
SUCCESSFUL STRATEGY, NOT FAILED COUNTERREVOLUTION

Kevin J. McMahon: *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences*. (Chicago: University of Chicago Press, 2011. Pp. xiii, 256.)

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The value of an American political development approach to understanding constitutional change lies in the way in which it provides historical context for understanding contemporary issues. One cannot read Kevin McMahon's *Nixon's Court* without reflecting on the way in which it informs the current debates about the conservative activism of the Roberts Court and about which of the two major political parties is best able to capture the loyalty of working-class white voters. McMahon's excellent account of how Richard Nixon's judicial strategy was driven by his electoral strategy provides ample evidence that constitutional law is indeed shaped by broader political forces. It also challenges some of the conventional wisdom about the impact of Nixon's appointments and his motives for making them.

McMahon relies on extensive research of presidential papers, media coverage, and voting and public-opinion data to demonstrate that Nixon successfully used "the Social Issue" (Americans' fears about social unrest, crime, and busing) to attack the Supreme Court and to drive a wedge in the Democratic coalition (2–3). This insight itself is not news to those who have studied this era, but McMahon's challenge to conventional wisdom comes in his argument that Nixon's judicial strategy was a success (rather than a counterrevolution that failed), that it was "targeted" and "pragmatic" (72) rather than ideologically driven, and that it served Nixon's real goal, which was to create a new electoral majority, rather than some desire to alter fundamentally the Court's interpretation of the Constitution. In fact, McMahon shows quite convincingly that Nixon saw some value in having a Court that *was not* ideologically aligned with the presidency. Particularly in the area of civil rights and busing for desegregation, Nixon sought to move responsibility (and thus blame) for enforcement of the desegregation orders out of the executive branch and onto the courts.

The infamous "Southern Strategy" of the 1968 and 1972 campaigns also comes under close scrutiny in McMahon's analysis. It has long been contended that Nixon intentionally played on the sentiments of white racist Democrats in what had been for many years a solidly Democratic region of the country. While McMahon provides evidence that some Republican strategists were pushing this agenda, and that the emergence of George Wallace's campaign suggested a political opportunity for the Republicans, he provides more evidence that Nixon sought instead a *national* campaign that took advantage of the existence of "the Social Issue" across the country. He was especially interested in the possibilities of tapping into the working-class white ethnic Catholic enclaves in the Midwest and the Northeast, many of whom felt threatened by civil rights advances in fair housing and school

desegregation, as well as the urban unrest of the 1960s. While the South was an important part of this national strategy, McMahon argues that it is a mistake to think that this was Nixon's focus or, ultimately, the sole reason for the success of his judicial and electoral strategies.

Another important factor shaping Nixon's decision making about judicial nominations and electoral strategy was the reality of the ideological splits within his own party and the necessity of negotiating that in both his public comments about the Court and his nomination choices. Looking back through the lens of contemporary politics, it is difficult to remember that in 1968 there still existed a liberal wing of the Republican Party, one that in particular was committed to a strong civil rights agenda. Nixon himself was on record as supporting the *Brown v. Board of Education* decision, so reviled by many of the Southern voters he hoped to attract. He had been vice president when President Eisenhower sent federal troops into Arkansas to enforce the desegregation of Little Rock schools. When President Nixon tried twice, unsuccessfully, to place a Southerner on the Supreme Court during his first term, it was members of his own party that provided some of the votes necessary to block these nominations. McMahon argues that his second-term choices of Lewis Powell (a Southerner but one whose age and moderation made him a less than ideal choice) and William Rehnquist (a Westerner) were driven in large part by his recognition that he would not be able to name a young Southerner who was conservative on civil rights issues. Instead, he chose two nominees with impeccable credentials and respect in the legal community. Similarly, Nixon knew that if he veered too far to the right in attacking the Court or its busing decisions, he risked alienating liberal Republican voters as well. There was still enough of the Party of Lincoln left to counsel caution in pursuing too aggressively the disaffected Southern Democrat.

By 1968, the legitimacy of *Brown* itself had been accepted across much of the country—now the disputes were about how to best remedy the constitutional violation, and whether busing was a legitimate remedy to achieve desegregation. McMahon shows that Nixon's opposition to busing was strategic and nuanced. He emphasized his commitment to the law of the land—that school districts could not require by law that students be separated—while emphasizing the damage to neighborhood schools and educational opportunity for children if they were forced to ride buses to achieve racial balance. McMahon reveals the fine line Nixon walked on this issue, and the way in which this position was ultimately reflected in Supreme Court opinion. In the end, the solution to embracing *Brown* while opposing busing was to distinguish between de jure and de facto segregation, and to support the use of limited busing as a remedy to correct constitutional violations in the Southern states while opposing it for racial balance in the North, Midwest, and West. In fact, the South gained little from Nixon's position or from his appointees. In *Swann v. Charlotte-Mecklenburg* (1971), the first significant busing decision after Warren Burger became Chief Justice, the Court unanimously upheld a

busing plan because of the history of de jure segregation in the school district. It was in the 1974 decision in *Milliken v. Bradley*, a case about busing in Detroit, Michigan, that the Court limited the ability of district courts to use busing as a remedy for de facto segregation. All four of Nixon's nominees were in the five-person majority.

There is little to criticize in this book. It is carefully and thoroughly researched and clearly argued, and offers new insights into an important era that continues to have an impact on our judicial and electoral politics. A reader without a good understanding of modern American history might come away from the book not realizing the importance of the Vietnam War to the politics of the period. McMahon acknowledges the war, but perhaps because his focus is on Nixon's targeted judicial strategy of focusing on busing and criminal procedure, he leaves the impression that "the Social Issue" was the central electoral force of the time. There are also some odd characterizations of a few cases that might only trouble someone who teaches these cases regularly. For example, he discusses the *Cohen v. California* (1971) case as one about profanity rather than political dissent, and the Pentagon Papers case as one about political dissent rather than free press and executive power, but these are minor points. They take nothing away from this very fine piece of scholarship.

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STATE POWER AND CIVIL WAR CONSTITUTIONALISM

Mark E. Neely Jr.: *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War*. (Chapel Hill: University of North Carolina Press, 2011. Pp. 349.)

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In *Lincoln and the Triumph of the Nation*, a Pulitzer Prize-winning historian and our foremost scholar of legal and constitutional controversy during the Civil War seeks to reopen debates that he says have languished since James G. Randall's *Constitutional Problems under Lincoln* (University of Illinois Press, 1926) and Harold M. Hyman's *A More Perfect Union* (Knopf, 1973). Certainly civil liberties in the period have been carefully scrutinized more recently, including by Neely himself in *The Fate of Liberty* (Oxford University Press, 1991), but Neely's project here is to more fully historicize constitutional argument in the period. Recent literature reflects our own constitutional preoccupations whereas Neely now turns his attention to the broader constitutional concerns of the participants themselves, concerns that he says "reached the largest questions of national existence" (17). Rather than supplying a comprehensive history, Neely wants to stimulate