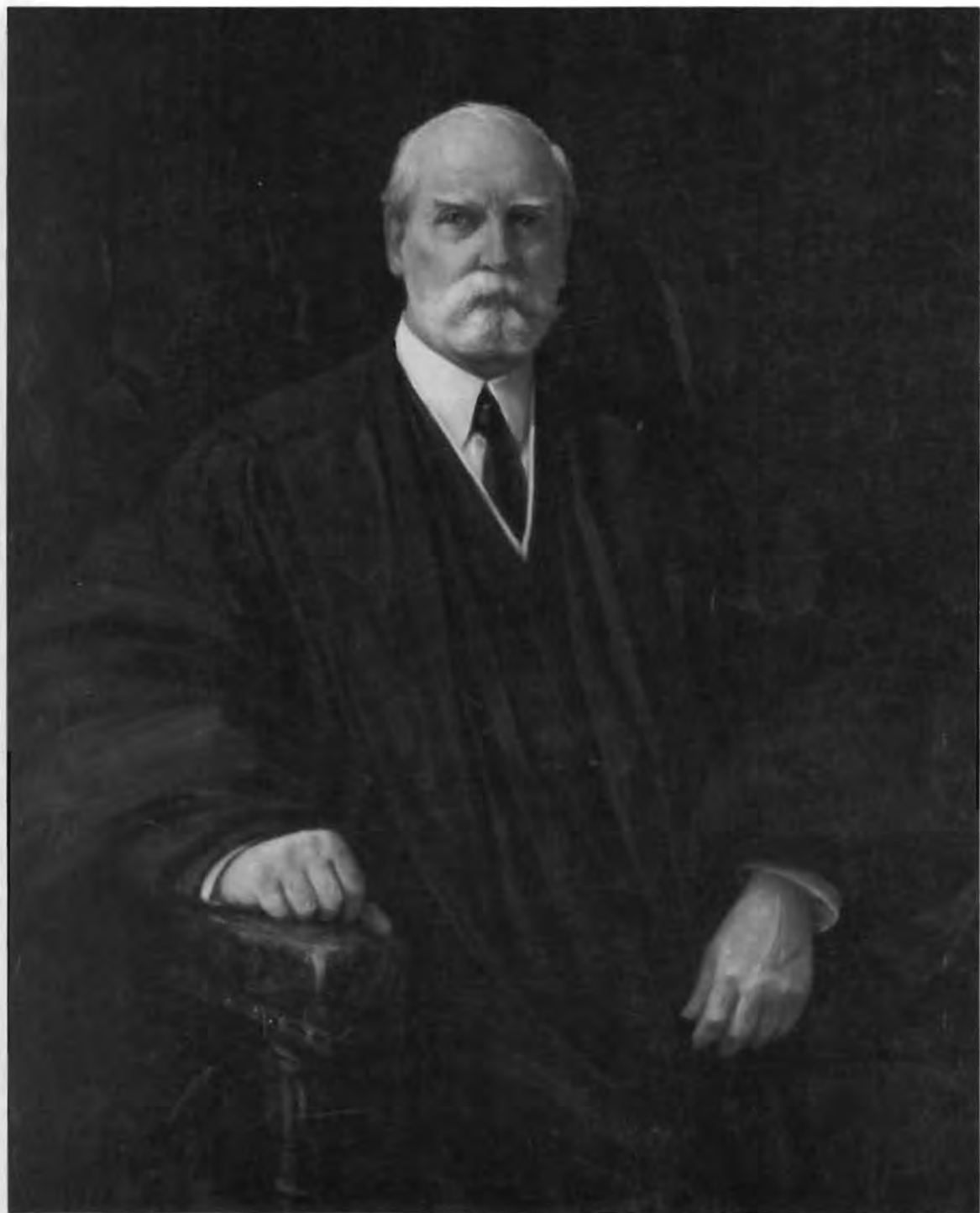


YEARBOOK 1984

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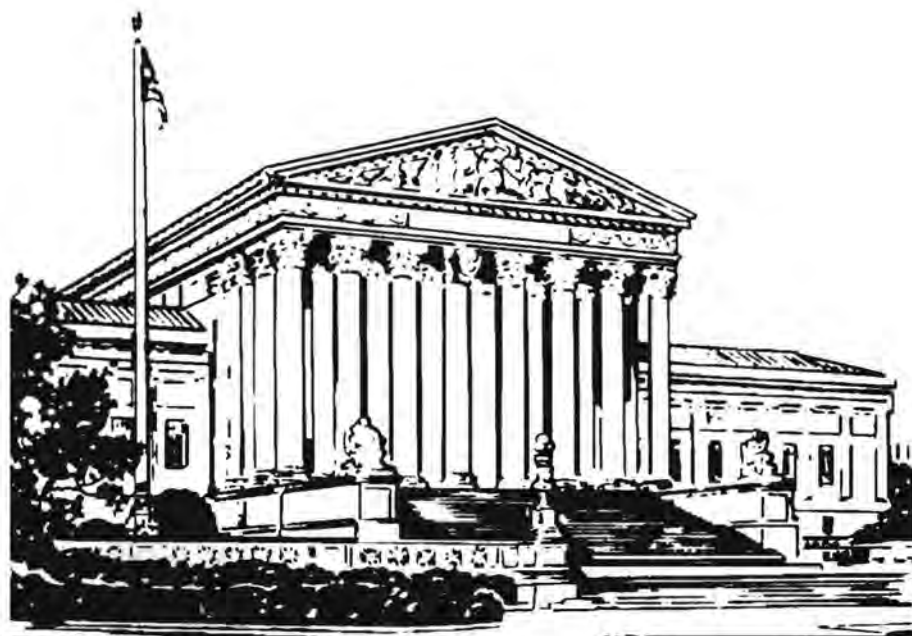


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ELEVENTH CHIEF JUSTICE, 1930-1941



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In Memoriam: William F. Swindler

by Jeffrey Morris

Bill Swindler was a warm human being, a blithe spirit, and a good companion, who brimmed over with enthusiasm for his protean interests and an ever-enlarging circle of friends.

As a scholar, his range was extraordinary and his output prodigious. His background as a journalist equipped him to write with enormous speed, facility, and readability. His range of scholarship was remarkable — from Bracton and Glanville to the Supreme Court; from the framing of the American Constitution to contemporary state constitution making.

That body of work has enduring scholarly value. The series he edited on state constitutions¹ is the standard reference. So is his two-volume history of the Supreme Court in the Twentieth Century.² Of his works he had a special affection for *The Constitution and John Marshall*,³ not just for its subject matter, but because the book was a companion to a series of films made for television.⁴ Thus, he could concurrently please scholars by making available for their home library documents such as the charter of the Second Bank of the United States and lower court opinions in *McCulloch v. Maryland* and *Gibbons v. Ogden*, while still providing a text, which was a superb short introduction to the great Chief Justice, for the general public.

Bill rarely wrote "just for scholars." Not only did he have that gift of writing readable prose, but his enthusiasms were such that he could not refrain from trying to expand the audience for whatever was exciting him. One such vehicle was the *Yearbook* of the Supreme Court Historical Society, which he edited from the beginning (1976), and for which we shared editorial chores for five years. As an editor, Bill was a delight to work with. In that job he was, as in many others, a creator and booster, full of ideas for articles and authors. The *Yearbook* benefited from his rich range of acquaintances whom he could prevail upon to contribute articles; from his mastery of



William F. Swindler
(1914-1984)

pictorial research; and from his ability to work well with printers and justices alike. His familiarity with the literature on the Supreme Court was prodigious. He could call back memories of obscure broadsides from the mid-Nineteenth Century and obscure pamphlets from the eras of Fuller and White. A three decade gap in our ages disappeared due to his warmth and enthusiasm.

The Supreme Court Historical Society was but one of many institutions to which Bill gave his time, his energy, and his ideas. There was his beloved Williamsburg. There was William and Mary Law School, where John Marshall and Thomas Jefferson were educated, and in whose grand tradition, Bill was very much a part. And there were people. Bill cared deeply and worked for his students and for his friends. Always, he was convincing one of his friends to help out another friend or student.

That enthusiasm for scholarship and that love for people was in some measure channeled into the building of new institutions. The existence of

the *Yearbook* of this Society and its first eight issues are the result of Bill Swindler's efforts and his love.⁵ He was in on its creation and guided its

early years. With this, as with so much else, he left us a rich legacy to maintain.

Footnotes

¹ *Sources and Documents of United States Constitutions* (Dobbs Ferry, N.Y.: Oceana Publications: 1st ser., 1973-79 (10 vol.); 2nd ser., 1982-)

² *Court and Constitution in the Twentieth Century* (Indianapolis: Bobbs-Merrill, 1969-74) (3 vol.). The third volume is an analysis of the Constitution itself as interpreted by the Twentieth Century Court.

³ New York: Dodd Mead and Co., 1978.

⁴ "Equal Justice Under Law" (produced by WQED, Pittsburgh in affiliation with the Judicial Conference of the United States).

⁵ The following articles by Bill Swindler appeared in the *Yearbook*:

"Of Revolution, Law and Order," *Yearbook* 1976,

pp. 16-24.

"Robin Hood, Congress and the Court," *Yearbook* 1977, pp. 39-42.

"The Trials of Aaron Burr," *Yearbook* 1978, pp. 18-24.

"Justices in Academe," *Yearbook* 1979, pp. 31-39.

"The Selling of the Constitution," *Yearbook* 1980, pp. 49-55.

