interview," Tape #35.

federal judge as a means for a path of progress. With a robust sampling of civil cases that originated in the shadows of America's largest and powerful banking, insurance, and pharmaceutical industries and a unique treatment of criminal conduct, Davies took to the books and underscored the experimental nature of the law. So too was he able to expand the progressive legacy that he and his Republican Network has rescued from superfluity in the 1920s and ushered through the federal courtroom to the century's later decades.

The 1956 civil case that preceded his time in Little Rock, *Blanche Dick v. New York Life Insurance Company,* stood as the first progressive break with the austerity of the courtroom as a Gilded Age sanctuary for big business early in his federal career.[298] As one of the first civil cases following his rise to the eighth circuit, Davies not only had to contend with an overall greenness in his knowledge of the federal system, but also making a determination for which there was no statutory precedence, even though there existed no shortage socio-political opinion and influence seeping into porous the halls of justice. Still a tenderfoot in legal experience on the federal level a year after his appointment in 1955, Davies soon highlighted his willingness to transcend the defined categories of judicial conduct and prescribed expectations as either activist or restrained. His handling of the civil case within the laboratory of the law helped to uplift an ordinary citizen to equal civil standing with that of a corporate giant.

The historical setup prior to Davies' arrival on the bench and a case against one of nation's largest insurance purveyors landing on his docket favored the continued protection of large corporations. Even the Supreme Court had already placed conglomerates behind the shield of the Fourteenth Amendment's equal protection clause with the *Santa Clara County v. Southern*

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[298] *Blanche Dick v. New York Life Insurance Company,* 359 U.S. 437, 445 (1959).

Pacific Railroad Company[299] in 1886 by upholding the 1819 *Dartmouth College v. Woodward*[300] and held with the prevailing attitude that the eyes of the law view corporations as "persons" and private entities entitled to full constitutional safeguards, thereby lending capitalist ventures a human status despite the inhuman sterility of many of their owners' practices. Often absent of a codified moral or ethical code of conduct, the government and the law left most businesses to an honor system of internal self-governance and monitories while only intervening when forces threatened a business's constitutional rights and protections of property and due process.[301]

Although the Roosevelt Court of the 1930s and 1940s initiated a new direction under which judges could operate under revised post-Depression standards, few had chosen to do so amid the unknown or undesirable consequences of defying the established arrangement and mutually reinforcing practiced that existed between politics, the law, and large businesses. A judge breaking with the unspoken tradition meant a more audacious tone to legal proceedings and the possibility of becoming a target of corporate and political ire. Maintaining the lock step of the practiced order illuminated a path of least resistance, especially for a wary public servant wet behind the ears. However, Davies instead relied on his training, guided by his experience and chose to depart with traditional order. He used the experimental nature of American law to instill a humanitarian sensibility in an attempt to uphold human rights against a detached corporate entity. As a result, he had helped securing a place for progressivism in the courtroom and within judicial jurisprudence as another untended consequence of his decision.

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[299] *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886).
[300] *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).
[301] Hofstadter, *Progressive Historians*, 586.

At the same time, by installing a legally-binding contract that outlined transactions, procedure, and protocol for company's relationship with its workers and customers, corporations justified the Gilded Age's rhetoric that argued for the ongoing protections for big business to the detriment of individual rights. While most contracts weighed heavily in service to the corporations from which they originated, the standard was enough to satisfy government officials and their political counterparts and enable them to adhere to laissez-faire attitudes already infused in the Gilded Age's business rhetoric and ethos. Because the law viewed any other action as a form of trade restraint and therefore violated a business's constitutional rights, contracts gave the Supreme Court additional ammunition to shoot down an individual's attempt to balance the equation of corporate capitalism with everyone citizen's basic civil rights, whether a laborers or a consumer.[302]

Not until after Roosevelt's Court and the passing of New Deal legislation did the tide begin to turn away from the court's Gilded Age conservatism and toward an acknowledged role of progressivism in the halls of justice.[303] Despite subtle and nuanced notes of change in support of public interest, the new role of the courts in settling "David versus Goliath" disputes remained largely untested, unproven, and unresolved. Judicial leverage was a keystone piece for transforming the narrative and recalibrating the scales to balance the interests of business and the individual citizen, but still all-too-often elusive when attempting to stand against industrial might and conservative support in protections of corporations as private property.

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[302] Flanagan, *America Reformed,* 201.

[303] Despite the turn, the inference herein does not denote an outward sense of activism or liberalism as can be associated with an analysis of progressivism within modern-standards.

The crucial debate in *Blanch Dick v. New York Life* rested on whether a person could suffer two fatal gunshots from a shotgun as an accidental occurrence. With meticulous supervision of the evidence and a careful consideration of the facts presented by both parties and having to proceed without precedence, Davies formulated a detailed set of instructions and passed the case to the jury over the objections of New York Life's team of attorneys. As became evident throughout his career, Davies adhered to the standard of the law with a direct clarity of interpretation. Well-researched and always prepared, he left no room for ambiguity, yet never lost sight of the human element when the depth of civil law and the stoicism of big business collided in his courtroom.

At twelve total pages, Davies provided jurors with the direction necessary to reach a sound conclusion in uncharted territory in civil litigation with a titan of the insurance business. He outlined only one goal for the jurors' consideration when he stated, "There is but one single issue for you to determine and that is manner of death."[304] But he introduced a multifaceted consideration of the human condition in the case by further charging them that is was "manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence, that suicide cannot be presumed" because "presumption is not evidence." [305] Just as Blanche Dick represented a Main Street David to Wall Street's Goliath, Davies introduced a main progressive plank into the court when he juxtaposed the hidden humanity behind the civil lawsuit with the detachment of a national corporate entity in his judicial guidance. Although his stated purpose was to set the boundaries of evidentiary interpretation, Davies had in effect put a person to an otherwise

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[304] *Blanche Dick v. New York Life Insurance Company,* 359 U.S. 437, 445 (1959).
[305] *Blanche Dick v. New York Life Insurance Company,* 359 U.S. 437, 445 (1959).

faceless policy held in the hands of an ascetic entity and humanized civil law while helping to break the corporate monopoly in federal civil law.

Davies also applied the cogency of the contract that corporations had been using to preserve their interests as a tool to flip the script and turn Supreme Court opinion on its ear. By utilizing the existing corporate rhetoric, Davies set a new precedent for judicial interpretation and case law. Included in his instructions to the jury was Davies' charge that "Blanche Dick has the burden on herself of showing the contract under the policies and the death of the deceased," and that, "that much has been shown and, as a matter of fact, had been admitted by the defendant company."[306] As a result, Davies used the Gilded Age's own ideology against the big business world from which it was borne. As significant, he also provided the jurors with a progressive legal instrument with which to outline a historic departure in civil litigation in the twentieth century and transfer legal power into the hands of the average citizen seeking basic justice and entitlement of restitution. Even though Davies had provided an alternative path of deliberation, it was still up to twelve individual jurors to determine the viability of a new approach and validate progressivism's place in American law.

The jury found the death in question was in fact an accident, thereby authenticating the whole of the contract and invoking the clause and holding New York Life liable to settle the claim with the stated monetary payment of and additional $7,500. Still, even though Davies used the nature of untested law to break the established order and create new more options for jurors 'to reach a just verdict, the initial outcomes still had to undergo further testing by withstanding an appeals process and reaching the Supreme Court of the United States before setting official

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[306] *Blanche Dick v. New York Life Insurance Company,* 359 U.S. 437, 445 (1959). (This is correct. See CMS 14.275)

precedence. Attorneys for New York Life appealed the decision on the basis that "the record contained insufficient evidence to sustain a jury verdict,"[307] arguing that the plaintiff's evidence had yet to invalidate their original assertion of suicide.

In a shocking surprise for Mrs. Dick and her attorneys, a panel of three judges from the Eighth Circuit Court of Appeals with decades of combined experience, agreed with New York Life's legal representatives and reversed the ruling. Holding in a unanimous decision, the three jurists further declared Mr. Dick's death to have been the result of suicide, which again made the indemnity clause null and void and absolved the company of responsibility for paying the additional portion of Mrs. Dick's claim. The trio justified their decision to overturn the jury's original verdict by stating that, "under the evidence, the question whether the death was accidental was not a question of fact for the jury,"[308] because the appellate court jurists operated under the assumption that it was implausible for Mr. Dick's passing to have occurred by accident. Not only had the higher court restored New York Life's position to the higher ground in the suit, but they had also walked the court back a step and returned to the traditional practice of assisting with the protection of the rights of big business.

However, based partially upon what Mrs. Dick's attorneys believed was a solid legal argument constructed under Davies leadership in the courtroom, his well-articulated instructions to the jury, and his published courtroom opinion, they sought and were granted, certiorari review by the United States Supreme Court. Such circumstances were rare given that the Supreme Court

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[307]Myron H. Bright, "The Case of William Dick: Ransom County, North Dakota," *Journal Supreme Court History*, Vol. 35: 1, 2010 28.

[308] Liva Baker, "John Marshall Harlan I and a Color Blind Constitution: The Frankfurter-Harlan II Conversations," *Journal of Supreme Court History* 17, no. 1 (1992): 27–37, accessed December 12, 2019, https://doi.org/10.1111/j.1540-5818.1992.tb00074.x.

only issues a certiorari review for cases that raise constitutional or legal questions regarding public benefit. Those acting on behalf of Mrs. Dick argued that while the Eight Circuit's opinion had acknowledged the flexibility of the law's interpretation, they had refused to apply it as guaranteed by the Seventh Amendment. In an attempt to uphold Mrs. Dick's civil rights and those of all individual citizens, attorneys further pushed for a writ by reiterating the statement of facts regarding the possibility of an accidental death and that "the denial to Mrs. Dick of her right to trial by jury, is of sufficient importance, not only to the petitioner, but to other citizens…"[309] In another surprising turn, the Supreme Court agreed with the petition and granted the writ on June 23, 1958 where after the nine justices planned to hear the case.

After nearly a year of review, the Supreme Court handed down its decision on May 18, 1959. To the elation of Mr. Dick's family, the justices reversed the circuit court's ruling and reinstated the original judgment and jury verdict from Davies' district court that Mrs. Dick receive the full $15,000 value of the policy. Chief Justice Earl Warren provided the majority opinion noting that "the respondent failed to satisfy its burden of showing that death resulted from suicide,"[310] and that the court's decision to support the jury's conclusion was rooted within a federal jurisdiction that "rested on the diversity of citizenship."[311] In both essence and practice, the Supreme Court solidified equal standing and upheld the Constitutional protections of all citizens regardless of their individual or corporate make-up in a case that began under Davies'

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[309] *Petition for Writ of Certiorari*, *Blanche Dick v. New York Life Insurance Company*, 359 U.S. 437 (No. 58) (1959).

[310] *Petition for Writ of Certiorari*, *Blanche Dick v. New York Life Insurance Company*, 359 U.S. 437 (No. 58) (1959).

[311] *Petition for Writ of Certiorari*, *Blanche Dick v. New York Life Insurance Company*, 359 U.S. 437 (No. 58) (1959).

management, jury instructions, and first published opinion regarding the question of fact in a federal civil matter.

Still, despite the progressive outlook of the Warren Court's decision, a universal acceptance of breaking with tradition and experimenting with the boundaries of the law and its relationship with big business did not come to pass. Though reflective of the law's transformative ability to change with the times and better balance the civil rights among all Americans, not all of the justices agreed with the outcome. With the backing of Justice Charles Whittaker, Justice Felix Frankfurter published a lengthy dissent and stated that the Court should not take what he viewed as a trivial cases because the Dick case would "set no precedents. It will guide no lawyers. It will guide no court"[312] and was of little fundamental importance to the law. Although in the minority, Frankfurter's stance characterized the long conflicts within the social, political, and legal institutions and illustrated that experimentation, growth, and progress for a higher civil standard did not come without disagreement and turbulence at all levels of government.

Yet, according to the Supreme Court, the case against New York Life Insurance that began under Davies' control and guidance was one that did have a substantive impact well beyond the sole litigants of this single case. Its legacy is one of precedent. Many operating in the legal field have cited the Dick case over 150 times, with 21 of them in the Supreme Court. When reflecting on the historical significance and larger meaning of the case, Judge Myron H. Bright praised the case's enduring legal importance as one not only about legal principles, but as one

[312] *Blanch Dick v. New York Life Insurance Company*, 359 U.S. 437, 463 (1959).

that included a human component too.[313] Bright's comments underscored the assets of the case in terms of the quality of representation, the importance of advocacy in righting a wrong, and provision of justice and finality for the Dick family. He also pointed to the centrality of the jury in the legal system and the legal acumen and perseverance necessary to direct jurists to a fair and equitable decision. For Bright, both the legal effects and human effects of the case have withstood the test of time and remain a laudable exercise of the law.

Davies' influential thinking would not end with an apolitical, yet progressive battle with an insurance giant. Having applied legal reasoning with the modern context, he was only just beginning to reach new heights in redefining the protection of civil rights through a progressive administration of the law. Even though much of the means, method, and mode for testing a case on behalf of a singular individual citizen standing against a faceless corporate organization for equal civil standing were unproven and unknown, the stakes and consequences in setting case law, redirecting the narrative, and expanding progressivism in the courtroom were clear. With *Dick v. New York Life*, Davies validated the ways in which a judge rendered a decision based on a case's individual merit alone. By not succumbing to the outside pressures of dominant consent, Davies forged a new practice and category of judicial progressivism that he was then able to use to address legal questions with other corporate giants and rebalance the civil equation.

The next case of significance stemmed from a months-long volatile situation between a married couple, William and Eloise Newgard, which culminated with her murder at the hands of her husband on July 24, 1965. William Newgard had become a patient at the United States

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[313] Bob Lind, "Neighbors: Tragedy leads to Landmark Supreme Court Case," *Fargo Forum*, December 9, 2013, accessed December 12, 2019, https://secure.forumcomm.com/?publisher_ID=1&article_id=420475&CFID=257873194&CFTOKEN=42179793.

Medical Center at Fort Meade, South Dakota, at his wife's insistence and a subsequent physician recommendation on January 17, 1965 following a series of frightening incidents by which he had shown signs of serious mental illness. She had sought initial assistance from Dr. Mack Traynor after witnessing her husband's high-strung, erratic, irrational, and hallucinogenic behavior. Upon immediate arrival, Traynor noted that Newgard appeared to be acting well out of character and exhibited a glassy-eyed expression and an incoherent rant regarding horses, cattle, and God.[314] The family's pastor, Reverend Richard C. Faust, was also present in an attempt to provide assistance in soothing his agitation. The pastor soon expressed his belief that he needed psychiatric help when he exposed himself to Faust and threatened to kill his wife for infidelity. Faust made immediate arrangements to have Newgard taken into custody and transferred to a hospital in Fargo, North Dakota, for examination.

Having neutralized the immediate threat to Eloise Newgard, psychiatrists in Fargo observed her husband's disturbing behavior, especially when he claimed to be Jesus Christ, and he was admitted to the North Dakota State Hospital. His condition stabilized within two months, and he was transferred to the veteran's hospital at Fort Meade in South Dakota and placed under the direct care of Dr. Leonard S. Linnell, a newly licensed medical doctor and psychiatrist. Linnell had just completed his residency in psychiatry at the University of Minnesota and the Veterans Administration Hospital in Minneapolis, Minnesota and accepted his first position as a psychiatrist with the United States Medical Center at Fort Meade. Although still young and less experienced than most of his colleagues working in a veteran's hospital, Newgard showed signs of improvement within the first eight weeks under his prescribed treatment of tranquilizers,

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[314] *Merchants National Bank & Trust Co. of Fargo v. United States*, 272 F. Supp. at 418 (1967).

psychotherapy sessions, regular examinations, and even meetings with a vocational psychologist. At one point, on May 25, 1965, Linnell approved a request from William Newgard's father that his son be allowed a temporary leave to attend his uncle's funeral and visit the family at their farm with Linnell later told a judge that he believed there was "nothing to worry about" as I told this man "not to stop in Fargo" and "not to try to see his wife."[315] He denoted a confidence in Newgard's status as cured and no longer a risk of harming anybody.