"Mr. Chisholm and the Eleventh Amendment," *Yearbook* 1981, pp. 14-18.

"Roscoe Conkling and the Fourteenth Amendment," *Yearbook* 1983, pp. 46-52.

Bill also made contributions to "De Minimis, of Judicial Potpourri," in every *Yearbook* from 1977 to 1983.

President George Washington and the First Supreme Court

by George Washington Nordham

I walk on untrodden ground. There is scarcely any part of my conduct which may not hereafter be drawn into precedent.¹

January 9, 1790

Those words by George Washington were written a few months after he had taken the oath of office as the first President of the United States. As his walk led toward the judicial branch of the federal government, the words had particular prophetic accuracy. This article explores some aspects of President Washington's relationships with the judiciary and the first Supreme Court of the United States. But, first let us briefly identify relationships that Washington had with the law in general.

George Washington wasn't a lawyer; he hadn't been formally educated in the law or even trained in it in anyone's law office. Yet, he developed one of the finest legal minds, according to an analysis made by the chairman of the 1932 George Washington Bicentennial Commission.² Before taking on the duties of President at age fifty-seven, Washington had spent considerable time dealing with legal matters, both in his many public roles and in his wide variety of private activities. Although it is outside the scope of this article to discuss those experiences in details, the following brief summary will demonstrate the extent of his involvement with the law:

On the public side of his life were:

- Seventeen years as an elected legislator in the Virginia House of Burgesses, including membership in three powerful committees: The Committee of Propositions and Grievances; The Committee on Privileges; and The Committee for Religion.³
- Seven years as an appointee of Virginia's Governor to the posts of Justice of the Peace and Judge of the County Court. This court had "wide judicial power as a court of common law, equity, and probate, as well as administrative duties including supervision of public buildings, laying out and improving roads,



As the first President, George Washington enjoyed more opportunities to nominate justices than any of his successors.

and levying taxes."⁴

- Eight years as General and Commander in Chief during the war for independence, with prime responsibility to enforce the Articles of War,⁵ to review courts-martial,⁶ to help define ways to handle captured enemy vessels in Admiralty or other courts,⁷ and to promote a meaningful role for a Judge Advocate in the military.⁸

On the private side of his life were:

- At least thirty-five years dealing with wills, trusts, estate administration, and guardianships. He had the principal duty to administer the sizeable (\$600,000 to \$800,000) estate of his wife's first husband on her behalf as well as on behalf of her two-year-old daughter and four-year-old son.⁹ George Washington also handled the estates of three brothers, two sisters, his mother, a stepson, a stepdaughter, and many friends and neighbors.¹⁰
- At least thirty-five years dealing with deeds, leases, mortgages, rent collections, eviction



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Washington placed three men in the Court's center chair (left to right) Chief Justices John Jay, John Rutledge, and Oliver Ellsworth. Rutledge's recess appointment, however, was rejected by the Senate when it reconvened.

actions, and other aspects of real property law. He owned approximately 63,000 acres in eight states plus choice building lots in the District of Columbia.¹¹

- More than twenty years involvement in corporation and securities law as an incorporator, director, officer, and shareholder in seven private corporations. He is reported, for example, to have written the bylaws for The Potomac Corporation, an inland waterways navigation company.¹²
- Almost fifty years of experience with contracts and employment law as the owner of a large mansion house, Mount Vernon, and its surrounding eight thousand acres that were divided into five separate operating farms.¹³

All these kinds of early experiences impacted on and benefitted George Washington in his role as President. The imprint of the training "necessarily progressed his knowledge of law and his appreciation of those who were trained in that profession."¹⁴ It culminated in his relationships with the judicial branch of the new federal government.

The "bill to set up the judicial courts for the United States" passed the Senate on July 17, 1789 and the House of Representatives on September 17, 1789. It was signed into law on September 24, 1789 by President George Washington.¹⁵ Within a week thereafter, Washington had named persons to fill virtually all the judicial positions in the United States of America. The speed with which he implemented the newly adopted law attests to the importance he assigned to it.

President Washington sent letters to the individuals he had appointed to all these judicial

offices. With the exceptions of the Attorney General and the Chief Justice, the letters were form letters that made the appointment rather than ask the person if he would accept the role. But all the letters emphasized Washington's personal convictions about the importance of the legal process in the new nation. Here are the letters Washington sent:

To Edmund Randolph asking him to accept the office of Attorney General of the United States, letter dated September 28, 1789:

Impressed with a conviction that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and to the stability of its political systems. Hence the selection of the fittest characters to expound the laws, and dispense justice, has been an invariable object of my anxious concern. I mean not to flatter when I say that considerations like these have ruled in the nomination of the Attorney General of the United States and that my private wishes would be highly gratified by your acceptance of the Office."¹⁶

To the District Judges of the United States, the form letter was dated September 30, 1789 and read in full as follows:

Sir: I have the pleasure to enclose you a commission as Judge of the United States for the District of ____, to which office I have nominated and, by and with the advice and consent of the Senate, have appointed you. In my nomination of persons to fill offices in the Judicial Department, I have been guided by the importance of the object, considering it as of the first magnitude, and as the pillar upon which our political fabric must rest. I have endeavored to bring stability and dignity to our national government and I persuade myself that they will discover a due desire to promote the

happiness of our Country by a ready acceptance of their several appointments. The Laws which have passed relative to your office accompany the commission." ¹⁷

The largest number of form letters were addressed to "The Marshals and Attorneys of the Several Districts of the United States." The complete text of those form letters dated September 30, 1789 is:

Sir: I have the pleasure to inform you that you are appointed (Marshal or Attorney) for the District of — and your commission is enclosed, accom-

panied by such laws as have been passed relative to the Judicial Department of the United States. The high importance of the Judicial Systems in our national government, made it an indispensable duty to select such character to fill the several offices in it as would discharge their respective trusts with honor to themselves and advantage to their country.¹⁸

President Washington selected John Jay to serve as Chief Justice. The full text of his letter dated October 5, 1789 is:

Sir: It is with singular pleasure that I address you as Chief Justice of the Supreme Court of the



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Shown here are seven of the eight Associate Justices President Washington placed on the Court during his tenure — counter-clockwise from upper right are: John Blair, James Wilson, William Cushing, James Iredell, Thomas Johnson, William Paterson, and Samuel Chase. (Washington's other Associate Justice was John Rutledge, shown on the previous page, who was later nominated to become Chief Justice.) Unlike with the presidency, where there is a constitutional prohibition against foreign-born individuals succeeding to that office, no such requirement exists for the Court, and two of the seven shown, Wilson and Iredell, were born abroad, in Scotland and England respectively.



Library of Congress

United States, for which Office your commission is enclosed. In nominating you for the important station which you now fill, I not only acted in conformity to my best judgment, but I trust, I did a grateful thing to the good Citizens of these United States; and I have a full confidence that the love which you bear to our Country, and a desire to promote the general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the key-stone of our political fabric.¹⁹

To the Associate Justices, President Washington's form letter dated September 26, 1789 read in full text as follows:

Sir: I experience peculiar pleasure in giving you notice of your appointment to the Offices of an Associate Justice on the Supreme Court of the United States. Considering the judicial system as the chief pillar upon which our national government must rest, I have thought it my duty to nominate for the high offices in that department such men as I conceived would give dignity and lustre to our national character. The love which you bear to our country and a desire to promote general happiness will lead you to a ready acceptance of the enclosed Commission, which is accompanied with such Laws as have passed relative to your office.²⁰

The foregoing letters show one qualification that President Washington looked for: love of our Country. Another objective was "geographical distribution." For example, the initial court consisted of a Justice from these States: New York, Virginia, Massachusetts, Maryland, South Carolina, and Pennsylvania. This geographic diversity made it possible for the first court to be free to get on with its work without any accusations that it was packed with members all from a particular region of the United States. And that intention to maintain a geographical balance was uppermost in Washington's mind throughout his two terms as President. For example, consider his letter to Alexander Hamilton, marked "Private and Confidential," about the difficulties in making appointments to high offices:

What with the nonacceptance of some, the known dereliction of those who are most fit, the exceptionable drawbacks from others, and a wish (if it were practicable) to make a geographical distribution of the great offices of the Administration, I find the selection of proper characters an arduous duty.²¹

Another qualification that President Washington tried to find was experience. In his letter of November 30, 1789 to James McHenry, Washington rejected two proposed names and gave

specific reasons for rejecting one of them, a Mr. Smith:

Age and experience is in my opinion an insuperable objection. For however good the qualifications or promising the talents of Mr. Smith may be, it will be expected that the important offices of Judges shall be fulfilled by men who have been tried and proved.²²

The element of age, as well as health, was a consideration that impacted on Washington's ultimate decision concerning his old friend, Colonel Pendleton. Washington wrote to James Madison as follows:

Mr. Pendleton could not I fear discharge . . . the duties of an Associate of the Supreme Court. But he may be able to fulfill those of the District Court . . . I have no objection to nominating him to (the Supreme Bench) if it is conceived that his health is competent, and his mental facilities are unimpaired by age.²³

In that same letter, Washington confided in Madison of his frustration with the Pendleton situation; he wrote:

I am very troublesome, but you must excuse me. Ascribe it to friendship and confidence, and you will do justice to my motives.²⁴

The difficulty and agony of what to do with his friend Pendleton was resolved by offering him a District Judgeship, only to have Pendleton decline to the embarrassment of President Washington.