However, his wife, upon hearing of her husband's temporary release was "frightened for her life" because she believed her husband was far from recovered and still posed a danger.[316] She contacted County Judge Paul M. Paulsen, chairman of the Cass County Mental Health Board. Paulsen agreed with Eloise Newgard and had her husband remanded back into custody at the bus stop in Fargo on May 27, 1965, unconvinced by his physician's assurance. In a phone call to Linnell, Paulsen chastised the doctor for his questionable conduct and stated that, "everyone knew about Newgard, his condition, and his commitment," and that he "was a dangerous man and should not have been released."[317] Yet, a month later on June 30, 1965, despite Eloise Newgard's continued misgivings, and as chief of psychiatry, Dr. Harland T. Harmann's independent investigation concluded that Newgard should not be released, Linnell filed a report that indicated Newgard's condition was near complete remission. Further disregarding Eloise. Newgard's pleadings and Harmann's recommendations. Linnell directed the head of counseling psychology, Dr. Truman M. Cheney, to prepare a plan of reintegration and Newgard was released to work on the ranch of Clarence A. Davis located ten miles north of the

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[315] *Merchants National Bank & Trust Co. of Fargo v. United States,* 272 F. Supp. at 418 (1967).
[316] *Merchants National Bank & Trust Co. of Fargo v. United States*, 272 F. Supp. at 413 (1967).
[317] *Merchants National Bank & Trust Co. of Fargo v. United States*, 272 F. Supp. at 413 (1967).

hospital in Belle Fourche, South Dakota. Soon after his arrival, Davis contacted Cheney to report that Newgard had shown signs of nervous agitation and a notable fixation on his wife after she had served him with divorce papers. According to court documents, Cheney conveyed his concerns to Linnell that his patient was not well enough to function outside of institutional care and was in fact dangerous without supervision by a qualified psychiatric team. However, Linnell refused to testify that he and Cheney ever discussed the warning and therefore took no action to alter the existing prescribed plan.

Within six months of the initial event, July 31, 1965, came the culmination of Eloise Newgard's fears. A week prior, Newgard left the Davis Ranch and visited his parents' farm in Mayville, North Dakota, and returned to the ranch without incident. Later on that day when Davis drove him into Belle Fourche for the purposes of compensating him for his work that Newgard acquired a car and drove to Detroit Lakes, Minnesota, where his estranged wife was staying with her mother. A violent confrontation began when Newgard first attempted to harm his wife by running her over with the car. Having failed with the car, he then exited the vehicle and shot and killed her.

Believing in their right to hold the government accountable under the federal tort claim act, Eloise Newgard's surviving family members pushed the case through the justice system where it reached Davies' courtroom in 1967 as a bench trial. Because issues of gross negligence on behalf of government employees lay at the heart of the case, it fell under the Federal Tort Claims Act (FTCA), a federal statute instituted in 1946.[318] The FTCA permits private parties to file specific types of suits in federal court against the United States and any federal employee if

[318] Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1946), Congressional Research Service, accessed, July 12, 2018, https://fas.org/sgp/crs/misc/R45732.pdf.

the accused acted within the scope of their public employment and caused injury to someone while working on behalf of a government agency. The FTCA's intricate tort law with strict rules of procedure for managing allegations of careless or wrongful conduct made suing the government a much trickier endeavor than attempting to settle a court claim against a private citizen. With added hoops and an exhaustive list of exceptions and limitations that made for a protracted process, most citizens, companies, and attorneys were discouraged from prosecuting their claims of harm or misgiving that occurred under the guard of government employees or denied eligibility altogether due to the restrictive criteria under which someone can file a suit.

Cases under the FTCA, or suing the federal government, were not unheard of since the law's inception, but the length, limitations, costs, and complications involved more often insulated the government from a direct confrontation from anyone seeking restitution through the act. Still, those injured while in the hands of a government agency and their attorneys began utilizing the law, though the overall practice and procedure remained in its infancy. The FTCA had yet to undergo a thorough vetting or establish a reliable precedence and remained a malleable opportunity to push the boundaries of judicial progress in the civil realm.

Davies had to first untangle the intricacies of the FTCA when an unprecedented federal tort claim against a veteran's hospital for negligent supervision and failure to protect an endangered family member reached his bench on October 16, 1967. The immediate issue that Davies had to decide was twofold. He needed to determine if the United States could be held liable for injury to a third party by a mental patient under the care of a veteran's hospital and qualify the case as holding under the FTCA. He also had to make an official ruling as to whether or not the United States was responsible for negligence for harm caused by an escaped mental

patient if the escape was the result of action by an employee of a government agency while on the job for the United States agency.

With no prior decisions in a similar aspect of civil law by which to direct his ruling, Davies again relied on his methodical review of the evidence in concert with a modern outlook which included a consideration of the human elements involved in the developments of the case. After weighing the facts and listening to hours of testimony from those at the center of events that led to Mrs. Newgard's murder, Davies based his findings on three main aspects of the issue. He agreed that counsel for Merchants Bank, acting on behalf of the slain wife, had provided sufficient evidence to prove their claims of negligence, the government's breach of ordinary care in regards to a documented mentally ill and dangerous patient, and most significantly, that the Federal Tort Claims Act authorized the case itself. Once determining that employees at Fort Meade Veterans Hospital in Sturgis, South Dakota, were directly responsible for Eloise Newgard's death at the hands of her mentally ill husband while under their care, Davies took an expansive view of the loss sustained by the wrongful death and awarded the family's three minor children a substantial $200,000 settlement under the FTCA.

Davies established case precedence in the civil arena which allows for private parties to bring certain lawsuits against federal employees who were acting within their scope of employment for the United States where typical "sovereign immunity" for federal employees does not apply. His findings remain applicable to all courts in the United States and are still cited by attorneys over forty years later to hold a hospital accountable for an patient who causes injury to an identifiable victim under circumstances in which employees should have known, warned, and protected a threatened individual victim. The government settled without appeal and the case continues to withstand the test of time and remains law throughout the country.

By having taken the individual human life into consideration rather than relying on a strict interpretation of the hospital's written policy and the negotiable framework of the legal system, Davies instigated another phase of progressive influence within the courts. He recognized the deprivation of "loving care and the advice and guidance"[319] that Eloise Newgard's children would experience from the loss of their mother. Davies awarded the family $200,000, which was the largest sum of money in the district's history at the time—over $1,500,000 with adjustment for inflation in 2019—after having determined that gross negligence of government employees at Fort Meade Veterans Hospital had resulted in the death of Newgard at the hands of her mentally ill husband. Davies' accomplished his intended goal in service to the public by providing a judgement that took all facets of the case into consideration while providing apt reverence for the legal code. Yet, the unintended consequence following the *Merchants National Bank & Trust Co. v. United States* was that the law now included a broader cross-section of protections of basic human rights for more people and reflected a more activist and progressive movement in the direction of the federal judiciary.

Like the New York Life Insurance case's rare grant of certiorari review by the Supreme Court, the Merchants National Bank case represents another instance of Davies' pioneering sense of duty in the protection of civil rights in the shadow of a legal juggernaut like the federal government of the United States.[320] The Department of Veteran Affairs has been plagued by a

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[319] *Merchants National Bank & Trust Co. of Fargo v. United States*, 272 F. Supp. at 421 (1967).

[320] As defined by Stephanie Jurkowski of the Cornell Law School in 2017, "A Writ of Certiorari is a type of writ, meant for rare use, by which an appellate court decides to review a case at its discretion. The word certiorari comes from Law Latin and means 'to be more fully informed.' A writ of certiorari orders a lower court to deliver its record in a case so that the higher court may review it. The U.S. Supreme Court uses certiorari to select most of the cases it hears. The writ of certiorari is a common law writ, which may be abrogated or controlled entirely by statute or court rules," Stephanie Jurkowski, "Writ of Certiorari," LII / Legal Information Institute, Cornell School of Law, accessed October 14, 2020, https://www.law.cornell.edu/wex/writ_of_certiorari.

troubled history of scandal, controversy, and absence of time-sensitive care for veterans in the United States for as long as there's been a republic. Many veterans had struggled to have the nation's government recognize their rights to proper healthcare and support after completing service to the country. [321] But, Davies' readiness to hear the case with compassion and guide the process through with sensible reason set a case law ruling that enable and empowered future private parties to challenge the federal government and hold its employees accountable for instances of gross negligence. With a more liberal-minded jurisprudence in breaking with conservative legal ethics, his ruling allowed a similar choice for future departures from the restrictive and legal standards.

Of the three substantial civil cases following the crisis in Little Rock, Davies later went on record as declaring the *Shane Stromsodt, a minor, by Robert M. Stromsodt, his guardian ad litem v. Parke-Davis and Company* proceedings in 1969 the most important legal ruling of his career. Because it not only involved debilitating damages to a young child during infancy, but also because the outcome of the incident resulted in painful, permanent, and several irreversible injuries to a child through no fault of his parents or pediatrician. Davies expressed exceptional care in studying, researching, and observing the proceedings in his courtroom and showed no signs of indifference to the human life that had been compromised by the faulty practices of a wealthy, powerful, and influential pharmaceutical giant. What began as another trial that pitted a heretofore underrepresented segment of the community against an industrial bastion of power and economic supremacy became another opportunity for Davies to rebalance the civil rights

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[321] Adam Oliver, "The Veterans Health Administration: An American Success Story?," *The Milbank Quarterly* 85, no. 1 (2007): 5, accessed January 8, 2018, https://www.jstor.org/stable/25098145.

between a citizen and a private corporation while further solidifying a progressive middle ground between the existing activist and restrained judicial practices. [322]

Born on May 24, 1959, in Grand Forks, North Dakota, Shane Stromsodt appeared as the epitome of a healthy infant with no noted physical or mental defects at the time of his birth or over the next four months. The family physician, Dr. John H. Graham, reported an "entirely normal and uneventful" pregnancy, birth, and initial development. In a follow-up examination on August 26, 1959, Graham remained confident in Shane's health and proceeded to administer the first of three doses of the vaccine Quadrigen, which the child was to receive over the course of the next few months. After receiving the first intramuscular dose of the vaccine that contained a combination of diphtheria, pertussis, and polio preventatives, neither the doctor nor the family reported any adverse effects.[323]

About five weeks later on October 1, 1959, the family arrived back at Graham's office where the physician examined Shane and delivered another clean bill of health along with a second dose of Quadrigen. However, within five to ten minutes of receiving the vaccine, Shane began to exhibit symptoms of a fine red rash on his face. Upon arriving home, the Stromsodts reported a worsening of the rash and a new wave of troubling symptoms including fever, vomiting, and multiple seizures; all uncharacteristic of Shane's previous health profile. Mrs. Stromsodt immediately telephoned Graham and described Shane's condition. The doctor expressed his opinion that the incident was a reaction to the shot and instructed the family to closely watch the infant and report back if Shane was no better or had further problems by

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[322] "Newspaper Clippings from *Bismarck Tribune*, July 10, 1987 and *Fargo Forum*, April 19, 1966," folder 12, box 6, Davies Collection, UND.

[323] *Shane Stromsodt, a minor, by Robert M. Stromsodt, his guardian ad litem v. Parke-Davis and Company,* 257 F. Supp. at 993 (1969).

morning. Although no additional symptoms manifested within the following days, Mrs. Stromsodt did tell Graham during the next visit on November 4, 1959 that she witnessed Shane suffering from two additional "spells" or minor seizures within the three weeks after the second injection. She also said that she noticed her son sleeping more and that "it seemed like he wasn't doing anything anymore."[324] In essence, Shane has ceased normal progression since the last vaccination and subsequent disruptions to his health and Graham concluded that Shane should not receive his final dose of Quadrigen.

Within the ensuing years and by the time the case came to trial just before Shane's seventh birthday, he had yet to meet the basic developmental milestones typical of a child his age. By the time the trial began in 1966, uncontroverted medical specialists had testified to irreversible and permanent damage to Shane's brain and central nervous system as a result of an anaphylactic shock in reaction to the vaccines. Court records confirmed the doctor's diagnosis when Shane, while present in the courtroom, appeared unsteady in his walk, lacked overall coordination, spoke only a handful of words, remained illiterate, and possessed none of the basic childhood skills typical of other children his age. Court records likewise reflected that Shane was "definitely, permanently, and irreversibly injured" and that his parents would soon be unable to render him necessary care and would face the decision to have him institutionalized. [325]

As the leaders of their own environment and bound by no formal dictates in the eyes of the law, no judge guaranteed a sympathetic court. Since the formation of the judiciary, Judges held the legal right to determine what items and arguments were allowed in their courtroom. The

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[324] *Shane Stromsodt, a minor, by Robert M. Stromsodt, his guardian ad litem v. Parke-Davis and Company,* 257 F. Supp. at 993 (1969).

[325] *Shane Stromsodt, a minor, by Robert M. Stromsodt, his guardian ad litem v. Parke-Davis and Company,* 257 F. Supp. at 994 (1969).

role of emotional appeal was of little prominence in the legal structure before the latter decades of the twentieth century. Even fewer were judges were known by practicing attorneys and scholars to display their heart on their sleeve. Though peripheral to the strict legal questions of the case, acknowledging Shane's condition and the family's struggles in the open court record lent a progressive humanitarian sensibility. Within an otherwise prostrate case that history indicates would have favored the faceless corporate entity in ignorance to the human effect of a faulty product that put one life and the public at large at risk, Davies had introduced a sympathetic quality to the courtroom.[326]

Still, the overarching question sought to answer whether or not Parke-Davis was liable for Shane's condition. After weeks of testimony and a weighing of "credible medical" evidence submitted by both the Stromsodt family and the Parke-Davis Corporation, Davies reached "the inescapable conclusion that the component producing cause of Shane Stromsodt's condition was Quadrigen" because it could be directly traced "chronologically and etiologically" to the vaccine administered to him on October 1, 1959. Davies was able to maintain his broadminded oppositional stance because Parke-Davis had breached two implied warranties inherent in the pharmaceutical industry's corporate liability structure. The first dereliction occurred when the company failed to warn consumers after studies had shown the possibility of side effects similar to those experienced by Shane. Davies noted the second liability as having been Parke-Davis' inadequate testing and reporting of their medical trial results in an appropriate manner to the proper industry regulating agencies. To ensure the case's legacy and larger outcomes, Davies

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[326] "Sympathy as a Legal Structure," *Harvard Law Review* 105, no. 8 (1992): 1961-980. Accessed January 8, 2020, http://doi:10.2307/1341553.

included in his opinion that Parke-Davis had no defense under the circumstances of the case to claim that the vaccine had even been approved by the federal government and therefore had no standing upon which to embark on an appeal of his decision.[327]

Recognizing the gravity of a human rights violation of a child and the unsuspecting parents at the hands of the giant pharmaceutical company , Davies ruled in favor of the Stromsodts and ordered a record-setting award of $500,000, or approximately $3.2 million today based off the 2017 inflation calculator,[328] the largest civil settlement at the time. Davies had not only upheld and expanded a progressive jurisprudence in the courtroom by acknowledging sympathy for the family in having to bear a lifelong weight of Shane's substantial medical expenses, but also with compassion for Shane's future quality of life. He went on record to emphasize his view that Shane was to "suffer from his tragic circumstances for the balance of his years, unable to live, work, and enjoy even the most basic things in life, but with some appreciation of what he will be missing" and affirmed that human compassion and fairness in the administration of the law could be balanced within the halls of justice. [329]

Shortly following the end of the trial, the Stromsodt's legal counselor, Melvin M. Belli, validated Davies' work. In a letter to the Grand Fork's *Herald*, Belli underscored its significance as part of an expanding and evolving practice of jurisprudence when he commended Davies for having done "a masterful job" in "a case that should have been affirmed a long time ago."[330] As

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[327] *Shane Stromsodt, a minor, by Robert M. Stromsodt, his guardian ad litem v. Parke-Davis and Company,* 257 F. Supp. at 995 (1969).

[328] "CPI Inflation Calculator," Bureau of Labor Statistics, United States of America, accessed January 8, 2020, https://data.bls.gov/cgi-bin/cpicalc.pl.

[329] *Shane Stromsodt, a minor, by Robert M. Stromsodt, his guardian ad litem v. Parke-Davis and Company,* 257 F. Supp. at 998 (1969).

[330] "Letter from Melvin Belli to Lloyd Tinnes of the *Grand Forks Herald*," box 2, folder 15, Davies Collection, UND.

a result of Davies' diligence and compassion, bad drug cases continue to operate within the body of law and under the same principles reached for the first time in Davies' courtroom with courtrooms handing similar cases having cited *Stromsodt v. Park-Davis and Company* 21 times over the 30 years that followed.[331]

As with his major rulings that reached the Supreme Court and confrontation with the federal government's accountability for its employees, Davies' award against the pharmaceutical giant, the largest ever given at the time, further stresses the development and implementation of proactive principles for human and civil rights in spite of the imposing presence of another big business like Parke-Davis and Company. His findings in cases of national recognition impacted similar suits in the future by establishing a baseline upon which others could build and protect basic civil rights within other facets of the law. So too did it advanced another area of Davies unintended activism separate from his purview of race and Constitutional rights to encompass a responsiveness to the inclusive role of the law in human and civil rights.