Some individuals turned down appointments for a variety of personal reasons. John Marshall, for example, declined to serve as Washington's Attorney General mainly because Marshall felt he required a larger income to support his family. Washington was a realist about such practical things and his letter offering the post to Marshall frankly opened the subject of salary. Washington wrote on August 26, 1795 to John Marshall:

The salary annexed thereto and the prospect of a lucrative practice in this city [Philadelphia], the present seat of the general government, must be as well known to you, better perhaps, than they are to me.²⁵

Yet, other individuals took the initiative and made application for judgeships.²⁶ For example, Joseph Jones asked President Washington to name him to a district court judgeship. In his reply, Washington set forth what was perhaps his most essential criteria of all—"fitness of character." Washington informed Jones that his application had arrived too late because another individual (Cyrus Griffin) had already been named to

that district judgeship. Washington wrote to Jones:

In every nomination to office, . . . fitness of character (is) my primary object."²⁷

And then Washington added some of his thinking for having selected and appointed Cyrus Griffin. He wrote that Griffin was "entirely out of employment" and therefore very likely to accept the appointment.

This circumstance added to the knowledge of his having been a regular student of law, having fulfilled an important office in the Union in the line of it, and being besides a man of competent abilities and of pure character, weighed me in the choice.²⁸

George Washington left many legacies. One of

the finest of all from his life is the manner in which he added respect for and dignity to the law, the legal profession, the courts, and the administration of justice. Washington was one of the staunchest supporters of a system of law to be found anywhere in early colonial America. A particularly incisive comment was made by Daniel Webster on the 100th anniversary of Washington's birth, February 22, 1832. Webster said:

Washington saw and felt the full value and importance of the judicial department of the government. The temple of justice in (Washington's) opinion, was a sacred place and he would profane and pollute it who should call any to minister to it, not spotless in character, not incorruptible in integrity, not competent in talent and learning, not a fit object of unhesitating trust.²⁹

Footnotes

A sixty-five page listing of major books about George Washington's life and career is in Douglas Southall Freeman's *George Washington*, published by Charles Scribners' Sons, New York City, 1948-1957, 7 vols., vol. VI, pp. 437-502. In addition to Freeman's Pulitzer Prize winning story, two biographies attract the attention of lawyers: Chief Justice John Marshall's *The Life of George Washington* in five volumes published by G. P. Wayne, Philadelphia, in 1804-1807 and Woodrow Wilson's *George Washington*, a one volume account published by Harper & Brothers of New York City in 1896.

¹ *The Writings of George Washington*, edited by John C. Fitzpatrick, U.S. Government Printing Office, 39 vols., 1931-1944, vol. 30, p. 496.

² *The History of the George Washington Bicentennial Commission*, U.S. Government Printing Office, 5 vols., 1932, vol. I, p. 145. Commission chairman Congressman Sol Bloom wrote a pamphlet "Washington The Business Man" that contained one section entitled "The Legal Mind."

³ Bernhard Knollenberg, *George Washington*, Duke University Press, 1964, p. 105. See also Charles Moore, *The Family Life of George Washington*, Houghton Mifflin & Co., 1926, p. 71.

⁴ Knollenberg, *George Washington*, p. 106. See also *History of GWBC*, vol. 2, p. 169 for speech by Hon. R. Walton Moore to Congress entitled "George Washington as a Judge."

⁵ *Writings*, vol. 4, p. 206.

⁶ *Ibid*, p. 187.

⁷ *Ibid*, p. 141.

⁸ *Ibid*, vol. 24, p. 392.

⁹ *Ibid*, vol. 2, p. 319.

¹⁰ Worthington Chauncey Ford, *Wills of George Washington and His Immediate Ancestors*, Brooklyn, N.Y., Historical Club, 1893, p. 38.

¹¹ John C. Fitzpatrick, *The Last Will and Testament of George Washington*, The Mount Vernon Ladies Association of the Union, 1972, p. 42.

¹² *History of GWBC*, vol. I, p. 157.

¹³ Thomas Nelson Page, *History and Preservation of Mount Vernon*, Mount Vernon Ladies Association of the Union, 1910, p. 44. See also *The Diaries of*

George Washington, edited by Donald C. Jackson, The University Press of Virginia, 6 vols., 1976-1979, for information about Washington's private affairs, especially while he was at home.

¹⁴ *History of GWBC*, vol. 2, p. 172. Quotation is by Virginia's Congressman R. Walton Moore.

¹⁵ Freeman, *George Washington*, vol. VI, p. 218. See also James Thomas Flexner, *George Washington*, Boston, Little Brown & Co., 4 vols., 1965-1969, vol. 3, p. 210 for the chapter entitled "Fleshing Out the New Government." See also Hendrick Hartog, *Law in the American Revolution and the Revolution in the Law*, a collection of essays published in 1981 by the New York University School of Law.

¹⁶ *Writings*, vol. 30, p. 418.

¹⁷ *Ibid*, p. 425.

¹⁸ *Ibid*, p. 424.

¹⁹ *Ibid*, p. 428.

²⁰ *Ibid*, p. 424.

²¹ *Ibid*, vol. 34, p. 347.

²² *Ibid*, vol. 30, p. 470.

²³ *Ibid*, vol. 414.

²⁴ *Ibid*, vol. 415.

²⁵ *Ibid*, vol. 34, p. 287. John Marshall's personal situation, among other factors, had changed by the year 1801 when he accepted the role of Chief Justice and served with distinction until 1835.

²⁶ Freeman, *George Washington*, vol. VI, p. 219. Among the more famous applicants for key positions in government were: Philadelphia's law professor James Wilson who asked, nine days before Washington was inaugurated as President, that he be named Chief Justice. Another applicant was Arthur Lee, a lawyer at Westminster Hall, who told Washington that he was anxious to resume his career in the United States as an Associate Justice of the high court. James Wilson had taught law to George Washington's nephew, Bushrod Washington. Bushrod was appointed to the Supreme Court by President John Adams and served in that office for thirty years.

²⁷ *Writings*, vol. 30, p. 467.

²⁸ *Ibid*.

²⁹ *History of GWBC*, vol. 2, p. 179.

Seditious Aliens and Native "Seditionists"

by William F. Swindler

The American Revolution, it has frequently been pointed out, was not a revolution so much as a War of Independence, its more nearly official title. From the Declaration and Resolves of the First Continental Congress in 1774 to the completion of the American constitutional rationale in the Bill of Rights in 1791, the Americans insisted that they were the heirs of the British constitution, ultimately compelled to declare their separation from England in order to secure to themselves the rights of Englishmen in the New World.

The French Revolution much more closely followed the dictionary definition of the word: "a sudden political overthrow brought about from within a given system," or "a seizure of state power by the militant vanguard of a subject class." The insurrectionists of 1789 had no well defined constitutional heritage to claim as a birthright. The *philosophes* of the *ancien regime*—Montesquieu, Rousseau and Voltaire—had theoretical views of constitutionalism which appealed to Adams, Jefferson and others of the American Founding Fathers; but they had no intellectual influence upon the events which led to the storming of the Bastille and the Reign of Terror. George III lost a major segment of British North America—but Louis XVI lost his head.

The events in France between 1789 and the end of the century were indeed a challenge to all Western political experience. The exhilarating Declaration of the Rights of Man and of the Citizen seemed, on paper at least, to be even loftier than the Virginia Declaration of Rights of 1776, which had been hailed as the epitome of individuals' constitutional protection against organized government. Jefferson, indeed, had ardently recommended the Virginia Declaration to the French hero of American independence, the Marquis de Lafayette. But the bloodbath of the guillotine, the rapid succession of new constitutions in France (four within ten years), and the proclaimed intention of the French revolutionaries to send forth armies to help overthrow other monarchies, caused many early sym-

pathizers to have second thoughts. Edmund Burke, the eloquent friend of the American rebels a generation earlier, was more apologetic than enthusiastic about the French affair. Jefferson himself, now in Paris, could see in the rapid change of governments the consequences of his suggestion that every generation should have its own revolution.

In the closing decade of the eighteenth century, as the new American experiment in constitutional government was getting under way, the violent outburst in France seemed in time to offer as grave a threat to the new order in the United States as it represented to the established kingdoms of Europe. For the emerging new political parties, the zeal and violence of the French revolutionaries created a profound dilemma. The Jeffersonians—originally known as anti-Federalists and soon to adopt the even more radical name of Republicans—found themselves maneuvered by political circumstances to a position of support for the French extremists, if only because, first, the *philosophes* had been French and second, France had aided the American Revolution. The Federalists, nominally centered around John Adams, claimed to be the heirs of the English tradition and thus committed to opposition to the extremists in France.

Throughout these years, from the eve of the Constitutional Convention to the Jeffersonian "revolution" in the Presidential elections of 1800, there were periodic alarms over movements which threatened to tear the young country apart. In August 1786, western and central Massachusetts erupted into the frustrations of violence bred of the economic depression which followed the Revolution, and the indifference of the state legislature to the plight of the under-apportioned citizenry west of Boston and its environs. A war veteran, Daniel Shays, emerged as a leader of the disenfranchised, debt-ridden countrymen, organizing bands of armed men to intimidate the courts hearing foreclosure suits, and talking of seizing supplies held in the "Continental" warehouse at Springfield. General Benjamin



In January, 1787, debtors in Massachusetts broke into open revolt reacting to the government's refusal to print paper money to expand the short supply of currency. Daniel Shays, and a group composed mostly of farmers, attacked the Springfield arsenal but were dispersed by a mercenary militia hired by Boston merchants.

Lincoln, Washington's fellow officer in the recent conflict, led government troops through a snowstorm in February 1787 and captured most of the rebels, ending the insurrection.

Only four years later, in Washington's first administration, a more serious uprising occurred in western Pennsylvania, provoked by a tax levied by the new Federal Congress. Because the tax fell primarily upon spiritous liquors, this became known in history as the Whiskey Rebellion. From July to September 1791, federal tax collectors were harrassed throughout the area; then United States troops, marshalled by Secretary of the Treasury Alexander Hamilton with the President's approval, marched into Monongahela and put an end to resistance.

Into this unstable situation, the envoy of the French Revolution now appeared, landing at Charleston, S. C. in April 1793: Edmond Charles Genet, who called himself "Citizen" in the way the Russian revolutionaries of the twentieth century called themselves "Comrade." His first act, even before proceeding to Philadelphia to present his credentials, was to arrange for the outfitting of four French privateers to be dispatched on the high seas to attack British ship-

ping; he claimed authority for doing this under the 1778 treaty of alliance with France, which had given the allies the right to use American ports both for such expeditions and for bringing prizes of war into American admiralty courts. Washington was thoroughly alarmed, and — again in April, and before Genet had reached the capital — issued the famous Neutrality Proclamation of 1793. Already the British minister was enlisting the aid of Hamilton, one cabinet officer, in bringing about the Neutrality Proclamation; Jefferson, whose political preferences were always diametrically opposed to Hamilton's, split the Cabinet by siding with the new French minister.

In the light of Revolutionary France's proclaimed policy of stirring up insurrection generally, buttressed by documentary records which have come to light over the years, there seems little reasonable doubt that "Citizen" Genet was to the French embassy what the disguised KGB officers are in the Russian embassy today. His instructions, indeed, were to probe three areas of the United States where trouble with England could be stirred up, either directly or through collateral adventurism against Spain. Thus the

South Carolina scene was explored to gauge the sentiment for invading Florida, the key coastal area which alternated between British and Spanish control. New separatist movements in Canada were discussed in New York. But the most sensitive—and flagrant—of his operations was the testing of the separatist dispositions of the new Western United States itself, fomented by the settlers' resentment at the Eastern political establishment's lack of support for chronic proposals to open the Mississippi for western exports by seizing the port of New Orleans from the Spanish.

Genet's tactics were so blatant that by late summer Washington's administration had formally asked France to recall him. When the recall came—in the form of a replacement by a more subtle *provocateur*, Charles Fauchet—Genet himself suddenly decided not to return to France. He bought a small farm on Long Island, married the daughter of Governor George Clinton, and eventually became an American citizen. As for Fouchet, his intrigues accounted for the disgrace and resignation of the Secretary of State, Edmund Randolph, and the exacerbation of international relations which led in the Adams administration to the so-called "quasi war" (today it would be called the "cold war") with France.

This was, accordingly, the background of foreign and domestic unrest which led the Adams administration to request legislation which has become notorious in early constitutional history as the Alien and Sedition Acts. The direct chain of events had begun in the closing years of Washington's second administration, when the United States undertook to seek diplomatic means of settling the issues between the Americans and the British on the one hand, and with Spain on the other. Chief Justice John Jay was drafted as the envoy plenipotentiary to negotiate with London, and the treaty which bears his name was concluded in the fall of 1794. The Spanish Treaty of San Lorenzo, bearing the name of the American minister to Madrid, Thomas Pinckney, was concluded in the winter of 1795. Both of these pacts substantially reduced the tensions between the United States and these powers, although Jay's Treaty represented such great concessions to Britain that it was bitterly condemned in the states; the public attacks on both Jay and the treaty were, in fact, the immediate cause of the Senate's failure to confirm the second Chief Justice, John Rutledge, after

his recess appointment to the Supreme Court.

Seeking to settle differences with the principal foreign source of tension, the incoming Adams administration sent a commission in 1797 to Paris (one of the commissioners being a future Chief Justice, John Marshall). The unofficial French negotiators disguised their identities under the letters XYZ, and these became the title for the *cause celebre* which resulted. The French proved bellicose and overdemanding, and negotiations broke off in the winter of 1798; publication of the correspondence involved in this affair provoked even greater public outcry—this time against France—in the United States and led to the "quasi-war." (Ultimately still another Chief Justice, Oliver Ellsworth, was drawn into these international issues, negotiating the settlement of the French question in the so-called Convention of 1800.)

With hostile European colonial powers or revolutionaries chronically interfering with American domestic and foreign policies, and with an already unpopular Federalist administration the target of virulent homegrown attacks, the Adams administration in the summer of 1798 prompted Congress to enact four momentous and controversial pieces of legislation (see box). Of these, the most famous was the Sedition Act of July 14, for it sparked a firestorm of political and constitutional events that led to the virtual annihilation of the Federalist party in the elections of 1800. On the constitutional side, it produced the Kentucky and Virginia Resolutions and a sequence of state trials which have been the subject of apologetic and ambivalent commentary ever since (see box, again).

The immediate legal (as well as political) question precipitated by the law of July 14 (by historic irony, taking effect on Bastille Day) was, of course, the constitutionality of the statute under the guarantees of the First Amendment. Among many evils abolished by the Bill of Rights, it was argued, was the common law of seditious libel. On the other hand, the situation raised the classic argument that the right of self-preservation placed a limit on the uses and abuses of First Amendment freedoms, when—as Justice Oliver Wendell Holmes would put it years later in dissenting on the constitutionality of the so-called Sedition Act of 1917—there might be a "clear and present danger" that there was an actual threat to the security of the state.

The situation also invoked another principle

which was to be tested by the facts: If freedom of expression was guaranteed by the Constitution, it obviously was not "safe" expression but inflammatory, unpopular expression which required protection. Even Holmes conceded that no one should irresponsibly cry "fire" in a crowded theater; but short of false, or what the French have always called "tendentious," publications, the right of the individual to say or publish what he pleased was the ultimate test of whether the First Amendment meant what it said.

As usual, the defendants in these cases were not models of propriety — indeed, the manifest virulence of their utterances, even in a day when political and personal invective was the rule, sorely tried sympathizers who sought to offer their defense. Although none of the prosecutions under the Sedition Act ever reached the Supreme Court on review, the fears of the American public at the time made it highly questionable which side would have won out in the court of public opinion. The statute itself was clearly treated as an emergency measure, with a provision that it should expire at the end of the term of the Congress ending in March 1801.

A total of two dozen prosecutions were attempted under the Sedition Act, and there was also an incident involving the privileges and immunities of a member of Congress. Nine convictions were obtained, but only a few individuals actually were fined or imprisoned. The defendants for the most part were the most scurrilous practitioners of a journalistic calling not yet affected by any canons of professional ethics; among them were such roughneck editors as Benjamin Franklin Bache, James Callendar and William Duane. They also included as separate targets the Congressman from Vermont, Matthew Lyon, and the scholarly South Carolina lawyer and writer, Thomas Cooper. Finally, as a comic footnote, the dragnet turned up a Massachusetts editor who had described the Sedition Act as a product of John Adams' "hinder parts."

In the case of Bache, his unbridled attacks on the Federalists provoked the Adams administration to institute proceedings against him even before the Sedition Act came into effect. That is, the prosecution based its claim to jurisdiction on the common law of seditious libel, thus revealing the theory they intended to advance under the statute. This raised the equally grave question of whether there was a Federal common law of

crime — something which the Marshall Court answered in the negative (*United States v. Hudson & Goodwin*) 1812.

The Philadelphia *Aurora* edited by Bache was a Jeffersonian mouthpiece, which made the Federalists all the more zealous to bring the writer to "condign punishment." The administration majorities in Congress had already barred him from the press section of both Houses; an economic boycott of the newspaper was in progress; and Bache himself was twice physically assaulted — an occupational hazard of journalism which continued well into the nineteenth century. Bache retaliated by obtaining and publishing a State Department copy of a letter from Talleyrand, the French foreign minister — an indication that the "news leak" had already made its appearance. Finally, in June 1798 — still several weeks before the Congressional Act of July 14 — an indictment was brought in the United States District Court in Philadelphia charging the journalist with "libelling the President & the Executive Government, in a manner tending to excite sedition, and opposition to the laws, by sundry publications and republications."

Bache, a grandson of the illustrious Franklin forebear, had founded the *Aurora* just as the new national government was getting under way, and before long was attacking everyone in sight with a fine disregard for fairness or facts. Even the heroic Washington was not immune; in 1796 Bache published, as true, the manifestly forged letters originally issued in London during the early part of the Revolution, in which the American commander in chief allegedly despaired of the patriot cause. Upon the retirement of the first President, Bache rejoiced that "this day ceases to give a currency to political iniquity and to legalize corruption." This was nothing to the contumely he poured upon the second President, which finally provoked the indictment for common law sedition. Bache beat that rap, however, by contracting yellow fever and dying, at the age of twenty-nine, that September.