At the same time, Davies did not fail to see the person behind the case nor did he ignore the human element underlying the structure of the court. The impact of his person-centered decisions, backed by informed research, acted as a civilizing factor and progressive judicial force. A criminal case that Davies handled within his various testing within the laboratory of the law came amid his other efforts to ameliorate the uncertainty of the civil cases on his docket for which there was no statute. The case that involved Irvin Warfield, Jr. did not fall outside the scope of long-established procedure, but Davies nevertheless weighed the defendant's circumstances and considered Warfield's situation with as much careful measure for an

[331] Erickson, "Remembering Judge Ronald N. Davies," 209.

individual as he did for cases illuminated by national spotlight and a country-wide scope of reverberating effects.

The Warfield trial spanned the course of two weeks with the jury returning a guilty verdict for nine of the counts. Warfield's conviction was nothing out of the ordinary. However, Davies' approach to issuing his sentencing is what pulls the case's status from the obscurity of a historical footnote to one that demonstrates appearance of humanity and progressivism in the law. Warfield's public defender, Myron H. Bright, who later became a United States Eighth Circuit Court of Appeals judge, advocated for the nature of Davies' sentencing and credited the judge for Warfield's complete rehabilitation. After the jury found the defendant guilty, instead of sending the young man to prison, Davies chose a less-exercised option and deferred his sentence as provided by the law at the time. As a result and with praise from Bright, the defendant had ample opportunity to commit no more crimes, to live honorably, and ultimately have his sentence vacated and expunged from his record.[332]

Even though criminal cases seeking federal indictments crossed his docket with established guidelines for prescribing punishment the case of Warfield, became another opportunity to use experimentation and testing of the law that was neither liberal nor conservative, but an individual path to one man's recovery. Bright encapsulated another facet of Davies' understanding of civil rights and positive progress he generated with his legal decisions by stating, "Davies, among other things, understood so well that rehabilitation was much better than incarceration."[333] As a result, he defined "just result" in the modern era of twentieth-century American law.

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[332] Bright, "Ronald N. Davies, My Friend," 197.
[333] Bright, "Ronald N. Davies, My Friend," 197.

Yet, not all of Davies' colleagues agree with his published opinions. There were many in the public who disapproved of his philosophy and decisions in September of 1957, even though it was not he who desegregated schools in Little Rock. Instead, he showed that a judge's responsibility lies in their efforts to uphold the rule of law, but his service to the public had been nonetheless met with threats of violence from the public and derision from the Arkansas governor. Not long after his return to Fargo, the *Dick v. New York Life Insurance* case likewise rendered a dissenting opinion once reaching the Supreme Court following the appeal of the jury's decision under Davies' instructions. Following the grant for the *writ of certiorari*, Chief Justice Earl Warren issued the majority opinion on behalf of the Supreme Court which noted, in part, that "lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict…" and concluded that throughout the course of the trial, the overseeing judge had applied the correct North Dakota state standard in its original decision.[334]

In opposition however, both Justice Felix Frankfurter and Justice Charles Whittaker issued a joint dissent that called the case "trivial" for the "human, almost folksy terms" in regards to the issues of the case.[335] The dissent went on to argue for the need to conserve the Court's time and energy, having stated, "This is a case that should never have been here. It will set no precedents. It will guide no lawyers. It will guide no courts."[336] While the attack came in response to the Court's majority support of the decision, Justice Frankfurter and Justice Whittaker had also criticized Davies' courtroom by extension for the case's overall lack of

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[334] *Blanche Dick v. New York Life Insurance Company*, 359 U.S. 437, 455-56 (1959).
[335] *Blanche Dick v. New York Life Insurance Company*, 359 U.S. 437, 461-62 (1959).
[336] Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court- A Judicial Biography* (New York: New York University Press, 1983), 270.

importance to "nobody else but the parties [involved in the case.]" and further railing against the legal principal of the case's progression. [337] Yet, courts across the nation and even the Supreme Court have cited the case over 170 times.. As important, the opposing opinions reflected how different legal minds analyze similar issues and how a diversity of opinion in the judiciary improves the administration of justice. In the end, as advanced by Bright, cases are not only about legal principles as the legacy of the Dick case is one that embodies a human component too, though opinions contrary to the importance of such considerations remain.[338]

At the beginning of the twentieth century, the American legal system remained a fluid institution whereby a definition of logical consistency in jurisprudence was as slippery and subjective to individual thought and action as ever before in the nation's history. Still, specific trends in the socio-political realm had developed and large corporations had emerged with unprecedented power and sway within the political and economic channels that helped shape the United States' courtrooms in the modern era. Predecessors, like Justice Cardozo, sought to further discern the ways in which the law could better address general customs, social welfare, and a common standard of justice and morals for the judicial branch of government. Because "every judgment has a generative power" regardless of whether or not a judge is acting upon or setting a case precedent, the outcome of any case is not a final truth, but rather becomes a working hypothesis for scholars, lawyers, and judges to continually test and retest the law. [339] Such tractability reflect the law's ability to evolve through time and with ongoing action and

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[337] Schwartz, *Super Chief*, 272.
[338] Bright, "The Case of William Dick," 33.
[339] Cardozo, *The Nature of the Judicial Process*, 21.

judicial interpretation; it begets in its own image and echoes a society where few things are stable or often dualistic.

Within his civil and criminal case ruling throughout the 1960s, Davies capitalized on the opportunity to experiment without case precedent. He set into motion a directive force of his own judicially progressive principles. He made permanent change possible despite long-standing favor in opposition to the expansion of individual civil rights while both upholding the basic tenets of early twentieth-century progressivism. With *Dick v. New York Life Insurance*, *Merchants National Bank v. United States*, *Stromsodt v. Parke-Davis*, and *United States v. Irwin Warfield Jr.*, Davies also expanded progressivism in the practice and application of the law and individual jurisprudence that solidified his significant and lasting legal contributions as judicial progressive with hundreds of citations referencing his case law. Each case presented novel issues for him to resolve by his court. Davies considered the individual and human elements of his cases. He dissented from the established order and pulled basic human rights from the shadow of the political and economic influence of corporate lobbyists and harsh penal codes. He reinforced his progressive trajectory for resolving remaining issues of conflict of the past. Such experience in building and diversifying his career portfolio would again be tested in 1972 following another explosive event with social, legal, political, and renewed racial implications after the Alcatraz Indian Occupation.

8. OPEN OCCUPATION

The Alcatraz Indian Occupation and Jury Trial

On August 27, 1971, Davies transitioned to the status of senior judge and continued to serve the district in eastern North Dakota. Despite the move toward retirement, Davies maintained an active schedule. Although no longer required to carry a full caseload, he embraced a full-time work schedule, but now with the benefit of being able to decide which type of cases to take, a greater liberty afforded him following almost two decades as a federal judge and over forty years of service to the law. Davies used his new free agency to travel within other federal court circuits and sit on benches outside his home territory of the Eighth District. He soon arrived in San Francisco in February of 1972 less than a year after the 19-month long Alcatraz Indian Occupation had drawn to a close on June 11, 1971.

What began as another ebbing expansion of the long civil rights narrative and mid-century social and political progressivism, became the heartbeat of a new social justice movement, the American Indian Movement (AIM), founded in 1969. AIM's newfound voice flowed into action and took direct effect on federal Indian termination policies and established precedent for Indian activism throughout the modern era and into the new millennium. Yet, much like the desegregation crisis in Little Rock in 1955, the minority group confronted similar challenges to promote a greater acceptance of a changing progressive landscape in the interests of equalizing human and civil rights in the United States. As was all too often the case with black American communities, American Indians also faced a strong headwind after centuries of marginalization and the government's systematic efforts to parlay recognition of the tribal communities as co-equal citizens with the same birthright entitlements as any other American. Lawmakers likewise had contributed little to better include American Indians in the mainstream

political and legal sphere. Congressional inaction therefore protracted centuries of neglect in incorporating indigenous people into the country's egalitarian bedrock and entrenched an ideological segregation in regard to the tribal role in America's democracy.

Even as the drumbeat of the Civil Rights Movement rattled the nation out of complacency with the deep social and cultural divisions that remained, few politicians, judges, and ordinary Americans included native civil rights in the evolving conversation. Many of the governmental institutions, like the halls of Congress and the courts, used by the public to seek social justice and demand civil rights remained restricted. As a result, American Indians had made little progress in finding the leverage with which to position their own interests in civil rights onto equal footing with the mainstream by the latter decades of the twentieth century. Still, a small fraction of legislators, politicians, and judiciaries parted with the past. Where progressive change had become a viable solution to the problems that threatened the more inclusive commonwealth of the nation, some chose to use their positions to readdress and revise their relationship with government and society within the context of the modern era.

One manifestation of some of the public servants' reevaluations orbited around the castration of people's power and the consent of the governed in the face of government encroachment on civil rights. At its core, the framers conceived a government to protect the rights of the people and the power flow of an untested democratic republic system. In a departure from their monarchial roots, but as had become part of its transitional nature and elastic interpretations, many in minority communities came to the conclusion that it was often the government that should be accused of curtailing rights.

Redolent of state and federal intrusion on the peoples' rights throughout the course of the American republic has been the articulation of a fundamental understanding of liberty as a

spectrum of "freedom from" at one end and "freedom to" at the other. One of the most discernable examples comes from rhetoric from the American Revolution which centered on the assertion that it was the colonists' right and the human condition to demand a government free from tyranny coupled with the freedom to pursue individual liberty in any manifestation within the boundaries of the law and acceptable societal decorum. Yet, the basic tenets of the Revolution functioned in an exclusionary practice when it came to defining "the people" and ethnicity came into the equation. American's race-based slave system insured that those with African ancestry would not be included in the democratic dialog nor would the new governmental functionaries allow participation from their Native American continental counterparts in creating the new nation [340]

Not until after the Civil War did black Americans see one of the first representations of the freedom from, with the removal of shackles of servitude with the passage of the Thirteenth constitutional amendment and the beginning of the freedom to participate in the longer civil rights narrative and have a direct voice in the country and equal standing in the civil and social conditions in the United States. Two additional Reconstruction-era amendments, the Fourteenth and Fifteenth Amendments which included the recognition of the respective citizenship and voting rights, further expanded the formal definition of "the people." Taken together, the three amendments opened the door to more minority-inclusive governmental and social institutions.

Likewise, those with tribal connections endured a similar and no less complex transition with their own journey. Much like the black plight, Native Americans ventured from the freedom from the government's domineering passage of legislation like the Indian Removal Act of 1830

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[340] John Hope Franklin and Evelyn Higginbotham, *From Slavery to Freedom: A History of African Americans* (New York: McGraw-Hill, 2010), 22.

which stripped tribes of their basic rights of agency, culture, and mobility, and the twentieth-century freedom to protest the restrictive and declensionist conditions under which the American administrative control had consigned most of their native communities.

By the height of the Civil Rights Movement, Dr. Martin Luther King Jr., one of the main protagonists of the modern era of equanimity and pro-egalitarian thought, penned a discourse while imprisoned for leading a protest against the treatment of blacks in Birmingham, Alabama in 1963. What became known as the "Letter from the Birmingham Jail" addressed a number of social, political, and governmental shortcomings in regards to persistent absence of progressive pathways for black and other minorities to enter sectors of the United States that had always been beyond reproach.

Not only did King condone the breaking of unjust laws as a moral responsibility, but he also encouraged direct action as the instigator of change rather than face a potential indefinite wait for those in control at the top to afford those at the bottom an equal say in all matters of government that affected their communities. King viewed all Americans as being "caught in an inescapable network of mutuality" with everyone "tied in a single garment of destiny" where "whatever affects one directly, affects all indirectly."[341] He therefore concluded with a warning that an "injustice anywhere is a threat to justice everywhere."[342] He encapsulated the significance of the fight against those with restrictive or destructive agendas; even those committed by the state or federal governments, and dared all sectors of society to challenge laws that restricted civil rights and efforts on behalf of social justice.

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[341] Martin Luther King Jr., *Letter from the Birmingham Jail* (San Francisco: Harper San Francisco, 1994), accessed December 13, 2019, https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

[342] King, *Letter from a Birmingham Jail*, https://www.africa.upenn.edu/Articles_Gen /Letter_Birmingham.html.

King's message sought to include everyone in the battle to hold the government and legislators accountable to America's ever-evolving vision of equality first set into motion by the nation's revolutionaries and founders. While most recognized King's legacy as one that redefined civil activism for the black community in the modern era, the impact of his progressive ideology hit well-outside the confines of a single ethnic, gender, or economic class. His call for social action and long-awaited legislation spoke to a multitude of experiences and reverberated throughout all marginalized groups of the country's past and present. Many Americans heeded King's urgings and began adapting their own responses to the persistent injustices within the context of their individual communities' needs. King had not only renewed demands that those in power uphold their Constitutional responsibilities as public servants working on behalf of all citizens, but also invigorated countless Americans of all stripes to be vigilant of subversive governmental and political agendas and take action when their efforts seek to encroach upon or restrict civil rights or the exercise of democracy overall. King and his grassroots supporters had nationalized the thesis of the movement and opened a public space for activists to confront government oppression from all ends of the social and ethnic continuum.

King had also called attention to the nation's combative relationship with civil rights. He noted that while state governments had often challenged federal interests when they infringed on a state's right to operate under their own constitution, few other institutions of government had ever been willing to confront federal laws that restricted citizens' rights on an individual scale. He did however acknowledge that progress had occurred in regard to historic changes in the law, like *Brown v. Board of Education*, and that many judges upheld such laws, even when tested or defied by those resistant to such changes. Still, in King's estimation, only upholding the law as stated was not good enough; more needed to be done to challenge other laws that restricted civil

rights and much of that work needed to come from within government as well from the outside. Even fewer judges showed a willingness to challenge areas where the government pushed for the creation of laws that restricted civil rights. In King's philosophical estimation, if those within the institutions of government, such as lawmakers and judges, do not challenge government encroachment on the basic rights of its citizens, then their position within the institution of justice is rendered unable to prevent or combat a greater destruction of democracy. King was calling for those willing to help rather than hinder progressive efforts to target the restrictive or destructive government-sponsored or partisan political agendas.[343]

Few groups had been more oppressed by the direct application of governmental power throughout the course of the nation's history than North America's tribal populations. From first European contact through the treaty-making process and intermittent military conflict, most tribal communities conformed to a subordinate role in response to the presence of first British, then the United States' dominate nationalized systems of government. Although notable cases of tribal resistance to forces of institutional control existed, most Native American communities sought respite by withdrawing attempts to coexist with the European majority on the outside. They often acquiesced their position as a means of maintaining their individual cultural practices and circumvent the complete destruction of their native traditions with ceaseless confrontations with the European and American government. Rather than recognizing native tribes as potential allies and continental counterparts, the British and American governments instead dictated a centuries-long series of popular political agendas and legislative programs aimed at subduing and assimilating Native Americans into the mainstream Euro-American cultural institutions. As the

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[343] Taylor Branch, *Parting the Waters: Martin Luther King and the Civil Rights Movement 1954-63* (New York: Simon & Schuster, 1989), 668.

societal majority and tribal communities left the government's derogatory policies toward Native Americans uncontested, systematic suppression transformed into systemic oppression. Many tribal people likewise became entrenched in the same subservient positions as other minorities in America and just as uncertain as to how to combat government-sponsored ethnic and civil inequality.[344]

As with black Americans and other minorities groups in the United States, Native Americans attempted to find ways forward in the American legal system. By the 1830s, the courtroom had replaced the battlefield for a tribal showdown between the Cherokee Nation and the local and national governments. In *Cherokee Nation v. Georgia* (1831), the Cherokee tribe solicited an injunction by the United States' federal government against the state of Georgia and its governmental officials' efforts to deprive Native American rights within the state's boundaries. At the same time, Cherokee leaders sought to establish a specified sovereign tribal independence by claiming the status of a foreign nation. The United States Supreme Court, however, refused to hear the case on its merits where Chief Justice John Marshall denied their claim of independence and further declared that all tribes were considered "domestic dependent nations" within the eyes of the law with their relationship to the United States as that of "a ward to its guardian."[345] Although the Supreme Court and federal government projected an air of sensible stewardship in its relationship with tribal peoples, Marshall's conclusions and the government's renewed discriminatory practices instead illustrated that oppression, not

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[344] Troy R. Johnson, "The Occupation of Alcatraz Island: Roots of American Indian Activism," *Wicazo Sa Review* 10, no. 2 (1994): 69, accessed August 27, 2019, https://doi.org/10.2307/1409133.

[345] John Marshall and the Supreme Court of the United States, *Cherokee Nation vs. the State of Georgia, 30 U.S. 5 Pet. 1* (1831), *United States Reports*, Library of Congress, Washington, D.C., accessed August 27, 2019, https://www.loc.gov/item/usrep030001/.

accommodation of all civil rights, was in fact the order of the day. Prejudicial attitudes became representative of the majority consent and desire to remain dominate over native populations despite their expressed voices of opposition to the contrary. Although the mainstream's rights had not been a target, the government's reach into the articulation of equality and civil rights was clear. Marshall's determination to not even hear *Cherokee Nation v. Georgia* became a prognostication of King's injustice anywhere as a threat to justice everywhere over 130 years later.

No sooner had the Supreme Court and the American government truncated tribal rights in the courtroom with *Cherokee Nation v. Georgia* did another case arise in response to the congressional passage and implementation of the Indian Removal Act first sponsored by President Andrew Jackson in 1830. However, unlike the former failed protest against the infringement of Native American rights by the state and federal governments, the Supreme Court allowed a hearing for *Worcester v. Georgia* of 1832. In a near-reversal of its position in the case a year prior, held that the Cherokee tribe did constitute a nation with distinct sovereign powers. Yet, in the short term, the high court's determination did not immediately protect the tribe from the federal government's removal from their ancestral homelands some by treaty, but most by force. Still, the decision became the foundation of the principle of tribal sovereignty that blossomed later in the twentieth century despite the devastating impact of violent state-sponsored, often-fatal immediate and forcible removal from their tribal lands. The legal volleys exchanged between the Cherokee Nation and the state and national governments as a result of President Jackson's well-supported actions against Native Americans left no doubt that a high-stakes dynamic existed where government encroachment restricted or denied the civil rights of

anyone living within the United States. Yet, it was the courts that welded the power to either help or hinder restrictive or destructive political agendas.[346]

The executive, legislative, and judicial branches of government remained in constant evolutionary motion. When it came to addressing the interplay between governmental attempts to curtail any of its citizens' rights, Black, Asian, and Native Americans, as well as women of all races, were not idle recipients of an inferior share of the democratic principles nor passive victims of an oppressive system. Many continued to use the public sphere to defy conventional wisdom and push back against the dominant forces at work in the United States. The dialog began to shift and the larger swath of a defined American culture represented an act of progressivism in and of itself. The cumulative crossing of the next boundary now characterized the nature of a unique American culture, thereby calling into question the role government was to play in equalizing, upholding, expanding, or even threatening the basic civil rights outlined in the Constitution. By the twentieth century, the institutions of government were as amorphous as they were engrained. They revealed a similar living quality in response to the actions of its constituents who had also shifted their goals to match the changes within society and redefining nature of the meaning of freedom in the modern era. The creators of the democratic republican government had not only endowed civil liberties to "the people," but also defined a structure intended to protect their rights and the democracy. But, as proven by the cases on behalf of the Cherokee Nation in the 1830s, the government could just as easily deny the people of their rights. In another manifestation of the nation's mutability, the people looked to the courts as the

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[346] Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States* (Boston: Beacon Press, 2015), 112.

primary enforcers of their rights, more so when the government became the one to impinge upon the established and progressive guarantees of rights.

In concert with changes and challenges to the views regarding the role of government, many came to also see that the courts could act as either protectors or destroyers of rights when government or an informal majority rule has superseded the interests of social justice and equal civil rights for all. Challenges to the existing state of affairs occupied an ever-present foothold in the American historical narrative, but proliferated within the twentieth century's progressive movement and its expanded inclusiveness in conjunction with the growing influence of the court. More people were now aware that the courts did not exist as an extension of the civil government's political agenda, but rather a viable stopgap on the administration if and when federal or state servants attempted to override the democracy under which the people had entrusted them to uphold. With its inextricable links to the socio-political arena as part of the election or appointment process for judges, the potential remained for the system to reinforce a government-backed restriction of civil rights. Hesitant of the social or political consequences, any judge retained the prerogative to accommodate state action. As arbiters between the social consensus and the executive and legislative political motives, judges stood at a crossroads.

With the discretion to either comply with or disrupt policy challenges from either side, courtrooms held the power to either safeguard or erode civil rights. The fluidity of the status of racial minorities at the turn of the twentieth century made a judge's authority that much more complex and consequential. Both federal and state governments sought to direct the course for ethnic minorities' rights at the dawn of the modern era, but more marginalized cross-sections of the population refused a continuation of their subservience. More diverse groups again called

upon the courts to defend their rights as citizens and secure an equal standing among all citizens of the United States.

After the first half of the twentieth century rumbled with instances of social discord, the 1960s erupted into an era of dissidence and protest. Beginning with the Civil Rights Movement and lasting into the 1970s with demonstrations against the war in Vietnam, activism on behalf of students, marginalized communities, and women came to define a decade of unrest and social agitation that shook the foundation of civil society in the United States. Organized groups, like the Congress of Racial Equity (CORE), the Student Nonviolent Coordinating Committee (SNCC), and the Southern Christian Leadership Conference (SCLC) proliferated and inspired others across the nation share in the energy of their efforts. New strategies and philosophies to improve lives grew from the Civil Rights Movement. The Black Power Movement and the Black Panther Party encouraged all black citizens to embrace their cultural heritage and rally on behalf racial pride, liberation, and determinism.

Sit-ins, marches, and protests at times gave way to the rise of the "New Left" and student radicalism and expanded their advocacy beyond the black communities. The growth of the youth political movements began in the early 1960s and reached its height during 1968. The new student activism spawned similar protests on college campuses from coast to coast and focused on issues that included the Vietnam War, free speech, the environment, and racism. Including student groups like Students for a Democratic Society (SDS) and the Free Speech Movement in Berkeley, the New Left rallied for the "common struggle with the liberation movements of the world" and offered new outlets of political agitation.[347]

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[347] Neil A. Hamilton, *Rebels and Renegades: A Chronology of Social and Political Dissent in the United States* (New York: Routledge, 2002), 232.

The Red Power Movement and the Chicano Movement rose in the struggle against racism while seeking to restore ethnic pride. The Red Power Movement bloomed as an inter-tribal movement and fought for self-determination, sovereignty, and better reservation conditions during the late 1960s and the 1970s. There were three pivotal moments of the Red Power Movement: the occupation of Alcatraz Island in 1969, the Siege of Wounded Knee in 1973, and the Longest Walk in 1978. Each highlighted the concerns of American Indians to the public through acts of civil disobedience and mass protest. The Chicano Movement also paralleled the black and tribal efforts in fighting for better labor conditions, against racism, and in celebration of Mexican-American traditions.[348]

The women's liberation movement also gained renewed energy in the turbulence of the 1960s as women also battled for equal pay, equal treatment, and new opportunities. Celebrations of International Women's Day and speeches by Equal Rights Amendment supporters helped empower women's voices as an influential force in society and politics as many carried the fight well into the new millennia. Gay and lesbian activism also prospered in the form of parades and demonstrations as activists and supporters protested the stigmatization of the lesbian, gay, bisexual, transgender, transsexual, and queer communities, demanded equal rights, and celebrated their identities. 1969 proved significant as the Stonewall uprising in New York City propelled activists around the United States into action and prompted annual pride parades.[349]

Protests against the war in Vietnam loomed large in New Left activities, drawing crowds of students, non-students, radicals, and moderates who agreed that the conflict needed to end.

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[348] Hamilton, *Rebels*, 282.

[349] Maurice Isserman and Michael Kazin, *America Divided: The Civil War of the 1960s* (New York: Oxford University Press, 2000), 172.

Protests against the Vietnam War began to gain prominence in 1965 on college campuses and around the United States as student protesters garnered national attention in the following two years. Some civil rights leaders, such as Martin Luther King Jr. and James Bevel, also joined the antiwar movement. In an anti-war protest in April of 1967, King and other members of a broad coalition called Spring Mobilization Committee to End the War in Vietnam helped to lead a march of 300,000 anti-war protesters in New York City. Hispanic community leaders, in events like the Chicano Moratorium, and black community leaders also protested that the war had a greater impact in terms of deaths and suffering on their communities.[350]

In fall of 1967, over 1,000 student protesters returned their draft cards at the steps of the Justice Department. By the end of the protest, demonstrators burned, returned, or destroyed an estimated 25,000 draft cards in protest during the course of the war. Recounting in 1982 his role in this act of civil disobedience, Rev. William Sloane Coffin of Yale remarked, "My own feeling was that this war was so wrong that having done all the other things I just felt I would have to commit civil disobedience. Now, it's not an easy thing to do if you're married and if you have small children…[But] I felt sort of a wider parish of students were turning in their draft cards. And what was their chaplain going to do? And the obvious thing was that the pastor should stand by his parishioners."[351] By the fall of 1967, only 35 percent of Americans supported U.S. policies in Vietnam. By 1968, the anti-war movement only gained in momentum and fervor. In particular, the Democratic Party felt the effects of anti-war sentiment as the party became increasingly

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[350] Tom Wells, "Vietnam Antiwar Movement," *The Oxford Companion to American Military History*, ed. John Whiteclay Chambers II (New York: Oxford University Press, 1999), 760.

[351] "Vietnam: A Television History; Homefront USA; 111; Interview with William Sloane Coffin, 1982," August 30, 1982, WGBH, *American Archive of Public Broadcasting* (WGBH and the Library of Congress: Boston and Washington, DC), accessed December 1, 2019, http://americanarchive.org/catalog/cpb-aacip_15-9k45q4rs29.

divided over the war. During the 1968 Democratic Convention in Chicago, a stand-off between anti-war protesters and police erupted in violence as police brutally and indiscriminately used force against the crowds gathered to protest.[352]

From 1968 to 1970, protests continued in force as events like the Tet Offensive, My Lai massacre, and the Kent State massacre led individuals to further protest the role of the United States in Vietnam. The last event, in which National Guardsmen shot and killed four Kent State students at an anti-war protest, led to a nationwide student strike that shut down 500 colleges. As one historian put it, "By January 1973, when Nixon announced the effective end of U.S. involvement [in Vietnam], he did so in response to a mandate unequaled in modern times" where the popular consensus had prompted a direct response by the American government[353]

While the Civil Rights Movement began as the basis for renewed focus on black American liberation, a broader counterculture movement of the 1960s, as it became to be known, spread into many facets of society, it nevertheless spawned a generalized rethinking of the government's role in societal tensions. Other groups had entered the fray and solicited the assertion and protection of their rights. By the late 1960s, the legislative successes of the Civil Rights and Voting Rights Acts offered a new dimension to the Native American plight when the events at Alcatraz Island sparked a new visibility of centuries-long questions that surround their civil rights' status.

As an outcropping of the greater era of protest in the 1960s and 1970s, the Red Power Movement was propagated as social activism led by Native Americans to demand self-

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[352] Wells, "Vietnam Antiwar Movement," 757.

[353] Mark Barringer, "Antiwar Movement, U.S." *Encyclopedia of the Vietnam War: A Political, Social, and Military History*, ed. Spencer C. Tucker (Santa Barbara: ABC-CLIO, 2011), 55.

determination for tribal communities in the United States. From 1953 to 1964, the United States government passed House Concurrent Resolution 108, which terminated recognition of more than 100 tribes and bands as sovereign dependent nations. The resolution stated that the tribes would be under the law of the United States and treated as American citizens instead of having the status as wards of the United States as established in *Cherokee Nation v. Georgia* in 1831. In essence, the affected tribes were no longer protected by the government and stripped of their right to govern the citizens of their own indigenous nations.[354]

In addition, the Relocation Act of 1956 resulted in as many as 750,000 American Indians migrating to cities from 1950 to 1980. The United States' government implemented relocation with the intention of encouraging and providing support for American Indians to find jobs in more populated urban centers and improve their lives from the restrictive and poverty-prone tribal reservations. The government offered vocational training, housing, and financial support for those who chose to relocate. Yet, the amenities promised by the government did not have adequate funding and did not manifest in the opportunities promised by the Relocation Act. As a result, many American Indians were distanced from their cultural lands and were economically worse off than before Resolution 108 and the Relocation Act of 1956.

Still, the congressional resolution and relocation ignited a new era of American Indian resistance in the modern age. Those with indigenous ancestry and tribal citizenship began forming collaborative pan-Indian coalitions as a means for fueling a larger national movement. Founded in 1944, the National Congress of American Indians (NCAI), organized as the first

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[354] 83rd Congress of the United States, "Indians," 67 Stat. B132, United States Statutes at Large, Bills and Statutes, Vol. 67, AE 2.111, August 1, 1953, United States Government Printing Office, accessed August 28, 2019, https://www.govinfo.gov/app/details/STATUTE-67/STATUTE-67-PgB132.

nationwide Native American group of the twentieth century who advocated for the equal rights of all tribal nations. As the main political precursor to the Red Power Movement, NCAI set a precedent by being the first successful and long-standing multi-tribal political organization run entirely by Indians. Formed with a comprehensive revision of the native role in the American government, the NCAI fought against voting discrimination, the termination of government to government relationship between the United States and native tribes, and against the United States government's continued interference in tribal councils and indigenous courts. Members also aimed to strengthen the ties between Native Americans who remained on reservations and those who had relocated to cities, reconnect the tribal elders and Indian youth, and foster a coming together of different tribes.[355]

As NCAI and the Red Power Movement took on a lives of their own during the early years of the 1960s, they also gave birth to new organizations that included the National Indian Youth Council (NIYC), founded in 1961, and AIM, founded in 1968. The groups and tribal movement as a whole sought the sovereign rights to make tribal policies and programs while maintaining and controlling their own land and resources without federal involvement or oversight. While many segments of the groups and Red Power Movement incorporated a stance of non-violent civil demonstration, native activists turned away from the traditional federal-tribal relationship and NCAI tactic of negotiation, policy by treaty, and resettlement by the latter years of the 1960s. The Red Power Movement adopted a more confrontational tone and utilized the tool of civil disobedience to incite change in United States-Tribal affairs. "Red Power" soon after

[355] Paul Chaat Smith and Robert Allen Warrior, *Like a Hurricane: The Indian Movement from Alcatraz to Wounded Knee* (New York: The New Press, 1996), 102.

centered on mass, militant, and unified action for the recognition of Native American social justice and civil rights.

Like the Black Power Movement, many Native Americans felt that the lasting impression of the Red Power Movement was the resurrection of Indian pride, action, and awareness throughout the tribal nations and within a greater consciousness in the mainstream public. The phrase "Red Power," first attributed to the author Vine Deloria, Jr., expressed a growing sense of pan-Indian identity in the late 1960s among American Indians. Events that came to headline parts of the movement included the Occupation of Alcatraz, the Trail of Broken Treaties, the Occupation of Wounded Knee, along with intermittent protests and other occupations throughout the era. In response to the Red Power Movement, Congress later enacted several legislative packages and laws in favor of Native Americans' rights, one of the most important being the reversal of tribe recognition termination, though gains in recognition came with a cost. [356]

November 9, 1969 transformed extant Native American history and galvanized national attention to the situation of indigenous peoples. The first day of the Alcatraz Indian Occupation also turned the eyes of the nation toward the federal government's responsibility to recognize long-ignored aboriginal civil rights to land and an inherent freedom to maintain traditional tribal culture. As the first intertribal protest action to garner and hold the country's attention. Indians of All Tribes, Inc. (IAT), a coalition formed of indigenous people, relocated to the Bay Area of California. For 19 months they rooted themselves on the island of Alcatraz as the central faces

[356] Alvin M. Josephy. *Red Power: The Native Americans' Fight for Freedom* (Lincoln: University of Nebraska Press, 1999), 225-241.

and voices in a new age of speaking out against oppressive government policies, which had rescinded aboriginal land for the purposes of extinguishing native culture.[357]

Though controversial, IAT adopted the Civil Rights Era technique of a non-violent sit-in and adapted the method into a tool not often used by native-rights groups. Like the first event at the Woolworth's lunch counter in Greensboro, North Carolina, on February 1, 1960, with four black Americans, the participants in the occupation of Alcatraz captured the activist spirit and sparked a national consciousness of Native American ethnicity, civil rights, and race relations with the federal government. At the end of the occupation on June 10, 1971, their efforts had ignited a protest movement and fanned the flames of change for native rights and equal standing in the future of the United States. The occupation of Wounded Knee on the Pine Ridge Reservation of the Oglala Sioux in South Dakota followed in 1973 and helped to sustain the movement throughout the modern era. Because of the consideration brought to the dilemmas still facing of the American Indian communities, as a result of the initial occupation, lawmakers set to work reforming federal laws on behalf of tribal citizens, which demonstrated new respect for aboriginal land rights and for the freedom of American Indians to maintain their traditional cultures. Still, a recasting of indigenous rights into the mainstream as a result of the Alcatraz Indian Occupation had to first face the courtroom in order to necessitate the widespread social, political, and congressional support needed for permanent change.