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Thomas Cooper (left) and William Duane (right) were two of the men prosecuted under the Alien and Sedition Acts. Cooper, a one-time Pennsylvania judge, and a former chemistry professor was jailed for six months in 1800 for criticizing the Adams administration in print.

life of Alexander Hamilton. Years later, when he fell out with the Sage of Monticello, he would publicize the affair of Sally Hemings and other peccadilloes which still lurk in the shadowy background of Jefferson's later biographies. Callendar, mindful of the indictment still pending in London, found it prudent to abandon Philadelphia upon the passage of the Sedition Act, and sought new refuge in Richmond. With Jefferson's secret patronage, he resumed writing, for the *Richmond Examiner*, and in 1800 published a manifestly Jeffersonian campaign pamphlet, *The Prospect Before Us*; combining typical campaign criticism of the incumbent administration, the pamphlet indulged in wild excesses of personal attacks on Adams—one of the factors in the long and tragic estrangement of the two Founding Fathers. The attacks were so outrageous that they insured his prosecution and conviction under the Sedition Act. Callendar was fined \$200 and sentenced to nine months imprisonment; and he showed his true character when Jefferson, after taking office, issued a full pardon and ordered the government to remit the fine. When bureaucratic delays held up the repayment of the funds, with interest, Callendar began an abusive attack on his former patron which threatened to exceed anything he had written against the first two Presidents. In 1803

Callendar died of drunken drowning in the James River, and even the Republicans breathed a sigh of relief that he had found a final resting place "in congenial mud."

Thomas Cooper, English born and Oxford educated, had far greater intellectual credentials than any of the other journalistic miscreants of this era. Yet he also managed to alienate even those on his side; the pro-American Burke criticized him in the House of Commons for his attempted justification of the murderous activities of the French Revolution—to which Cooper rejoined with an attack on "privileged orders." Soon thereafter he set sail for America. Possessed of a law degree and a smattering of training in medicine, he practiced both professions around Philadelphia and eventually received an honorary M.D. from the "University of New York." He also taught chemistry and launched a new round of political writings; his volume of *Political Essays* in 1800 brought on an indictment under the Sedition Act and a fine of \$400, repayment for which was finally made to his estate after his death in 1839. Jefferson considered Cooper a true Renaissance man, and secured his appointment to the faculty of the New University of Virginia; but delays in opening the institution caused Cooper to move on to South Carolina, where he maintained a rich corre-

spondence with Jefferson and developed a career in scholarship. His *Lectures on the Elements of Political Economy* became a standard textbook of its day, and his later commentary on the Constitution was one of the most eloquent expressions of the Jeffersonian view to counterbalance Joseph Story's great work of the 1830s.

William Duane presented a clear case of Jefferson's own involvement in the political drive against the Sedition Act and thus against the incumbent Federalist administration. As the election year of 1800 approached, the hysteria over French radicalism and its impact in the United States merged with the alarm of conservatives that the far-left Republicans under Jefferson were a good bet to win both the Executive and Legislative branches of government. The Virginia firebrand, whose great Declaration of 1776 had originally proposed the abolition of slavery, had worried the establishment of the older seaboard centers ever since; and the certainty that the Alien and Sedition Acts would be officially repudiated once he took office, added to the eagerness of the Federalists to denigrate his journalistic spokesmen as soon and as drastically as possible. Duane, although born in colonial New York, had returned to his mother's native Ireland in 1774 and had only returned to America after a twenty-year absence; hence he could be lumped with other "seditious aliens" who constituted a threat to the "older" America.

Duane succeeded Bache, upon Bache's death, as editor of the *Aurora*, and promptly gave notice that its anti-Federalist venom had not been diluted. The government equally quickly identified him with the body of "intriguing, mischief-making foreigners," and late in 1798 brought an indictment which was virtually a reissue of the indictment against the late and largely unlamented Bache. The case was badly handled by the government, and the editor was quickly acquitted. A fresh prosecution on a new charge was initiated in 1799, for a statement that Adams was privy to British efforts to bribe various government agents. Duane offered in defense a letter signed by Adams himself, which so strongly suggested the President's knowledge of British machinations that the government dropped its charges. Seeking to reach the increasingly effective critic by another tactic, the Senate then undertook to cite him for contempt; Jefferson, as Vice-President and therefore presiding officer of the Senate, formally signed the Senate com-

plaint. The contempt ploy eventually died, and a third indictment was obtained in 1800; Duane and Jefferson, in collaborative correspondence, simply delayed government action until Jefferson took office as President and the statute expired.

These were typical of the byzantine policies generated by the Alien and Sedition Acts, which offered the first practical challenge to the democratic theories of the Founding Fathers. It was a time of passionate commitments to political positions, in which both sides were equally guilty of excesses beyond the bounds of political and civic good taste. As a recent insightful study by Professor Leonard Levy has shown, the succeeding Jefferson administration had its "dark side" in the area of civil liberties. The invective of political journalism persisted at least until Andrew Jackson's day, with Congressional subsidies of government printing unabashedly improving the chances of administration organs. The youthful United States, until the hysteria of the so-called Burr conspiracy and the War of 1812 had been survived, had no means of demonstrating its ability to control its own future.

Nor is it a sign of the innocence of the eighteenth century, that sweeping generalizations about absolute freedom of expression have had to come to terms with palpable abuses of the freedom. The hysteria of the McCarthy era has been less than a generation before 1984, a clear warning that the overreaction of the Federalist age can occur again.

Appendix

Constitutional Crises: Acts and Resolutions

The four acts passed by Congress in June of 1798 (5th Congress, 2nd Session), though never enforced as to the first three, reflected the xenophobia and the domestic tensions of the time. The first three statutes were aimed at tightening the qualifications for citizenship, creating what amounted to an alien registration system (for all aliens, not official agents as the modern law stipulates) and providing means of interning nationals of hostile powers in the event of war. The fourth and most significant act, dealing with sedition and seditious activities, raised constitutional questions which have never been satisfactorily resolved.

Naturalization Act of June 18, 1798 (1 Stat. 566). This statute, among other things, increased the minimum time of residence for candidates for citizenship from five to fourteen years. The new time period dated back to 1784, when the Treaty of Paris had gone into effect, and thus created a "safety" interval before refugees from the French uprisings of 1789-93 who had come to America could become eligible for naturalization.

Alien Act of June 25, 1798 (1 Stat. 570). This law amounted to a compulsory registration statute for foreign residents, and empowered the Executive branch to expel any undesirables.

Alien Enemies Act of July 6, 1798 (1 Stat. 577). This somewhat extraordinary statute, passed in obvious anticipation of a quasi-war or actual war with one or more foreign powers, embodied familiar provisions of international law for internment residents who were subjects of a hostile power. An "alien friends" act which was advanced as a companion statute failed to pass Congress, and as a result a number of French refugees fled to Congress or went into hiding.

Sedition Act of July 14, 1798 (1 Stat. 596). Because of the serious constitutional problems embodied in it, this statute warrants quoting in detail, viz.:

SEC. 1. *Be it enacted* . . . That if any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing or executing his trust or duty; and if any person or persons, with intent as aforesaid, shall counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt shall have the proposed effect or not, he or they shall be deemed guilty of high misdemeanor, and on conviction, before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than six months nor exceeding five years; and further, at the discretion of the court may be holden to find sureties for his good behaviour in such sum, and for such time, as the said court may direct.

SEC. 2. That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered or published or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either

house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or dispute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment, not exceeding two years.

SEC. 3. That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

SEC. 4. That this act shall continue to be in force until March 3, 1801, and no longer. . .

The Kentucky and Virginia Resolutions, manifestly in protest against the Alien and Sedition Acts, were actually a consummate expression of Thomas Jefferson's theory of constitutional government. Jefferson himself drafted the Kentucky Resolution, and his ardent disciple, James Madison, sponsored the companion Virginia Resolution, each passed by the legislatures of the respective states on the heels of the Congressional enactments. They represented the political egalitarianism dear to Jefferson, and his equally firm conviction that the states were the ultimate reviewers of the constitutionality of acts of the Federal government. His theory that the sovereign states could "interpose" their paramount authority in cases where they determined that the national government was acting unconstitutionally, was rejected by the majority of the nation both at this time and in the early desegregation crisis of the 1950s.

Kentucky Resolution of November 16, 1798. This ninefold Resolution was the more detailed of the two companion legislative expressions. It (I) reiterated the compact theory that the Federal Constitution was created by the states; (II) found that Congress had exceeded its powers in enact-

ing these and a contemporaneous tax statute; (III) expressly declared that the Commonwealth of Kentucky found the Sedition act in violation of the First Amendment; (IV) recited the "alien friends" which Congress had failed to pass and declared—in keeping with specific provisions of a number of state constitutions—that such persons were under the protection of those states; (V) served notice that the states had a right to resist attempted deportation of anyone under the Congressional Act of July 6; (VI) found the Congressional act of June 25 to violate state policy; (VII) found a revenue law (though unrelated to the principal enactments) to exceed Congress'

delegated authority; (VIII) instructed its Congressional delegates to treat the Resolution as a formal Remonstrance to Congress warranting an act of rescission; and (IX) directed the governor formally to dispatch copies of the Resolution to the other states.

Virginia Resolution of December 24, 1798. Since Jefferson's Kentucky Resolution had apparently said all there was to be said on the subject, Madison's Virginia Resolution was much briefer. Its main thrust was that the General Assembly "doth particularly PROTEST against the palpable and alarming infraction of the Constitution."