First possessed and utilized by native tribes for multiple purposes before European contact, Alcatraz Island remained of little interest to explorers and non-native governments until

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[357] Marc S. Boatwright, "Biography and History," GOGA 35158, Alcatraz Indian Occupation Collection, Golden Gate National Recreation Area, United States National Park Service, accessed December 9, 2019, https://www.nps.gov/goga/learn/historyculture/upload/Marc%20S.%20Boatwright%20Alcatraz%20Indian%20Occupation%20Collection%2035158.pdf.

the mid-nineteenth century.[358] Not until after the end of the war with Mexico in 1848 did the United States government seek control of the island as a military fort for the purposes of defending the harbor upon California's statehood. Having wrested control of the island and surrounding territory from the Mexican government, who had already taken control away from the local tribal communities, the United States officials soon commissioned the first lighthouse on the West Coast in 1854 to guide ships around the rocky harbor. By 1859, the United States Army had completed the construction of the coastal fortification of Fort Alcatraz for its strategic location at the mouth of San Francisco Bay.

The military then used the island fort as a training base for the duration of the Civil War from 1861 to 1865. Without the funding needed to upgrade and maintain an active military outpost, the island's purpose shifted from tactical defense to that of a military prison in 1868 with the main prison building in place by 1912. The United States Department of Justice acquired the island in 1933 and operated a maximum-security prison from 1934 until 1963 when the facility closed and fell into disuse. After the IAT occupation, Alcatraz Island became a national park in 1972 and opened to the public in 1973 as part of the Golden Gate National Recreation Area. In 1986, the island received the National Historic Landmark designation and continues to host millions of visitors.

Despite the early loss of indigenous territorial control and subsequent federal oversight, the island retained its presence in the lives and minds of native communities. Compounding the anguish over the forfeiture of their ancestral lands, the United States government incarcerated

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[358] Erwin N. Thompson, "The Rock: A History of Alcatraz Island, 1847-1972," Historic Resource Study, Golden Gate National Recreation Area, Denver Service Center, Historic Preservation Division, National Park Service, United States Department of the Interior (January 1, 1979), 2.

many American Indians in both the military and civilian prison system on Alcatraz. In fact, in 1895, the United States government arrested, tried, and transferred nineteen Moqui Hopi Indians to the island's prison as the single largest group of Native Americans sentenced to confinement at one time. The government continued to imprison other tribal members to the disciplinary barracks throughout the latter decades of the nineteenth and into the early twentieth century. As the turbulence of the 1960s gave way to waves of protest, tribal leaders recognized the irony of the history of the treatment of native peoples and their lands and chose the island as their platform upon which to stand and confront centuries of the American government's cultural pretense and oppressive inequality in the treatment of indigenes.

Following the social and political upheaval of the Civil Rights Movement and embracing the energy of agitation and attention of the age, Richard D. McKenzie of the Sicangu Lakota Sioux of the south-central South Dakota region, and his wife, Belva Cottier, a descendent of the Oglala Sioux, Crazy Horse, and of the Pine Ridge reservation in southwest South Dakota, were among the first native activists to foment an open occupation of Alcatraz in protest of tribal rights to the island. McKenzie had grown up on the Rosebud Reservation in South Dakota and had settled in Oakland in 1956, where he became a welder. Cottier was the daughter of Allen Cottier, the president of the American Indian Council, Inc. in 1964. By 1973, around 200 Oglala Sioux joined followers of AIM in seizing and occupying the town of Wounded Knee on the Pine Ridge Reservation in South Dakota.[359]

On March 9, 1964, McKenzie led four of his fellow tribespeople to Alcatraz where they demanded that the federal government repurpose the island as a Native American cultural center

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[359] Adam Fortunate Eagle and Ilka Hartmann, *Alcatraz! Alcatraz!: The Indian Occupation of 1969-1971* (Berkeley: Heyday Books, 1992), 58.

and Indian university. The occupation lasted only four hours and ended without the government meeting their demands, but their actions had a rippling effect among other tribal communities. McKenzie's stated purpose and activist method of occupation found new light just over five years later as another, much longer protest began to form. In September 1965, McKenzie again drew attention to the Indians' claim when he filed the complaint in the U.S. District Court of Northern California asking for an injunction against the sale of Alcatraz that adjudicated their right to it, or, in the alternative, demanding a judgment of $2.5 million. The suit lingered in court until July 1968 when it was dismissed for lack of prosecution.

Richard Oakes of the St. Regis Mohawk Reservation of the Lake Ontario and St. Lawrence River regions of New York State and southeastern Canada, and a group of diverse native supporters calling themselves the Indians of All Tribes (IAT), again took initiative to return Native Americans to the island and restore their collective rights to indigenous lands. Oakes had begun a career as a local dockworker on the St. Lawrence Seaway, but was laid off at the age of sixteen. He then took on a job as a high steelworker, which enabled him to travel around the country to various jobsites. After a failed marriage, Oakes moved to San Francisco in the early 1960s and enrolled at San Francisco State University (SFSU). He also worked as a bartender in the Mission District of the city, which brought him in contact with the local Native American communities and the growing urban activism of the Red Power Movement.

While attending SFSU, Oakes became disenchanted with the classes offered at the campus and went on to work with an anthropology professor, Dr. Bea Medicine, to create one of the first Native American Studies departments in the nation. He developed the initial curriculum and then encouraged other Native Americans to enroll at SFSU. At the same time, the Mohawk National Council was forming and traveling in troupes to fight oppression of Mohawk religion

by means of peaceful protest, which they called White Roots of Peace. In the spring of 1969, Oakes met the members of the White Roots of Peace, who encouraged him to take a stand and fight for what he believed in. Oakes had also gained the support of many students.[360]

On November 9, 1969, Oakes led a group of students and urban Bay Area Native Americans and using a chartered boat descended upon the island of Alcatraz as a symbolic occupation intended to assert claims to the ancestral territory in the name of all Indian people. By the end of their first day with no action by the federal government to remove the occupiers, IAT members realized that a sustained occupation was possible. Oakes and his cohorts began recruiting other Indians and their ranks swelled to around a hundred occupiers on the island, eighty of whom he had drawn from the University of California, Los Angeles (UCLA)'s American Indian Studies Center, and their emblematic presence solidified into a formal occupation on November 20, 1969.[361]

Once established, IAT formed an elected council to manage day-to-day activities and open negotiations with the federal government. All decisions were finalized by unanimous consent of the people and their demands were sweeping. The occupiers refused to leave with nothing less than the deed to the island and the foundation of an Indian university, cultural center, and museum. The government instead refused to engage in talks with the council, demanded they leave the island, and surrounded Alcatraz with what proved to be an ineffectual barrier. Undeterred, organized, and willing to test the government's resolve, IAT members held their position and government officials agreed to hold formal negotiations with the council.

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[360] Kent Blansett, *A Journey to Freedom: Richard Oakes, Alcatraz, and the Red Power Movement* (New Haven: Yale University Press, 2018), 221.

[361] Blansett, *Journey to Freedom*, 242.

However, suspicious of a government fix, the talks bore no fruit and the federal government again repudiated their claims and insisted they leave the island with nothing more than the brand of criminal trespassers. Yet, drawing from a deep well of modern civil ideology and a commitment to holding the government accountable for their rights, occupiers showed no interest in acquiescing their position until the government agreed to their demands.[362]

Much like the Eisenhower administration's tepid approach to interfering in the school integration and race crisis in Little Rock, President Richard M. Nixon's administration responded to the Alcatraz Indian Occupation with a kid-glove approach. The federal government assumed a policy of non-interference as Nixon and his administration directed the FBI to avoid contact with anyone on the island. At the same time, the Coast Guard and Government Services Administration (GSA) received orders to not interfere with the occupiers with explicit instructions barring attempts to remove anyone from the island. With the appearance of an accommodationist agenda, IAT members were optimistic that negotiations with a government amenable to their demands would advance their goals to a peaceful and favorable outcome.

In actuality, the federal government was maintaining a stance of attrition. Their original strategy sought to absolve the Nixon administration of having to take an official stance on the contentious indigenous race relations. At the same time, an attitude of non-interference would alleviate the government from direct involvement to end the occupation and be the first contemporary to address the historic inequality and injustices that continued to plague native communities. Thinking that support for the occupiers' cause would wane, officials in charge of the response bet that those on the island would grow weary and end the occupation by their own

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[362] Adam Fortunate Eagle, Tim Findley, and Vine Deloria Jr, *Heart of the Rock: The Indian Invasion of Alcatraz* (Norman: University of Oklahoma Press, 2002), 118.

accord. However, the occupiers refused to relent and in the summer of 1970, redoubling their efforts to sustain the protest until the government guaranteed it would transfer the full title to the island and build both an Indian university and cultural center.[363]

With their position of non-interference yielding no results and under growing national pressure to either begin serious talks with the IAT council and develop a reformed federal Indian policy or take action to end the occupation by force, the government began to deprive the island of the basic necessities needed to sustain a living environment. They proceeded to switch off all electricity and remove the water barge responsible for the island's source of fresh water as a means for breaking the stalemate. However, instead of bringing both parties to the negotiating table, tensions increased when a fire engulfed several historic buildings and the government blamed the Indians. Occupiers responded with an accusation of arson by undercover government infiltrators seeking to turn non-Indian supporters against them. Public opinion of the incident was divided and neither the federal government nor the protesters pursued any significant or violent response and the occupation stretched well into 1971.

In the meantime, organized management of the occupation had already begun to deteriorate following the departure of Richard Oakes on January 5, 1970, after a fatal fall on the island took the life of his 13-year-old step daughter, Yvonne. As two competing factions of the movement competed to fill the vacant leadership position and control of the island, conditions continued to decline. A new population of occupiers had also taken up residence on the island,

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[363] "Planning Grant Proposal to Develop an All Indian University and Cultural Complex on Indian Land, Alcatraz, February 1970,"Council Records, 1968-1974, NAID 6120300, National Council on Indian Opportunity, Record Group 220: Records of Temporary Committees, Commissions, and Boards, 1893 – 2008, United States National Archives, Washington, D.C., accessed, August 22, 2020, https://text-message.blogs.archives.gov/2020/03/03/we-hold-the-rock/.

which further transformed the climate of solidarity into a storm of disorder and disarray. Open drug use, battles over authority, and general dismay in Oakes' absence pushed those still on the island toward more desperate measures in order to weather the hardships and sustain the occupation. In what became the case that Davies was to oversee, three men, John D. Halloran, Frank J. Robbins, and Raymond E. Cox made a fateful decision to strip copper wiring and copper tubing from the buildings and trade it as scrap metal in order to buy food. The trio was able to collect and sell around 1,600 pounds of copper and meet the immediate goal of acquiring food supplies. But their actions would catch up to them by the end of the occupation and set off another showdown between the government and the Indigenous Americans community in both the courtroom itself and the court of public opinion.

Expressed sympathy also began to wane among members of the press who at the outset had been supportive of the occupiers, their message, and stated goals. Once the government's allegations of the theft emerged, news coverage that had once covered occupiers' activities on the island with a compassionate tenor shifted their focus to publishing accusations of other alleged crimes like assaults and beatings. Public opinion grew more divided in light of the increasing number of reports of violence emanating from the island. Despite its powerful beginning, the occupation had stumbled and faced a difficult fall to a precipitous end.

An unrelated collision of two oil tankers at the mouth of San Francisco Bay in January of 1971 proved to be the catalyst for the occupation's demise. Authorities determined that the occupiers bore no responsibility for the accident, but the event was enough to prod the Nixon administration into taking decisive action to remove civilian protesters and restore government management of the island. Nixon abandoned the policy of non-interference and authorized a removal strategy designed to retain federal control when the occupiers' population was low and

with as little use of force as possible. On June 10, 1971, citing the need to reestablish the lighthouse and foghorn safety features to the island, armed federal marshals, FBI agents, and police special forces put the plan into action and infiltrated the island. In prior months of the occupation, population numbers exceeded 600 people present at Alcatraz, but authorities removed just five women, four children, and six unarmed men to bring the official end of the occupation by June 11, 1971 without incident, violence, or a large-scale protest. On the same day the occupation ended, federal marshals arrested John D. Halloran, Frank J. Robbins, and Raymond E. Cox, the three occupiers accused of stealing federal property during the occupation, and began criminal proceedings to prosecute the men for the alleged theft of copper.

Compared to the occupation's newfound voice on behalf of American Indians and its amplification that became a raucous staccato throughout its 19-month duration, the event's coda had shrunk to a whisper. In another echo of the past, the federal government had not only again removed indigenous peoples by force from ancestral lands, but also continued to ignore the tribal communities' demand for equal recognition by failing to meet a single stipulation for tribal civil rights outlined by their cause. Despite disappointment in the immediate aftermath, the IAT and all veteran members of the Alcatraz Occupation had redirected the course of indigenous activism throughout the rest of the twentieth century.

The occupiers left empty-handed, but they had aroused the American public's consciousness to Native American standing. Tribal peoples, their history, and their cultures then secured a decided place in the long civil rights narrative and would also play a pivotal role in revising the indigenous people's place in state, federal, legislative, and judicial civil rights' policies. However, an expansion of their accomplishments still required institutional support from outside the tribal and activist communities. Meanwhile, politicians, government

bureaucracy, state and federal jurisprudence, and the various facets of society had yet to reach a consensus in regard to native rights. In fact, the national socio-political fan still oscillated between liberal and conservative factions with progressivists still unable find *terra firma* in either the legislative or political arenas.

The relationship of the federal court to issues of tribal members underscores a history that is both complex and contentious. Article I, Section 8, Clause 3 of the United States Constitution treats the tribes and indigenous peoples as separate entities from the United States or the individual states for purposes of federal law and trade, tribal relationships with the states are governed mostly by tribal-state compacts when not in conflict with federal law. The idea that tribes maintain an inherent right to self-government lies at the foundation of their constitutional status and stresses that the power is not delegated by congressional acts. Although, the United States Congress can limit tribal sovereignty as determined by the Marshall Court in 1831 and most Native American land remains held in trust by the United States and federal law still regulates the economic and political rights of tribal governments on the reservations; tribal jurisdiction over persons and things within a tribal nation's borders are often in conflict. While tribal criminal jurisdiction over Native Americans is reasonably well settled, the equal administration of justice for Native American defendants when appearing federal courts is less concrete.

While most crimes on Indian reservations go to state or tribal court, the Federal Bureau of Indian Affairs (FBIA) maintains control over serious crimes and possesses the right to bring accused tribal citizens to federal court. Although no comparative statistical study exists to determine the administration of punishment across the different ethnicities in the federal system for the early to mid-twentieth century, the Red Power Movement, FBIA, and the Occupation of

Alcatraz stimulated calls for an examination, analysis, and synthesis of Natives' treatment in federal court. By the turn of the twenty-first century, tribal citizens and scholars began exploring the undertreated aspect of the Native American experience and the tribal relationship with the American legal system.[364]

The 2015 publication of *Native Americans and the Criminal Justice System: Theoretical and Policy Directions* by Jeffery Ian Ross and Larry Gould arrived as a much-needed comprehensive approach to explaining the causes, effects, and solutions for the presence and plight of Native Americans in the criminal justice system. Included are articles from scholars and experts in Native American issues who examine the ways in which society has response to Native Americans in criminal court. The consensus of the contributors is that the relationship between accused Native Americans accused of crimes and the administration of justice in federal court is often socially constructed and unequally applied. They advance the argument that both the apprehension of suspects as well as the conviction and sentencing of accused tribal members has been harsher than the treatment of their white, non-tribal counterparts. The scholars' assertions parallel other twenty-first century calls for an exploration of Native American injustice that many see has persisted in the federal court system as the tribal and federal law have remained at odds since the earliest days of European colonization.[365]

The time of the legal fallout after the occupation in the early 1970s was similar to the experiences of with the northern-Midwestern Republican response of the 1920s, the Little Rock litmus test of *Brown v. Board of Education* in 1956, and the laboratory of civil law in the late

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[364] Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples," *Stanford Law Review* 45, no. 5 (1993): 1347.

[365] Jeffery Ian Ross and Larry Gould, *Native Americans and the Criminal Justice System: Theoretical and Policy Directions* (Philadelphia: Routledge, 2015), 245.

1950s and well into the 1960s. As with events prior, progressive-leaning politicians and legislators still turned to the courts to either uphold or strike down legislation that was either beneficial or harmful to their attempts to redirect energy from the left and right camps into the channels of progressive efforts for racial equality, civil rights, and social justice. The events at Alcatraz coupled with a new direction for Indian activism and political and legislative support generated a new decade of opportunity. Public servants of the court, and Davies in particular, had the opening to uphold the actions of political progressives who had otherwise been unable to dominate the political realm on behalf of indigenous rights despite increasing public support of the issues.

As Halloran, Robbins, and Cox's copper-theft case made its way through the system, Davies was also working his way to California in the months leading up to their trial. Once appointed to the bench in San Francisco with senior status, Davies took his seat on the bench following the controversial occupation of Alcatraz in the same manner that he handled all of the preceding cases he oversaw. As a senior-level judge, his public service in the trial was by choice, not assignment. Absent of any social, political, or personal agenda, he committed the same level of consideration for the context of the time. As a result, he continued to exercise judicial progressivism. Except in break with his past stoic persona, Davies spoke with a more candid, critical, and provocative tone when he later offered his summation of the outcome of the trial to the public in 1971.

As with the Little Rock case, Davies was positioned to defend the rule of law and enforce the prescribed procedure in the face of direct government involvement and intense public scrutiny. However, unlike the desegregation case, and with more than a decade's experience as a judge in the federal system, he was also poised to affect the social and political narrative not as a

liberal or conservative, Republican or Democrat, but as a judicial advocate for comprehensive and equal civil rights and racial justice. Since politicians and lawmakers had been unable to reach a legislative consensus for tribal rights and restitution, the courts were again the mitigates of Washington gridlock.

First categorized by Schlesinger in relation to the Roosevelt Court during the 1930s, many judges continued to leverage their position as either activists or restrained officers of the court and left little doubt of their ability to influence the contemporary social and political rhetoric. Because of the transformation of the courts as tiebreakers in an executive-congressional deadlock and of unquestionable power of their lifetime appointments as a political tool, judges had also become potential allies or enemies of the governmental administration's policy development, execution, and enforcement. With one implicit or explicit determination, a judge could instill and enforce what the non-dominate executive and legislative factions could not and establish a legacy of precedent for decades to come.

By the first day of the trial at the end of April in 1972, Davies' own jurisprudence as seen through his actions in Little Rock and legal opinions in his civil and criminal court cases had also evolved to embody an understanding that his role as a public servant included the protection of "the people's" rights. When he was in charge of a case in which he could influence the racial narrative for the indigenous communities, he remained true to his judicial philosophy of decades past and did not execute his duties as either an overt "activist judge" nor as an obedient servant to the opposing side of conservative restraint. Instead, although in the socio-political minority, he conducted the case within the same non-conformist canons as his senatorial mentor, Frazier, who Davies had witnessed advocating for the improvement of tribal living conditions throughout his days assisting the chair of the Indian Affairs Committee as a Georgetown law student.

Halloran, Robbins, and Cox's criminal trial was limited in scope to four days between April 28 and March 1, 1972, when the three defendants appeared before a twelve-person jury of their peers in the United States Ninth District Federal Court in San Francisco, California. In the initial proceedings, federal prosecutors feared that a trial for trespassing would further politicize the long-debated and white-hot issues of Native American land and civil rights. Nixon had already abolished the United States' tribal termination policy in June of 1970 and set a legislative directive toward native self-determination and Indian autonomy, due in large part to the public spotlight cast upon the issue and the Nixon administration's understanding of the delicate nature of the situation. As other problems began to consume Nixon's presidency, the administration did not want to diminish the policy gains already in hand or halt the progression of reform. Therefore, attorneys for the United States instead charged the men with theft and sought a federal grand larceny felony conviction for stealing approximately $680, around $4,100 adjusted for inflation in 2019, worth of underground copper piping belonging to the government during the occupation of the island.

After nearly a year since the end of the occupation, AIM, IAT, and other Indian activists had fanned out and continued to foment agitation in other parts of the country and the nation's attention had pivoted to other news-making events, especially the Watergate scandal that was quickly engulfing Nixon and key members of his administration. Press coverage of the trial was scant, but the proceedings and the outcome were nonetheless significant for the future of Native Americans and a revised understanding of their role in a reformed and inclusive civil rights policy and practice in the United States' public institutions. Having taken a seat on the Ninth Circuit bench in California, Davies again stood at the center of another consequential legal situation amid the firestorm of social, political, racial controversy still stoked, if not by the press,

by the proliferation of Native American activism during its high tide in the fallout of the occupation.

Neither their defense attorney, Donald Jelinek, a civil rights lawyer who assisted with legal advice during the occupation and provided representation during the trial, and federal prosecutors reached an agreement to waive the trial by jury. The men's fate then rested in the hands of a twelve-person panel of their peers, instead of the rare instance of proceeding with a bench trial in federal criminal court. As such, it was not Davies' sole discretion that decided their guilt or innocence, but he still retained responsibility for guiding the jury with instructions and the charge of determining their sentence if the jury voted to convict the men. Throughout the course of the four-day litigation, Davies provided both sides with the freedom to present their cases unobstructed; only intervening where the law required and compelled him to interject in the mechanics of the proceedings.

Federal prosecutors fixed their argument around not only the tangible evidence that the men had stripped copper metal from various buildings on the island and sold it for profit as scrap, but also the assertion that the metal belonged to the United States as part of the government's federal land holdings where its removal constituted a felony theft. Jelinek countered by positing that because the occupation had made the land and buildings contested between the tribal nations and the United States' government and federal officials had failed to accuse the occupiers of trespassing or make any formal arrests and removals based on their presence on the island, Halloran, Robbins, and Cox had a reasonable belief in their rights to be on the land and manage its property and furthermore, that they and were not breaking any laws by removing and selling the copper. After both sides rested their cases, Davies tasked the jury with instructions that requested they carefully consider the evidence presented and circumstances

of the charges within the scope of the stated laws. Having heard the case and making their deliberations in private, the jury returned a unanimous guilty verdict for all three men.

Under federal guidelines, jurors were not tasked with determining punishment and Davies dismissed the jurors upon completion of their service. Fallout from the jury's decision came swift from the Indian activist camp. The University of California at Berkley campus newspaper, *The Daily Californian*, branded the jury's condemnation of the men in an article titled "White Man's Justice."[366] Writers even placed blame for the men's conviction on Davies for having placed strict limitations on his instructions to the jurors, while sentiments from those in support of the government divided public reaction.

The power to determine the next direction for the men's lives then shifted to Davies. He bore the duty of imposing their sentences, which according to the law ranged anywhere from probation to prison and a payment of fines. Prosecutors recommended a six-month jail sentence and $200 in fines for each of the men. Davies rejected their plea and placed the men on three years' probation and required no monetary restitution. Although the jury had tempered Davies' ability to act with singular discretion in the finding of their guilt or innocence, his deviation from federal prosecutors' sentencing recommendations showed his understanding of the men's rights as citizens in the face of the government's overreach and ability to handle the situation in order to uphold and protect the rights of any individual citizen of the United States.

In rare on-record public comments following the end of the trial, Davies took a decisive stance that criticized the government's handling of the entire incident. "I think the officials of the U.S. Government in many areas, handled the whole Alcatraz situation very badly. They

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[366] Staff, "White Man's Justice," *Daily Californian*, March 2, 1972, 1.

vacillated. They couldn't make up their minds," he said.[367] He had taken not a liberal or conservative tone, but a progressive position by admonishing the government's neutralization of the occupation with confrontation and force rather than diplomacy and compromise. He also posited a lack of transparency in the government's talks with occupiers, which he indicated had the possibility of influencing Halloran, Robbins, and Cox's decision to remove the copper when he went on to say, "With the course of conduct of certain officials, there is a very great possibility that these men may have thought they had a right to this property" meaning that the men believed they were acting within their rights and did not view their actions as thievery or criminal. [368] As a public servant in the federal judiciary, Davies had called attention to a mishandling of the men's rights at the least and an outright violation of the civil code of conduct at the worst, all at the hands of a government created to protect all citizens equally.

To add to the notion that the government's mixed messaging had misled the occupiers while on the island, one of the jurors, Helen B. Offutt, wrote to Davies the day the trial ended on March 1, 1972 to express her regret that as "the only juror who believed the Indians not guilty (by reason of the governmental inaction which led them to believe their position was secure),"[369] she had not possessed the confidence to hang the jury. In her letter, Offutt underscored her sense of shame and dismay for lacking the fortitude to disagree with her peers despite writing that she felt she had become "an accomplice to the immoral manipulation of these three unwary men."[370] Offutt closed her letter by praising Davies' "infinite wisdom and justice with which you have

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[367] Staff, "3 Indians Get Probation in Alcatraz island Theft," *Oakland Tribune*, March 2, 1972, 34E.
[368] Staff, "3 Indians Get Probation in Alcatraz island Theft."
[369] "Letter from Helen B. Offutt to the Honorable Ronald N. Davies, Visiting Justice, Federal District Court of San Francisco, March 1, 1972," box 2, folder 5, Davies Collection, UND.
[370] "Offutt to Davies," box 2, folder 5, Davies Collection, UND.

viewed their case," further illustrating a show of support of both Davies' public comments in reference to the government's mismanagement of the situation and the men's rights, and his decision in favor of a more lenient sentence to make clear the rule of law from his purview. Davies personally responded to her with assurances that he did not, and would not criticize the jury in any way for their choice to convict. Rather, he praised her service and showed gratitude for her efforts to carry out justice in the best tradition of United States jurors and stressed that he thought "the jury verdict was technically correct" and imparted no reproach on them for the ultimate outcome. [371]

Despite the strong indications of blurred lines at the time by both judge and juror in a contentious case of indigenous social justice and advanced civil rights, the courts upheld the men's convictions. Yet, the publicity following the end of the trial and Davies' public comments contributed to ongoing Native American activism and their efforts to address the persistent inequality stemming from the government's slow reaction to reform in indigenous policy and civil rights. Though leaving without the government meeting their demands and subjected to another removal by federal force, the Alcatraz Indian Occupation and the trial that followed set off and stimulated a flurry of Indian activism and redirected the course of indigenous history in the twentieth century.

The occupation was brief, but had a direct effect on federal Indian termination policies. Having the rapt attention of the nation, the White House was compelled to respond. During the occupation, Nixon ended the government policy of terminating Indian tribes 'restrictions when it

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[371] "Letter from the Honorable Ronald. N. Davies, U.S. District Judge, to Mrs. C.Y. Offutt, March 23, 1972," box 2, folder 5, Davies Collection, UND.

came to sustaining their cultural heritage. The administration also placed new emphasis on the need to recognize the rights of Indian self-determination separate from federal oversight. Nixon also began returning land to tribal communities, where lands near Davis, California, became the site of a Native American university.[372]

The trial over which Davies presided was even more abbreviated, having lasted four days, yet it had stirred a mainstream consciousness to the reality of Native American life. Renewed press coverage and his outspoken views as a federal judge established precedent for Indian activism and indicated that judicial support existed to help ensure that their progressivist endeavors to bring people belonging to indigenous tribes into the mainstream fight for equal civil rights and social justice remained unbroken. Halloran, Robbins, and Cox's experience was not in vain. Supporters of native activism and Davies' discourse had helped turn the public spotlight on the relationship among the government, Indian issues, and the modern judiciary. Together, activists and Davies' acknowledgement of a changing landscape promoted a greater public awareness and understanding of the work necessary to achieve comprehensive civil rights reform and include the indigenous communities.

As was the public crux of the argument that fueled the crisis in Little Rock, Davies' actions in the wake of the Alcatraz Indian Occupation represented those whose rights the government had denied. It was the judiciary whose role it was to enforce the rights of all citizens. However, unlike the circumstances of the desegregation of Central High School where he upheld the constitutionality of federal law established by *Brown v. Board of Education* in the face of state-sanctioned defiance, Davies challenged the government's action that attempted to restrict

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[372] Eagle and Hartmann, *Alcatraz! Alcatraz!,* 135.

Native American's rights before, during, and after the occupation. His charge was to uphold the rights of all citizens in the face of governmental efforts to maintain their exclusionary policies in regard to indigenous people. His tool was progressive legal rhetoric that placed people over politics and humanity above hamstrings. Though contained to the incidents in San Francisco, the wider impact of his actions dared future judges to examine the role and responsibility of the judiciary at precipitous times of opportunity and potential failure of law, order, and democracy in upholding citizens' rights in the face of government or majority consent and mob rule.

Davies protected both the black communities and the tribal population from government intrusion and their basic rights guaranteed by the Constitution and Civil Rights Act of 1964. Instead of maintaining the court as another extension of government's reach, he helped recast the judiciary as the branch of government willing to protect everyone's rights from non-government forces, one element present in the mob-majority rule in Little Rock, as well as over government-sanctioned responses such as the state-sponsored curtailing of rights by Arkansas' governor Faubus. At the same time, he intervened against federal actions taken in California to suppress the desired outcome of AIM's actions throughout the occupation of Alcatraz Island.

Over thirty years after Davies began studying law, similar problems persisted for indigenous peoples. By the 1970s, Davies connected the government's actions against the Indian protesters on Alcatraz to the current generation's Native American social and civil rights violations that executives and legislators had failed to solve and the government had continued to perpetuate. He did not let the popular politics, societal fervor, and racial divisions draw his attention away from the human conditions that surrounded the events at Alcatraz, which he viewed as the core issues around which all other conversations circulated. Rather, Davies remained confident in the interpretive value of the Constitution and his sworn duty and proven

ability to protect citizens' rights. His judicial self-possession and willingness to confront the federal government, though not always acceptable within the mainstream cultural channels of the time, helped him uphold and magnify progressivism's legacy. Legal progress now included the lives and rights of Native Americans; that which Frazier had tried to initiate with politics, but failed to secure as a progressive minority in an expanding landscape of liberalism and conservatism in the first three decades of the twentieth century.

As a result, Davies' time out west became stands as evidence of unintended activism within the vein of judicial progressivism. His readiness to assert an atypical and outspoken stance confirmed a new progressive safeguard of citizens' rights and hinder their degradation by government or majority-mob delegation. Davies proved that simply maintaining the law was not good enough to afford security. His comments refuted a consensus of consciousness that was based on decades of government and majority-support of encroachments that both restricted and often denied racial minority citizens of their equal rights entitlements. Pointing toward a threat, rather than a strengthening of the nation's founding principles of inherent rights and equality, he made a public appeal that the socio-political balance be geared toward preventing or combating the destruction of people-powered democracy with government overreach and mob rule.

As he transitioned to a new status as a senior judge and became involved in another contemporary socio-political conflict, Davies held to his philosophy and the progressive legacy that was concerned with problems of democracy, corruption, and the un-egalitarian application of freedomist values in the twentieth century. As he presided over the trial as a direct result of the Alcatraz Indian Occupation and the federal government's response to Native American activism, Davies did not advocate for an activist, restrained, liberal, or conservative agenda for mitigating the disparity between indigenous activism and the government's restriction of civil

rights. Instead, he appropriated the resources at his disposal and tested the government's position and policy on indigenous rights. He declined the U.S. attorneys' recommended plea for the men convicted of stealing copper from Alcatraz Island and went a step further and utilized the case's publicity to openly chastise the federal handling of the entire occupation.

Decades of experience and conviction in the law's ability to protect the rights of all citizens in the face of government-sponsored injustices and a prejudicial social majority, positioned Davies to tackle a difficult case. By holding firm contrary to the desires of the federal government during and after the Alcatraz Indian Occupation, Davies cast the judiciary as an institution capable of protecting and enforcing all citizens' rights against a restrictive or destructive government-backed political agenda. His jurisprudence and actions helped to both prevent and combat the destruction of the basic doctrines of democracy when the government engaged in a policy of inequality in the treatment of minority civil rights. His responsibilities on the bench in California characterized the variable nature of both the judiciary and the nation's understanding of civil rights and minority inclusion; all of which substantiated how he and the court both defined and represented not either the activist or restrained court of decades prior, but that of a third category of judicial progressivism.