The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937

by Charles W. McCurdy

I

The constitutional right of liberty of contract has been dead now for nearly fifty years, and only a handful of legal scholars still mourn its passing. Indeed, its chief legacy to American constitutional law has been an opprobrious word — "Lochnerism" — which modern commentators habitually use when charging one another of harboring "subjective" or "political" conceptions of judicial review. Yet in recent years it has been increasingly difficult for historians to describe with any precision either the nature of "Lochnerism" or its sources. Criticizing the liberty of contract doctrine is, of course, still a snap. We need only quote the pithy remarks of Holmes and Thayer, Pound and Powell, Brandeis and Freund, Hand and Frankfurter—or, in short, we can simply invoke the analytical tradition of liberalism in modern American law. But many of us are no longer satisfied with the description of "Lochnerism" that liberals minted at the turn of the century or with their explanation of where "Lochnerism" came from. The collapse of the progressive synthesis in American constitutional history accounts for much of our current inability to agree on a description, let alone an explanation, of what "Lochnerism" was all about. Equally important, however, are new developments in legal theory which, during the past twenty years, have generated fundamentally different versions of American legal history and consequently fundamentally different versions of the nature and sources of liberty of contract in American constitutional law.

This paper was originally delivered by Professor McCurdy at the 98th annual meeting of the American Historical Association in December, 1983.



Associate Justice Oliver Wendell Holmes, Jr.—one of the leading critics of the "liberty of contract" concept in his era.

Consider first Elizabeth Mensch's treatment of *Coppage v. Kansas* in her elegant essay on "The History of Mainstream Legal Thought" which appeared last year in a collection of papers produced by the Conference on Critical Legal Studies. By 1850, Mensch argues, American courts had developed a mature body of contract

law and an equally mature array of constitutional doctrines relating to contractual obligations. But judges and commentators still kept those bodies of law in "wholly separate," "vacuum-bounded" categories that "allow[ed] for no blurring or intermeshing." By the 1880s, however, "the thrust of . . . legal thought was toward higher and higher levels of rationalization and generalization. Eventually, that process produced a grandly integrated conceptual scheme that seemed . . . to bring coherence to the whole structure of American law . . ." Mensch, following the lead of Duncan Kennedy, calls that late-nineteenth-century conceptual scheme "classical legal thought"; in her view, the liberty of contract doctrine in constitutional law emerged ineluctably as the public law counterpart of prevailing private law notions about the enforceability of agreements. *Coppage v. Kansas*, where the Supreme Court struck down a statute outlawing yellow-dog contracts, she argues, "provides a clear example of the classical approach" to adjudication. The Court invalidated the statute, Mensch explains:

not because it denied the obvious inequality [of bargaining power] between workers and employers, but because freedom of contract had to be defined objectively, which meant according to common law doctrine. Since the common law had excluded economic pressure from its definition of duress as a legal excuse for non-performance of contracts, then *by definition* yellow-dog contracts were not formed under duress and were therefore freely entered. It then followed logically that the statute constituted an invasion of liberty protected by the Constitution.

Mensch claims that it "trivializes the underlying power of the classical conceptual scheme" to suggest that cases like *Coppage* represent nothing more than "a judiciary determined to impose its own economic biases on the country." "In fact," she concludes, "courts during the classical period described a police power as absolute in its sphere as were private rights in theirs," and "the key claim" made by judges "was that they could objectively 'find' the boundary" that distinguished legitimate police regulations from those that unconstitutionally trenched on the right of contract.

Lawrence Friedman urges us to consider liberty of contract from an altogether different perspective. In *A History of American Law*, published in 1973, Friedman claims that the integrated conceptual scheme that Mensch finds so

impressive never existed outside the Harvard Law School. He argues that "[i]f one looks not to treatises, but to the actual business of the courts, it could be argued that the law of contract, after 1850, was beginning a long slide into triviality." Especially significant, in Friedman's view, were the "statutory incursions, [which] after 1850, significantly shrank the kingdom of contract. Each new law on the statute books, if it dealt with the economy, was a cup of water withdrawn from the oceanic domain of the law of contract." Equally striking was the judiciary's response to those statutory incursions. Many statutes, including debtor-protection laws and insurance policy regulations, were designed to redress perceived inequalities of bargaining power between creditors and debtors, salesmen and consumers; in effect, the statutes abrogated existing common law concepts of duress in the bargaining relation and substituted new protective concepts under the police power. Statutes that outlawed yellow-dog contracts or required mining and manufacturing corporations to pay their workers in cash rather than company-store scrip were enacted for the same reason, and were anchored to the same theory about the scope of the police power, as statutes that regulated insurance agreements. "Yet the same judges who were, in some instances, so quick to see through the police power rationalization of 'labor' legislation," Friedman argues, "were perfectly willing in [these] other cases to blind themselves." And Friedman all but underscores the phrase "in some instances." "Constitutional madness," he says, "was not distributed evenly across the country" during the 1880s and 1890s; in the twentieth century, the Supreme Court's response to protective labor legislation was no more predictable than the response of the several state courts a generation earlier. For Friedman, then, the most remarkable characteristics of the liberty of contract doctrine are, first, that it applied exclusively to contracts of employment and, second, that "it was randomly and irresponsibly invoked." And in his view, the only plausible explanation for these phenomena is "the prejudices of the judges." They read constitutions "as middle-class texts, embodying middle-class values, striving toward middle-class goals." Consequently debtor-protection laws and insurance policy regulations were unquestionably constitutional. But some judges in some jurisdictions "allowed themselves to be persuaded that



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Did the concept of liberty of contract extend to an individual's right to join a union, or was this an infringement upon the relationship between employer and employee? Frequently the state and federal governments supported employers' attempts to frustrate organized labor as in this drawing of the Maryland state militia firing on Baltimore and Ohio Railroad strikers in 1877.

organized labor was dangerous and un-American, that it threatened the balance of society," and these prejudices — "predominantly old-American, conservative, middle-class," Friedman concludes "dictated where the effects of [judicial] power would fall."

William E. Nelson offers a third, equally distinctive version of "Lochnerism" in his widely-noticed article on "The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth-Century America," the vast bulk of which was incorporated into *The Roots of American Bureaucracy*, published last year. Nelson implicitly rejects Friedman's claim that liberty of contract can only be understood in terms of instinctive class bias and an essentially instrumentalist impulse to deaden the fangs of organized labor. According to Nelson, the liberty of contract doctrine flowed, instead, from an

anti-instrumentalist tradition of jurisprudence derived from "the human rights thought" of the antislavery movement, the arguments of which were anchored to ideas "about the law of God and the rights of man." Beginning in the 1830s, Nelson observes, abolitionists repeatedly invoked natural law concepts in defense of the slaves' right of self-ownership and linked that right to fundamental American ideas about property and contract. Because bondage divested each slave's property in his own labor and also impaired his right to dispose of that labor in the market, abolitionists contended that slavery in the District of Columbia, at the very least, was in violation of the Fifth Amendment. And in Nelson's view, late-nineteenth-century judges ineluctably "put these antislavery notions of freedom of contract to use" in controversies involving the validity of protective labor legisla-

tion. In *Braceville Coal Co. v. People*, for example, the Illinois court struck down a statute requiring corporations to pay their employees weekly and in cash because, said the court, it interfered with "the right of every man to be free in the use of his powers and faculties." This, Nelson claims, is "the language of antislavery jurisprudence." Neither the rhetoric nor the holdings in cases like *Braceville Coal* should surprise us, he adds, for "the right of the individual to bestow his labor as he pleased . . . [was] among the rights for which the Civil War was fought."

What should we make of these distinctive versions of the nature and sources of the liberty of contract doctrine? Two things can be said from the very outset. First, each of these scholars is obviously interested in a different dimension of "Lochnerism." Mensch wants to describe the structure of legal thought that characterized the period; Friedman seeks to explain the pattern of outcomes. Nelson only attempts to account for the late-nineteenth-century "style of reasoning," which, in his hands, largely amounts to a mode of expression. Indeed, Nelson expressly declines to argue that the antislavery style "was determinative of the outcome of any particular case" — the problem that most concerns Friedman. And, though he does not acknowledge as much, Nelson's analysis is not very helpful in demonstrating how judges conceptualized freedom of contract issues — the problem that most concerns

Mensch. Equally apparent is the fact that these scholars have made no effort to engage one another. Neither Nelson nor Mensch notice the work of the other and both ignore the earlier work of Friedman. This can no doubt be attributed to the distinctive conceptions of law, and therefore of legal history, that inform their accounts. Mensch treats law as a manifestation of hegemonic ideologies and is quick to derive insights from formal social theory. Friedman sees law "as a mirror of society," believes that the application of doctrine is "powerfully influenced by social facts," and borrows freely from the social sciences. Nelson links law to cultural attitudes and leans heavily on the work of American intellectual historians. They invite us, in effect, to take their theory, their method, and their history, or, if we are not prepared to buy it all, to go shopping elsewhere.

I am not prepared to do any such thing. It seems to me that each mode of analysis offers extraordinarily powerful vistas on the American past, and I am unwilling to dismiss any of them as a matter of course. Consequently my first impulse is to defer reflection on the disparate theories and methods which Mensch, Friedman, and Nelson have employed and to engage their work at the descriptive level. Each of them is interested in a particular dimension of "Lochnerism"; I am interested in all those dimensions. Their theories of legal history may be irreconcilable, but I am convinced that their descriptions



Nineteenth century courts generally declined to interfere in labor and management disputes unless some other law was broken. Unfortunately, this approach did little to defuse the inherent problems brought on by rapid industrialization and violence often ensued. In this drawing miners at the Coeur D'Alene mining camp in Idaho sought to settle a dispute by destroying their employer's mill with an explosive charge.

course that the presumption of constitutionality concept did not apply. Consequently cases were decided by issuing conclusions. "The employer and the employee have equality of right," Justice Harlan remarked in *Adair v. United States*, "and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land."