9. LEAVING A LEGACY

The Latter Years of Davies' Career

In the twelve years following the culmination of the Alcatraz Indian Occupation trial, Davies' sweeping career came full circle. He remained on the Eight Circuit Federal District Court in Fargo and still traveled throughout the country to preside in other district courts as requested, only retiring in 1984 after the first in a series of strokes that later claimed his life in Fargo, North Dakota, on April 18, 1996, at the age of ninety-one. Having always been a self-proclaimed "farmer at heart"[373] and with his conviction of character, he had risen from a hard-scrabble teenage "flunky" in the NPL offices, to a Georgetown law student, let go from the Capitol Police force, a Depression-era upstart attorney and World War II veteran, to an influential force in regional and national law and civil service to the public.

His transformation within the scope and power of the legal system in the United States encompassed a set of principles and modern, forward-thinking jurisprudence not often witnessed in prior centuries of American law. Yet, Davies achieved a judicial progressivist sensibility without activist intentions; nor did he operate with staunch conservatism. His expressed goal was to rise to his responsibilities and have the courage to serve only the Constitution and the people of the United States. He refused recognition for his accomplishments, revealing his belief that his decisions were in actuality unremarkable and a mere demonstration of the rule of law, rather than the exception. Still, the impact of his life, legal determinisms, and career rose in prominence. The founders crafted the judicial branch to protect the rights of citizens and Davies held the law as sacrosanct while never forgetting the core humanistic elements around which the entire system

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[373] Carlson, "Davies Interview," Tape #35.

revolved. As a judge, his actions elevated him above the standards of his time, propelled progressivism throughout the halls of justice, and left a legacy of legal and human significance rarely matched by others at such pivotal points in history.

Even in the twilight years of his career, Davies devoted one week a year to travel and sit on the bench in Washington D.C. where he oversaw a variety of both conventional and contemporary cases. However, recalling his conversation with Colonel Charles Marsh nearly fifty years prior, Davies still harbored no desire to become a "Washington bum" and returned to his home state following an abbreviated stint paying a homage of service to the city that helped shape his professional character and judicial outlook. Still, returning to Washington D.C. to serve on a regular basis not only confirmed his decision to remain a North Dakotan and judge with deep roots in the northern plains, but laid bare a lifelong desire to be and remain relevant to the ever-changing national conversation of the federal law and its continual intersection with society and politics.

As was an underlying narrative of his career, Davies was not content to contain his ability to advance the practice of law or restrict his efforts to elevate legal standards and humanitarian practices to municipal, state, or even regional significance. At the same time, part of his success was his ability to create a counterbalance to his ambition by not becoming immersed in political in-fighting or acting as a simple "yes man" in the name of political favor for he had already witnessed his fill of people pleasing for the sake of posterity and patronage while serving in the army during World War II. Echoing the "very crusty old lawyer" from whom he had solicited advice hours after receiving his nomination to the federal bench, Davies' active agenda in the latter days of his service illuminated a desire to not become a judge who thought "of little but retirement" in his waning years, but rather a judge, citizen, and person who not only understood

the contemporary issues faced by Americans and the law, but to also be able to contribute to the ongoing progression and evolution of the law itself to the very final days he was able to be of able-bodied and mind of service.

A stroke proved to be the debilitating blow, but not before he was able to see and pass along a marquee brand of cerebral sincerity to next generation. At the same time, his service both secured and advanced a new awareness of progressivism in the judicial matrix of American law. Davies stood as an arbiter who was not trapped by convention nor unafraid to move and advance the bar of expectations of the law beyond standard acceptance of the day. When he stated, "I have a constitutional duty and obligation from which I shall not shrink. In an organized society, there can be nothing but ultimate confusion and chaos if court decrees are flaunted,"[374] he delivered on that promise he made on the same day he ordered the immediate integration of Central High School in Little Rock, Arkansas, on September 7, 1957, and in every decade of service thereafter. Irrespective of the consequences of breaking with the socio-political mainstream with his decision of national significance in Little Rock, his on-record philosophy publicized an unintended introduction of a progressive judicial ideology that had begun to solidify in the twentieth century understanding, importance, and impact of the law in the United States.

What many once viewed as an aberration, Davies' ultimate legacy has since made mainstream. The hundreds of citations of his legal opinions further endorse a prolific facet of Davies' legacy as a judicial progressive. Having demonstrated his ability to pass on his methods and approaches when navigating modern law, attorneys and judges alike continue to reference,

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[374] Associated Press, "Judge's Ruling in Little Rock," *Arkansas Gazette*, Sept. 8, 1957, 1.

cite, and use the power of the progressive precedence of some of his most notable cases. Court documents show that legal professionals have cited *Aaron v. Cooper* (1957) at least 29 times, *Dick v. New York Life Insurance* (1959) 167 times, *Stromsodt v. Parke-Davis* (1966) 21 times, and *Merchants National Bank and Trust Company of Fargo v. the United States* (1967) in 29 cases, all to date but still ongoing and active. Included in the court records are over ten summaries written by judges who have overseen subsequent cases in which attorneys have employed Davies rulings as a basis for their own argumentation, with input from justices of the Supreme Court and at least one published attorney analysis in regards to the importance of Davies' determinisms in the *Dick v. New York Life Insurance* case. The citations stem from cases within varying states across the nation and continue to appear in records throughout the new millennia, with once reference as late as 2019. Although Davies may have passed, the prominence of his work as a judicial progressive of the past continues to inform and influence the legal practitioners and judicial thought of today where he remains a visible figure and no less substantial than when he lived and projected a voice far beyond a physical stature of five feet, one and a half inches tall.

Davies' lifelong commitment to the Constitution and impact on nation's cultural conscious did not limit his legacy to the achievements of his mid to late career either. While he never failed to remember the importance of his roots and the influence of the northern plains on the legal profession in the twentieth century, he remained humble in regard to how he viewed himself and the role of the legal profession in North Dakota. Still, when commenting to Bob Carlson during the 1974 interview, Davies suggested an ardent belief in quality of training and practicing lawyers from North Dakota. Unwavering in his conviction that the state produced hard-working and well-prepared capable legal representatives, Davies also credited the state's

congressional legislature as having had a positive influence on the evolution of the law and the caliber of attorneys that emerged from the region. He noted that there had been changes in the legal progression in the state that challenged lawyers to keep pace with the increasing difficulties of navigating the legal system as part of a more diverse and integrated state and national institution in the modern world, but that many, like he, rose time and again to the demands and contributed to a redistricting of the confines of the practice.

Even though he sat on the leading edge of progress, advancement, and transformation of the law from the local, state, and region to that of national prominence, he would not speak about the significance of his own cases. He instead praised the up and coming generation of attorneys and judges as even more accomplished and capable of arguing cases as the federal and even Supreme Court level than in the past. Davies went on to attest to the growing virility of the legal standards of the state with the bar exam having increased in difficulty in concert. In fact, he went so far as to say that he had yet to see any bar exam, in reference to the legal profession as an institution, "better than North Dakota."[375] He asserted that legal representatives from a "small state," though strange at first blush, stood on par with those from the more notorious coastal sectors by citing Phillip Vogel of the Vogel Firm of Fargo. In Davies estimation, despite being able to "name man after man [from North Dakota] that's capable of trying a very complex lawsuit," Vogel was a prime example of the northern plains' ability to churn out lawyers capable of holding their own at the highest levels of legal argumentation.

Davies' esteem for Vogel grew from the federal judge's observation of the young upstart attorney when Vogel took a case that began in Davies' North Dakota courtroom to the United

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[375] Carlson, "Davies Interview," Tape #35.

States Supreme Court, despite never having argued a case at that level. The established judge extolled Vogel as a "very accomplished lawyer"[376] and expressed admiration that it "didn't bother him one bit" to practice in the highest court any more than at any other. Yet, Davies did not isolate his contention to a single practicing attorney, but spoke openly of his belief that North Dakotan lawyers were often capable of outpacing many from both coasts in terms of preparedness, intelligence, education, and work ethic. Like Vogel, he remarked how other attorneys were "not afraid of anything…nothing frightens them" because, according to Davies, he had witnessed time and again a willingness, like his own, to immerse themselves in the law.[377] He spent countless hours doing what those in their profession were trained to do in order to uphold and elevate the standards of the practice. Davies further noted his high respect for the men's efforts for they held the singular responsibility of knowing what was right and what was wrong as arbiters of the law in which every case was of consequence regardless of the size and scope of the courtroom or socio-political pressures from the outside.

Davies pointed to the inherent similarities to his own progressive judicial ideology, yet he avoided including himself among the trove of legal practitioners he exalted as having emerged from the region and imparted a higher standard of legal influence across the country. In what was more often the exception than the rule in the modern changes of American jurisprudence in the twentieth century, Davies recognized the power of the position he and others in service to the law held, but upheld a self-awareness of his own fallibilities as well as those on behalf of the collective whole of the profession. In the words of a political acquaintance, Senator Usher

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[376] Carlson, "Davies Interview," Tape #35.
[377] Carlson.

Burdick, Davies never failed to demonstrate where the "bear went through the buckwheat,"[378] but he did not view himself as an individual actor of influence and instead as a part of a collective whole. Not one to self-aggrandize or accept credit for his own ability, Davies remained silent on the subject of his accomplishments. It was the attitude of his actions that spoke volumes on his behalf and transformed his career into a legacy as a "giant among us"[379] upon the shoulders of which later generations stood as proof of his ultimate, though unintended, influence.

Both at the time of his rulings and few points thereafter, Davies would not accept any accolades for the outcomes his rulings that were seen by many as resolute accomplishments. The honors he received nonetheless validated his choices as progressive departures from the status quo and setting a course for a new narrative in the history of the judiciary as well as the modern-day power and practice of the law in the United States. *Time*, *Newsweek*, and *U.S. News and World Report* were a few of many publications to report on the ramifications of Davies' judgements during the Crisis in Little Rock.[380] *The Minneapolis Tribune* described a "wiry toughness" and jurist of "unyielding principles" while the *New York Herald* identified his role in the case as "an example to remember." The *New York Times* stated that Davies had issued a "landmark decision on racial integration in our nation," and the *Catholic View* said that he had "made integration a fact rather than a theory" and named him "Catholic Man of the Year" for his progressive ruling.[381] Still, in a testament to his humility following the case in Little Rock, Georgetown University Law School sought to name him the "outstanding alumnus" for 1958, but

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[378] Carlson, "Davies Interview," Tape #35.

[379] Erickson, "Remembering Judge Ronald N. Davies," 210.

[380] "Clippings from *Time, Newsweek*, and *U.S. News and World Report*," folder 8, box 4, Davies Collection, UND.

[381] "Clippings from *The Minneapolis Tribune, New York Herald, The New York Times, Catholic View*," folder 8, box 4, Davies Collection, UND.

Davies declined to attend the awards ceremony, stating his belief that the timing of the publicity and recognition was inappropriate because the case was yet to be closed.[382] In further appreciation of his influence, a number of organizations honored his career as an achievements with sundry high-profile awards, one of which included the United States Senate Appropriations Committee's approval in 2000 to rename the Grand Forks federal building and courthouse the Ronald N. Davies Federal Building[383] (see fig. 10). That was perhaps the most poignant distinction given his childhood desire to one day serve in the courtroom he had observed and felt as a youngster.

Fig. 10. Ronald N. Davies Federal Building and U.S. Courthouse. The Ronald N. Davies Federal Building and U.S. Courthouse was among the first monumental civic buildings in Grand Forks. Originally completed in 1906, the building was envisioned to be a majestic Post Office and Federal Courthouse at a time when Grand Forks was achieving increasing prominence in the agricultural hub of the Red River Valley. Created by U.S. General Services Administration, date unknown. From GSA Historic Buildings Online Catalog. https://www.gsa.gov/historic-buildings/ronald-n-davies-federal-building-and-us-courthouse-grand-forks-nd.

[382] Tharaldson, *Patronage*, 79.

[383] Historic Buildings History, *Ronald N. Davies Federal Building and U.S. Courthouse*, date unknown, digital image, 126 x 180px., United States General Services Administration, Washington, D.C., accessed November 23, 2020, https://www.gsa.gov/historic-buildings/ronald-n-davies-federal-building-and-us-courthouse-grand-forks-nd.

The continued recognition he received before and after his retirement solidified the heritage of his effectual change. The University of North Dakota Alumni Association bestowed upon him their highest honor, the Sioux Award, in 1979. He was also inducted into the university's Athletic Hall of Fame and allotted the North Dakota Bar Association's Distinguished Service award in 1980. By the age of 82 in 1987, Davies was finally willing to accept acknowledgement of the positive impact of his legal decisions when Governor George Sinner presented him with the state's highest honor, the Theodore Roosevelt Rough Rider award as the twenty-first recipient and only judge to be welcomed into the Rough Rider Hall of Fame. In attribution to his legacy in the new millennia, the City of Fargo held a dedication ceremony on August 21, 2011 to honor the judge and commemorate the new high school that bears his name. While Supreme Court Justice Stephen Breyer was scheduled to deliver the keynote address at the ceremony, but was prevented from attending due to weather delays, the Honorable Myron H. Bright, Circuit Judge for the United States Court of Appeals for the Eighth Circuit instead spoke on his behalf. In Bright's estimation, his dedication was in deference to two types of heroes, the Little Rock Nine student champions and the judicial hero Davies as having encapsulated the conduct and rulings in a case that began a great movement that the nation needed beginning with the desegregation of public schools as a "truly great moment."[384]

According to a separate tribute published by the *Grand Fork Herald* upon his transition into senior status in 1971, Davies did not measure his cases by either money, as with the lengthy lawsuit on behalf of Shane Stromsodt against the Parke-Davis Company, or headlines, as with the cases in Little Rock and San Francisco. By treating all cases alike noting that all were

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[384] Bright, "Ronald N. Davies, My Friend," 16.

important to the litigants, Davies' unintended activism captured the poignant advancement of both his career in public service and a greater understanding of the law and its adjudicates in the modern era. Underscoring the purpose that he brought to the UND track team in his undergraduate days by running through snow along the railroad tracks to strengthen his legs and then set a school record for a ten-second one hundred-yard dash, Davies had transformed the trait into "the fastest tongue in the west."[385] Those on both sides of the bench revealed their thoughts on Davies' humor as part of a singular courtroom dynamic in terms of his dedication to service and ability to insert a light-hearted comment designed to "take the tension away, just a little bit" when lawyers got too involved in their arguments while in his courtroom.[386] Many continued to reference his hard work ethic and willingness to accommodate his own schedule to the necessities of the court, noting that he put in long hours at night, on weekends, and holidays when necessary to provide speedy justice.

In fact, by going on record and quipping that he had "never known a federal judge to expire from overwork" and that hard labor never bothered him, Davies added a deeper dimension to his unwavering commitment to social justice and civil rights through his use of the law. The *Grand Forks Herald* went on to conclude that the same sort of dedication was apparent in the long years that Davies had served as police magistrate and a practicing attorney before rising to a seat at the federal bench, during much of which time he was also executive director of the North Dakota Bar Association and gave his time to helping out the fledgling Legislative Research Council (LRC) draft bills and check them for legal form when the LRC had only one lawyer on its staff. In both an honest and candid statement, the editor of the *Grand Fork Herald* captured

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[385] Bright, 18.
[386] Bright, "Ronald N. Davies, My Friend," 16.

one essential element of Davies' influence and enduring legacy by stating that "he had the mark of greatness then" and that "he has never lost it;"[387] a sentiment that Davies, in the true spirit of his nature as an unintended activist, never uttered himself.

In every official statement, Davies maintained that he was acting as any other judge, but the praise for make the just decisions based upon the individuals suggests a social and political consensus otherwise. The Crisis in Little Rock proved that Davies was not prone to taking a path of least resistance. In the case of integration, he chose to make a progressive decision, despite the risk to his early reputation as a federal judge, a far-reaching resolution given the racial climate and circumstances of the time. But, he did not lose sight of the individual person or people around whom the case revolved. Davies made a concerted effort to balance his oath to the Constitution and rule of law with the human conditions to which Lady Justice was not always blind. As a result, he emboldened other judges to consider basing their decisions not on a duality of liberal activism or conservative restraint, but instead on a footing of seeing people over popularity or politics, thus transforming Lady Justice's historic bandages into the blindfolds of judicial progressivism. As a result, Davies was leading the way toward a new understanding of citizens' rights and the obligations of the law to uphold and enforce the public's guaranteed of equal protection regardless of race, economic class, or social or political affiliations.

Part of his legacy rests in the fact that Davies was able to see the people in on the other side of the bench, not just the Gilded Age's politics and protections of big business as in the *New York Life* and *Stromsodt* cases. By including the protection of every citizen within each consideration, he struck a new tone and set forth a new understanding of the public's rights and

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[387] "Tribute to Davies," *Grand Forks Herald*, Thursday, August 26, 1971, 4.

relationship within the boundaries of the law. His frankness with his light sentencing and public opinion after the Alcatraz Indian Occupation proved another instance where he was willing to sacrifice personal vestiges for the protection of the public good in the face of government threat.

So too did Davies continue to be a force in the public arena of service outside of the courtroom as the president of the Chamber of Commerce, leader of the Elks Club, head of the Jaycees, the American Legion, and the Knights Club, twice leading two March of Dimes fundraising events, all of which included an ongoing membership with the American Red Cross. By all accounts, Davies remained active engagement with the community throughout his life.

Even though the balance of power had started to tip in favor of the judiciary during the course of its history, Davies ignored the opportunity to hedge his bet and settle into one side of a polarized purview or the other. He instead contributed a selfless legacy to the next phase of forward growth of America's system of justice. He did not profess to be a hero or view himself as anything more than a person attempting to do the best job possible and uphold a sworn oath to the Constitution. Throughout his career and life, Davies never claimed to be acting with the intent of leaving a footprint of activism or defiance. Yet, because he was not motivated by adulations, political favor, or personal retributions, he imprinted a legacy of humanistic honor, integrity, and a progressive directive for the judiciary in modern legal thought. By the end of his life and after his passing, Davies paved not only a different road for judicial action, but also set into motion a rethinking of other judges whose memory have too been obscured for having chosen a road less travelled and yet who have secured progressivism's legacy by a path into the future through the halls of justice.

10. CONCLUSION: PUSHING PROGRESS

In 1881, Oliver Wendell Holmes maintained that, "the life of the law has not been logic; it has been experience," whereas two decades after the century's dawn in 1921, Benjamin Cardozo viewed the law as a result of logical consistency, which had crafted the symmetry of the legal structure as an institution. [388] Further still, by 1974 when remarking on the influence of the judiciary, Davies lamented that those critical of judges "forget that we're frail; we have all the qualities of a human being that any other profession has! We're just men; feet of clay."[389] Yet, taken together each men's views and differing experiences reflected a shared fundamental belief that the law still culminated in a "strange compound which is brewed daily in the caldron of the courts."[390] Despite their variances in time, space, and place, each one recognized and embraced the need to modify and progress in their judicial ideology and philosophy in order for the law to advance beyond the inequalities and restrictions of the past. Unbeknownst to them at the time, their individual jurisprudence had contributed to a departing course directive for the future of the American legal system.[391]

For King, when expanding on his sentiments while imprisoned in Birmingham, Alabama in 1963, viewed Americans as, "caught in an inescapable network of mutuality, tied in a single garment of destiny."[392] He reiterated the notion that no person could escape injustices experienced in one sector of society for the effects rippled throughout each corner of the nation. King refused to entertain ideas of exempted actors and insisted that "Anyone who lives inside the

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[388] Holmes, *Common Law*, xiii.

[389] Carlson, "Davies Interview," Tape #35.

[390] Cardozo, *Nature of the Judicial Process,* 10.

[391] Although there exists movement towards an expanded understanding of progressivism in present-day terms, the overall scope of this dissertation does not extend the use of "progressivism" into contemporary purviews.

[392] King Jr., *Letter from the Birmingham Jail*, https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

United States can never be considered an outsider anywhere within its bounds."[393] Contemporary scholarship from both the New Civil Rights history and New Social Movements fields acknowledge King's assertions and help shed light on the persistence of similar struggles that continue to plague contemporary movements like BLM, March for Women's Lives, LGBT rights', and the Indigenous Peoples Movement in the twenty-first century. Inaction from those outside the social and civil movement communities have allowed institutional problems to persist in past and present. Yet many did not always observe the movements as outsiders and share in others ambivalence as King had suggested. Some, like King and his millennial predecessors, recognize that no one is immune from the societal moors of discrimination and injustice. Many took action when confronted with the liberty of their choice. Still, action and involvement did not exalt anyone above those standing in peripheral silence, but instead validated King's position by proving that all Americans are directly affected by the direct and indirect measures of each other.[394] In King's spirit, Davies did not feign a persona of valor for the decisions he made. He avoided claims that he was a heroic outsider or any different than his fellow Americans. Rather, his actions reflected a nation harboring communities who continued to struggle against centuries of systemic oppression and injustice. Where the country's cultural forces had stacked the cards of judicial recourse in favor of the socio-political mainstream and racial majority for the greater part of history, those like Holmes, Cardozo, and Davies had throughout their careers asserted that the Constitution made blind the law to the human discrepancies in race, social and economic standing, and political creed. Just as significant, their actions proved that experience, mistakes,

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[393] King Jr., *Letter from the Birmingham Jail*, https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

[394] King Jr., *Letter from the Birmingham Jail*.

and precedence also existed to lend an individual and elastic responsiveness to understanding, practicing, and enforcing the law throughout its continued course of historic evolution. Neither Holmes or Cardozo, nor Davies sought credit for their contributions. Their focused attention to both the boundaries and flexibility of the law at the center of humanistic interpretation allowed them to think, work, and act not with either judicial activism or restraint to uphold the majority-consent of the law of their time, but as individuals with a legal sensibility aimed at balancing the scales of justice through the progressive tenets of the late nineteenth and early twentieth centuries.

Although political pressure can direct a president's judicial nomination, it remains the singular discretion of the appointee to either reflect a party's platform or exercise their jurisprudence to move beyond the existing state of public affairs, whether intended or not. Few systems of government and legal structures afford such ongoing and sweeping innovation that can be driven by a single person's actions, but due to the personal, public, and private influences and experiences, Davies developed and applied an open, progressive, and evolutionary interpretation of human rights to the law that he loved, practiced, and judged throughout most of his live. His devotion to maintaining a commitment to people, not politics on behalf of the Constitution he served transformed him into an influential promoter for the advancement of civil rights and social justice within the legal institutions of the twentieth century.

Absent of explicit intention, Davies' historic decisions of the twentieth century took the establishment of judicial review of the 1803 Supreme Court case *Marbury v. Madison,* and helped change the meaning of Arthur Schlesinger's judicial activism in the modern vernacular to that as one of judicial progressivism. The nation's founders did not foresee the inability of the legislative and executive branches to reach a compromise and came to rely on the courts for

resolution. The impasse therefore generated a greater power for the courts and had created the space for Davies' role and vigor as a federal judge to not only redefine the power and politics of the judiciary and the influence of an individual's inimitable jurisprudence, but also create and define a new category of judges in the modern era of United States history.

However, even the history of the courts is not exempt from the socio-political influences of the mainstream consensus. Davies' own actions within a position of considerable power characterized the larger societal impact of the singular decision from one judge. His actions on behalf of the legal system further epitomized the modern judicial ability to both enforce a controversial stance as a choice, but also as an echo of an ongoing desire for change and progress toward an equal and all-inclusive access and allocation of institutional resources for every citizen. Yet, policy and practice have often manifested as two opposing sides as neither are self-enforcing nor self-correcting within the confines of the law. Davies chose to depart from the activist or restrained choice and was not bound to echo the socio-political interests of a few powerful figures at the peak of influence. Instead, his role as an unintended advocate for many who existed on the margins transformed into that of a judicial progressive; an independent public servant who strove to abandon the sins of the past and embrace a legal legacy which sought to correct the problems of democracy and corruption and balance the scales of civil rights and social justice for all Americans.

Without knowing it, Davies became part of a long lineage of adjudicates, from Supreme Court Justices John Marshall, Earl Warren, William Rehnquist, John Roberts, legal philosophers like Holmes, John Chipman Gray, and Akhil Reed Amar, and even lesser-known judges like the Honorable Judges J. Skelly Wright, Frank M. Johnson Jr., and Constance Baker Motley, who used their interpretation to push the legal system beyond the exclusions and restrictions of the

past and form the basis of a larger progressive movement as a new category and new standard of the law. The also informed the present and helped define the future. As individual and a collective whole, they each helped mobilize progressive policy into practice within the law and secure a path for which judicial progressivism can expand into the future in concert with the nation's ongoing social, political, and cultural changes.

Davies' reached across regional or Civil Rights Era boundaries and cast him as national figure in new aspects of legal understanding, meaning, and historical significance. His rulings defied the ethics as established by society's majority-consent in the law at the time. His determination to uphold an egalitarian legal standard solidified a renewed consideration of the ways in which a single person can stimulate a modern national consensus within the broader American legal institution. While fighting against an entrenched historical precedence of opposite action, Davies' life and career reflect a historical notion of importance of the role, application, and influence of law-based code of ethics. His decisions, though not intended as direct activism, imparted lasting cultural change in twentieth-century civil rights and social justice.

Throughout his life, he stayed true to an idea of individual progress and was committed to battling the pitfalls of democracy and corruption. By the time of his passing, Davies had infused a forward-thinking and future-focused current into the continuing growth of the judiciary. Through his civil cases, decisions in the Little Rock Crisis, and outspoken handling of the trial for members of the Alcatraz Indian Occupation, Davies defined a way to keep progressivism alive by augmenting his own jurisprudence with the larger social and political progressive ideology. As an unintended activist, Davies' courtroom character solidified the melding of twentieth-century political philosophy, and judicial influence into a larger cultural shift that

brought many marginalized minority groups into the mainstream of a progressive understanding of civil rights and include the legal system in the expansion of progressivism. Davies' service to the Constitution and public broke rank with those who view judges as politically driven within the duality of only judicial activism and restraint. An account of his life transforms the entrenched parochial notions and revises the future outlook of the judiciary to show how a judge was able to use his position to affect change without suspicion of biased motivation.

The lives and public work of judges at the federal level, like Davies, remain a less recognized component of a national social movement that defined over a century of judicial change. As federal district judge from the northern plains, his methodology encapsulated a progressive code of ethics that applied to the cases and set a decisive precedent within the most divisive instances. While his life, career, and influence have lingered on the public periphery, he nevertheless often operated at center of large-scale national action that captivated many in the United States and the international community throughout his five decades of service and sacrifice.

In a wider context, Davies' life and career compels a greater consideration of both the northern-Midwest region and the cultural consequences as a result of the application of judicial power to contemporary challenges of the law and its advocates. Permanent changes could not happen without people like Davies who helped stimulate the growing civil rights movement from outside the South and within the legal system to help create the fuel needed for a significant and permanent shift in fundamental human rights. While the activism was unintentional in Davies case, he illustrated his decisions as both an ultimate choice and echo of his upbringing and social and political inculcation within the Republican network of the northern plains and the national power of the justice system. The mixing within the cauldron of the courts fomented a

constructive touch. His place in the federal court system not only fostered an agent of change, but also strengthened a progressive point of departure within the legal institutions of the United States.

Having stood resolute within moments of transformative conflict and rendering legal decisions that reformed the social, political, and racial complexion across time and various regional landscapes, Davies' life and career still reverberate through his legacy as an unintended judicial progressive. He served his profession by developing and instilling a type of social justice that favored the civil equality within his interpretation of the Constitution and law in the spirit of a more egalitarian society. Many of his cases validate a continuity that highlighted his adherence to enforcing the power of the Constitution through his tactful presence in United States law. The outcome of his legal determinisms underscored a unique and individual evolution of his presence within the federal legal system at the intersection of extensive shifts in American society, politics, and civil rights. Without knowing it, Davies had also crafted his own relevance to the law as he redefined judicial activism as judicial progressivism within the social, political, and legal histories.

As notable, the progressive and activist actions as those executed by Davies continue to warrant further inquiry in understanding the full impact of his decisions within the transformation of American politics, the law, and society. Although focused study of his life crystallizes the meaning of the complex race and civil relations across multiple generations and well into the future, it also alters an understanding of the role of the Northern Plain in affecting lasting change in America's progressive movements through an interdisciplinary approach of history and law. As is apparent through its ongoing elasticity and transformative growth, neither the law nor society is static. Both remain fluid and susceptible to further influences,

reinterpretation, and revision. As such, so too will the role of judicial progressive continue to open the channels of inquiry into other historical events, factors, and figures who, like Davies, ignite the forces of change with their singular thoughts and actions.

Where independent Vermont Senator Bernie Sanders stated, "We must remember that the struggle for our rights is not a struggle for one day, for one year, or one generation—it is a struggle of a lifetime and one that must be fought by every generation," a synthesis of Davies' career and place in history both characterizes Sanders' modern consciousness of public service and the ways in which his life has impacted and changed the understanding of civil rights, social justice and the role of law and the federal judiciary in the modern era. Though conclusive in highlighting him as a prominent figure within the legal and ethically progressive moorings, the door remains open for other scholars, judges, and activists to walk through and add narrative and further push the conjecture of judicial progressivism forward.

A history of Davies acts as a connection between the past to inform the present and future. His position within the progressive movements solidifies the influence of the northern plains throughout major social, cultural, political, racial, and legal conversions in the United States. His decisions emphasized multiple historic connections within the broader racial and political history of twentieth-century school desegregation, civil and human rights, and a fresh notion of judicial progressivism, while his actions, though not intended as explicit progressivist action, raised the role of the northern-Midwest region within a national consciousness in American progress. Davies, with his decisions and his career, instead illustrated an undefined path at the intersection of politics and the judiciary within the changing channels of the legal

system.[395] As scholars and the public continue to deal with the most seminal events, figures, and legal repercussions of civil and progressive movements, the people, like Davies, who created a lasting transformation and directly places the northern plains within a national movement and transformation can no longer be overlooked when considering the historical and legal effects of their decisions.

Davies ultimate influence cast his place of significance as both a choice, that he mobilized his position as a federal judge to affect lasting change in civil and human rights, and an echo of historic social and legal change. He was also a part of the contemporary legal transitions that championed race and human rights progress regardless of the political climate or position of the pendulum at the time of his decisions. Although scholars like Schlesinger and his contemporaries identify individual judges and justices who characterize the definition of either judicial activist or judicial restraint in their determinisms and opinions, the system and its servants are not absolute dualities in nature. Davies' career and courtroom candor substantiated that despite the concerted efforts of many from the grassroots to the White House, especially throughout times of tumult and uncertainty, there still existed a space or a middle ground for a single federal judge to exercise their power absent of personal or political motives and define a third category of judicial progressivism.

Where Japanese philosopher Daisaku Ikeda stated, "We are not merely passive pawns of historical forces; nor are we victims of the past. We can shape and direct history,"[396] a synthesis of Davies' overarching career and ultimate place in history not only represents a manifestation of

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[395] Schlafly, *A Choice Not an Echo*, 18.

[396] Daisaku Ikeda, *The Living Buddha: An Interpretive Biography* (Santa Monica: Middleway Press, 2008), 21.

Ikeda's social consciousness and sensibility, but also the ways in which Davies' life has impacted and changed a collective understanding of civil rights and the role of law and the federal judiciary in the United States. Davies was an example of how understanding of the past informs the present, which influences the future. Though conclusive in highlighting him as a prominent figure within the legal and ethically progressive moorings, the door remains open for other scholars, judges, and activists to add to narrative and further push the conjecture of this work forward.

Davies' daughter, Jean Davies Schmith, once quoted her father as having said, "All that counts at the end of the day is what you see when you look in the mirror."[397] Davies' lifetime of action speak to the personification of a private testament transformed into an unparalleled civic commitment. For those who either stood in his courtroom or knew him without his judges' robe, often perceived him as larger than life despite his small stature. Like his affable personality was to his physical stature, his judicial impact exceeded the canons of the time. With a disciplined mind and uncommon humility, Davies rose through the ranks and became "a giant among us."[398] His legal opinions have withstood the test of time while still sending ripples of progressive influences through the waves of ongoing change. Although the Little Rock case elevated him to the status of a national figure, his history, character, and pioneering body of work have transformed him into more than the man in the mirror he sought to see at the end of each day. Davies' lifetime of pushing progress became a reflection of growth and gains. For those who will

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[397] Teri Fenneman, "I Shall Not Shrink," *Fargo Forum*, August 26, 2007, accessed March 14, 2017, https://www.inforum.com/news/3012659-judge-davies-step-down-after-40-years.

[398] Erickson, "Remembering Judge Ronald N. Davies," 207.

stand on the other side of the judge's bench, his legacy has also become a mirror imagine of what many want to see when seeking civil rights, social justice, and equality.

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