Harlan's remarks in *Adair* provide an effective transition to the second characteristic of "Lochnerism." This is so because Harlan actually dissented in *Lochner v. New York*. But Harlan and the two colleagues who joined him in *Lochner* did not concur with Holmes's more famous dissent. Their disagreement with the majority focused not on the legitimacy of the liberty of contract doctrine *per se*, but on the Court's authority to reassess the legislature's claim that working more than ten hours daily endangered the health of bakeshop employees. According to Harlan, the Court had no authority to look behind the legislature's determination of fact when the justification proffered was ordinarily within the scope of the police power. When the justification was linked to inequality of bargaining power, as in *Adair*, however, Harlan assumed that labor laws were unquestionably unconstitutional. What happened in *Lochner* and *Adair*, then, can be reduced to this. Five *Lochner* judges said that the bakeshop law was not a police regulation because the proffered health rationale was so unreasonable that it must be a "mere pretense" for something else. For the majority, the only plausible explanation for the statute was that it had been enacted to improve the bargaining position of the bakery-workers union. Three *Lochner* judges said that the Court could not make that determination because the legislature's proffered rationale, if ordinarily within the scope of the police power, could not be reassessed by the judiciary. In *Adair*, however, the judges who divided in *Lochner* readily agreed that a statute outlawing yellow dog contracts could not possibly be a police regulation, for the only plausible ground for enacting such a law was that the state had a duty to redress inequalities in the bargaining relation.

At this point Mensch's analysis is especially valuable. "[C]ourts during the classical period," she argues, "described a police power as absolute in its sphere as were private rights in theirs," and "the key claim" made by judges "was that

they could objectively 'find' the boundary." In *Lochner* eight judges divided five-to-three about the legitimacy of a particular ten-hour law. But in neither *Lochner* nor *Adair* did they disagree about "the boundary." What the liberty of contract doctrine proscribed absolutely was protective labor legislation that could be justified only on the ground of unequal bargaining power. In that sense "the boundary" could be discovered "objectively." This is not to say that allusions to inequality never penetrated judicial opinions. In *Holden v. Hardy*, decided in 1898, Mr. Justice Brown spoke eloquently about the disparity of bargaining power between workers and their employers. But discussions of this kind can be found only in cases where statutes were sustained and even then another, narrower ground was always invoked to validate the legislature's regulation. In *Holden* that narrower ground was the legislature's competence to protect the safety of underground miners. And Justice Brown, it should be added, was in the *Lochner* majority seven years later.

This second characteristic of "Lochnerism" also speaks to the fact that, as Friedman puts it, "constitutional madness was not distributed evenly across the country" during the 1880s and 1890s. Statutes that prohibited payment of wages in company-store orders, for example, were invalidated in Pennsylvania, Illinois, Missouri, Colorado, Georgia, Kansas, and Texas. But similar statutes met the judiciary's approval in Indiana, Rhode Island, Arkansas, and Tennessee. The West Virginia court invalidated a store-order law in 1889; it sustained one in 1892. The Maine statute was never even tested in the courts. What Friedman fails to report, however, is that the rationale invoked by the approving courts was extraordinarily narrow. In each instance courts evaded the unequal bargaining power question, though it was occasionally discussed in *dicta*, and held that such laws were valid so long as they applied only to corporations. "It has been urged" that the store-order statute "is unconstitutional because it interferes with the rights of employes to make such contracts . . . as they see fit," the Rhode Island court declared in 1892. But the legislature, the court explained, had placed:

[n]o inhibition . . . upon employes to make such contracts as they choose, with any person or body, natural or artificial, that is authorized to contract with them . . . [C]orporations are artificial bodies and possess only such powers as are granted to

them, and natural persons dealing with them have no right to demand that greater power should be granted to corporations in order that they may make other contracts with such corporations than the corporations are authorized to enter into.

For the Rhode Island court, in short, store-order laws did not interfere with the workers' liberty of contract at all. That was a constitutional right. All the legislature had done was to alter the contract-making capacities of corporations, which, after all, were creatures of the state. It was a nifty rationale and it figured in almost all of the cases where store-order laws were sustained either in the several state courts or, later, in the Supreme Court.

When we turn from matters of substance and what Nelson calls style to matters of conceptualization, then, the second characteristic of "Lochnerism" emerges. Judges assumed that alleged disparities of bargaining power between workers and employers did not provide a legitimate basis for exercises of the police power. If protective labor legislation could be sustained under the police power at all, it was not because workers might be exploited by their employers in the absence of regulation but because some rather narrow public interest was at stake. Courts articulated these public interests in four different ways during the liberty of contract era. They validated labor laws that protected the health and safety of the public, particularly in cases involving maximum hours for railroad workers. They validated labor laws that clearly protected the health and safety of workers and were not designed to achieve a forbidden purpose. They ordinarily validated store-order laws, coal-weighting statutes and the like on the ground that legislatures might regulate the capacity to contract of all corporations chartered by the state. And they validated the workmen's compensation laws on what is best described as a *quid pro quo* theory—that is, employers lost their defenses against liability at common law in return for more predictable costs due to industrial accidents. Mr. Justice Sutherland was simply summing up the case law, then, when in *Adkins* he proclaimed that "liberty of contract is the rule, restraint the exception."

The artificiality of the distinction I have made between the two habits of thought and action that, in my view, gave "Lochnerism" a particular configuration is now evident. Alleged disparities of bargaining power between workers and employers did not provide a legitimate basis for

exercises of the police power because the contract of employment was somehow special. And it was those two dimensions of "Lochnerism," taken together, that distinguished the incidence of judicial review in cases involving commercial relations from the incidence of judicial review in cases involving labor relations. In the latter context the presumption of constitutionality concept did not apply when the only imaginable rationale for the statute was that it redressed alleged inequalities in the bargaining relation. Yet the distinction I have drawn between particular habits of thought and action that infused "Lochnerism" remains useful for analytical purposes because my first story speaks primarily to the specialness of the employment contract and the presumption of constitutionality question, while the second speaks primarily to the judiciary's penchant for invoking only narrow grounds of public interest when sustaining legal intervention on behalf of workers.

III

The specialness of the labor contract in American law was the product of a "free labor" ideology which penetrated so deeply into the consciousness of Northerners at mid-century that Republicans and Democrats, Protestants and Catholics, workers and employers all regarded its tenets to be the very foundation of the North's distinctive social order. Two "social facts"—to invoke Friedman's phrase—generated the "free labor" ideology and stamped it with a particular configuration. The first was the very existence of a quite different social order based on slave labor in the southern states; the second was the nation's spatial expansion which, in turn, brought the two systems into conflict and unleashed a long, bitter political struggle between the sections for hegemony in the territories. The "free labor" ideology that materialized in the North distinguished its social system from that of the South, affirmed the North's superiority, and underscored the long-term importance of how the territorial question got resolved. It also brought to the threshold of consciousness an array of ideas about the very nature of the "free labor" system. And Northerners clung to those ideas so tightly that, even when contradictions between them emerged, almost nobody was prepared to think about the labor contract in terms other than those dictated by the "free labor" ideology.

Underlying the "free labor" ideology was a negative image of the slave South. As Eric Foner has shown, Northerners claimed that people who labored at the will and for the profit of others were slaves; what gave this idea such power was the assumption that things were different in the North. Things were different, first, in the formal sense that all northern workers owned their own toil. Each person determined how long he would work and on what terms. And not only were those decisions his to make but the fruits of such labor were his to keep. The concept of economic independence provided the second, equally important component of the "free labor" ideology. Northerners not only distinguished the North's "free labor" system from the South's slave labor system but also contrasted the dignity and vitality of the free white worker in the North with the laboring white's poverty, degradation, and lack of opportunity for advancement in the South. For Northerners, free labor "meant labor with economic choices, with the opportunity to quit the wage-earning class. A man who remained all his life dependent on wages for his livelihood appeared almost as unfree as a southern slave." But Northerners claimed that the North's dynamic, expanding economy, itself a product of the "free labor" system, generated ample opportunities for the wage-earner's advancement. "Our paupers to-day, thanks to free labor, are our yeomen and merchants of tomorrow," the *New York Times* remarked in 1857. Abraham Lincoln was of the same mind. In 1859 he asserted that "advancement, improvement in condition — is the order of things in a society of equals," and he stridently assailed the pro-slavery theorists who argued that northern wage earners were "fally fixed in that condition for life." The opportunity for upward mobility and eventual independence, in sum, distinguishes the condition of free labor in North from the degraded condition of free labor in the South. Modern social historians, to be sure, have shown that this claim was largely a myth even in the 1850s; but in the 1980s it is certainly unnecessary to demonstrate that people constantly order their lives on the basis of such myths.

During the past two decades a veritable army of scholars have explored the impact of the "free labor" ideology on the political and social history of Reconstruction. Two aspects of that story, at the very least, have been firmly established. First, historians have demonstrated that North-

erners disagreed with one another on scores of issues. Even within the Republican party some lawmakers were free traders, others were protectionists. Some called for an exclusively specie-based currency, others preferred to enlarge the volume of greenbacks in circulation. Some favored subsidies for railroad corporations, others called not only for a halt to such subsidies but also advocated government regulation of freight rates. Some worked tirelessly for the freed peoples' equal political and social rights, others were unable to overcome either their own racial prejudices or those of their constituents. For decades after Appomattox, in short, there was neither a dominant laissez-faire ideology (which the progressive historians often identified as the source of liberty of contract in constitutional law) nor a dominant "antislavery jurisprudence" that infused law, generally, with an egalitarian idealism based on natural law. But the shared commitment to "free labor" ideas never withered in the post-Appomattox era. Northerners not only imposed their "free labor" ideology on the South but also learned that it set outer limits on the range of options they were prepared to consider for the reconstruction of the South. Republican lawmakers enacted the Civil Rights Act of 1866 in response to the notorious black codes, and the first protected right they enumerated was freedom of contract. The Freedman's Bureau regulated southern labor relations until 1868, but its chief function was to provide a forum for the enforcement of contracts. Bureau agents neither prescribed standards for employment agreements nor reviewed them when terms were claimed to be exploitative. And land redistribution proposals evoked protests derived from "free labor" concepts that most Northerners deemed persuasive. As a result, the abolition of slavery generated fundamental change in the legal relations between southern whites and southern blacks, but fostered little if any change in class relations. As Foner observes in his recent book on the subject, the freed people got "nothing but freedom."

Yet with the exception of David Montgomery, whose *Beyond Equality: Labor and the Radical Republicans, 1862-1872* was published in 1967, scholars have devoted almost no attention to the implications of the "free labor" ideology for the development of labor law in the post-Civil War North. And the implications were far-reaching because, soon after Appomattox, many North-



Labor marches like the one depicted above supporting the establishment of an eight hour day led many states to legislate limits upon the amount of time an employer could demand of his or her workers. But throughout much of the latter nineteenth century the Court struck down these laws as interfering with an individual's liberty of contract.

erners began to wonder whether there was not at least a grain of truth in the antebellum Southerners' claim that there was not much difference between bond-slavery and the wage-slavery, which, in their view, prevailed in the North even during the 1850s. Beginning in the mid-1860s, northern moralists and labor reformers anxiously pointed out the lack of correspondence between the changing structure of the industrial economy and the rhetoric of the free labor system. "One capitalist employs five men now where he employed one twenty years ago," remarked a writer in the *New York Times* soon after the Confederate armed forces surrendered. And this loss of independence on the part of northern wage earners, he said, foreshadowed:

... a system of slavery as absolute if not as degrading as that which lately prevailed at the South. The only difference is that there agriculture was the field, landed proprietors were the masters and negroes were the slaves, while in the North manufacturers in the field, manufacturing capitalists threaten to become the masters, and it is the white laborers who are to be slaves.

And if the five-man workshop threatened the "free labor" ideal, the armies of employees the factories already had begun to assemble provided occasion for real alarm. "The next great step for American statesmanship," a Fanueil

Hall mass meeting resolved on November 2, 1865, "is the adoption of measures" designed to maintain the promise of economic independence for Northern wage earners.

Ira Steward, the Boston machinist who framed the resolution, offered a political solution for the problem of wage slavery. "The legislation necessary to secure," he said, was a "law making eight hours a legal day's labor." The eight-hour day, Steward argued, would allow the wage earner more time for self-improvement, the chief prerequisite for achieving economic independence. Nor was it necessary, he explained, for the reduction in hours to be coupled with a reduction in wages. The common sense view of "less work, less pay" assumed that shorter hours would reduce the national product while the proportions of its division would remain constant, so that workers would end up with less. In Steward's view, however, this was nonsense rather than common sense. He claimed that the reduction in hours would expose wage earners to new and more complex social relations which, in turn, would generate new tastes and increase demand. The increased demand would stimulate production, promote the use of machinery, and lower unit costs. And for Steward, rising productivity could be expected to increase profits at the very time that workers' hourly wages increased be-

cause of the eight-hour day.

The ensuing attack on Steward's economic theory need not concern us. The eight-hour idea as an appropriate solution to perceived contradictions in the "free labor" ideology caught on despite them. Eight-hour leagues sprang up all over the industrial North during the mid-1860s; the National Labor Union, a federation of state labor organizations established in 1867, made the eight-hour idea the centerpiece of its program for political action. What does concern us is how labor reformers and their allies in the several state legislatures proposed to institute the eight-hour system, thus salvaging the "free labor" ideology, without undermining the very foundation of that ideology—the principle of free contract in the employment relation. It was one thing to suggest that statutes ought to be enacted making eight hours a legal day's work and something quite different to prohibit industrious, ambitious wage earners from working more than eight hours if they chose to do so. The relationship between hours and wages also posed problems. All the terms of the labor contract could not be prescribed by law, the *New York Evening Post* observed, for "[t]o decree that a man should be compelled to pay any fixed amount for the eight specified hours of work, would be the worst species of demagogic tyranny, making the masters and the employed in turn the veriest slaves." Thus the metaphor of slavery, which had earlier generated a broadly shared ideology celebrating the "free labor" system, cut two ways by the 1860s. As prospects for advancement appeared to diminish, industrial wage earners seemed to labor permanently at the will and for the profit of others, making them mere wage slaves. Yet proposed legal interventions that threatened to restrict each worker's right to determine how long he would work and on what terms ineluctably evoked the *Evening Post* rejoinder: that, too, would make workers "the veriest slaves."

The manner in which this dilemma was handled by the several state legislatures reflects the extraordinary durability of the "free labor" ideology. Six jurisdictions enacted statutes prescribing eight hours as a legal day's work in 1867; California and Pennsylvania enacted similar statutes the following year. Yet none of them said anything about wages; all of them authorized wage earners to contract out of the eight-hour system if they chose to do so. The Wisconsin law was typical. It provided that in "all engagements

to labor in any mechanical or manufacturing business, when the contract is silent on the subject, or where there is no express contract to the contrary, a day's work shall consist of eight hours." It goes without saying that such laws were ineffective. But it is simply wrong to claim, as John R. Commons did early in this century, that the labor reformers were "easily befuddled by skillful politicians." Even Ira Steward called only for "a law making eight hours a legal day's labor in the absence of a written agreement" to the contrary. The labor reformers, in short, were befuddled not by the politicians but by contradictions in the very "free labor" ideal they sought to salvage. As Montgomery has pointed out, northern workers "shared their employers' commitment to the ideology of the free-labor system, which the maturing industrial order already had rendered anachronistic. Also like their employers, workmen sought remedies for their problem from the machinery of state." But their employers succeeded because their call for tariff protection only necessitated rejection of laissez-faire ideas. Even the workers, however, were unprepared "to defile the sanctum sanctorum of free contract" in the employment relation. Given their ideological imprisonment, all the labor reformers could request from the state was a legislative declaration of community goals and sentiments. As New York labor leader Ezra Heywood remarked in 1867, the eight-hour law was valuable not "as an arbitrary standard, but as an enabling act to assist labor to make fair terms." As matters developed, the statutes proved useless even in that restricted capacity.

One additional aspect of this crucial episode in American labor history merits attention. Because nobody called for a compulsory eight-hour law, there was no cause for a discussion of constitutional limitation on government's power to regulate the labor contract. Nevertheless, two eminent newspaper editors considered it. Thurlow Weed, the political wizard who edited the *Albany Evening Journal*, sympathized with the aims of labor reformers yet regarded the eight-hour measure that was enacted to be so much "buncumbe and bagatelle." "It accomplishes nothing for the labor interest," he said, "because it makes no change in relations which already exist." But "[o]n the other hand," Weed added, "any attempt to prescribe by arbitrary legislation the length of time for which one party shall pay and the other contract to serve, would be liable to

fatal constitutional objections." Three thousand miles away in California, James McClatchey, the radical editor of the Sacramento *Bee* whom Henry George later acknowledged as the progenitor of the key ideas for his *Progress and Poverty*, said essentially the same thing in a somewhat different context. The California statute not only proclaimed eight hours to be a legal day's work "in all cases within this State, unless otherwise stipulated by the parties" but also dealt with the question of public works. Section two of the act provided that "eight hours of labor shall constitute a legal day's work . . . and a stipulation to that effect shall be made a part of all contracts to which the State or municipal governments . . . shall be a party." On public works, then, employers could not require laborers to work more than eight hours as a condition of employment; but, as the California Supreme Court later explained, wage earners remained free to work more than eight hours for extra pay if they chose to do so. When the bill was first introduced in the legislature, however, section two provided for punishment of all contractors on state work who declined to permit overtime work. "Of course," McClatchey wrote in a lead editorial:

the Judiciary Committee to whom it was referred, changed all that, for men have a right to agree to labor as many hours as they please. This is a Constitutional right granted by the Bill of Rights, and any law to the contrary would not stand the test of Judicial investigation. It is now so amended as to allow persons on State work to contract for laboring more than eight hours per day. Such amendment seems to be useless, for American citizens have that right Constitutionally. A simple declaration that eight hours . . . shall be considered and held to be a legal day's labor, save when otherwise agreed between employer and employed appears to be all that is wanted, and in fact that the Legislature could do. To this extent only have other States gone.

What is especially remarkable about these editorials is that neither Weed nor McClatchey explained why compulsory eight-hour laws would be unconstitutional. Weed simply stated that such a statute "would be liable to fatal constitutional objections;" McClatchey asserted that liberty of contract was "granted by the Bill of Rights" without referring to any particular provision in the text of the California constitution. It is possible that Weed was thinking in terms of due process; since the California constitution did not contain a due process clause

until 1879, McClatchey may have been thinking about California's guarantee of the right "to acquire and possess property." It is more likely, however, that both editors assumed that the language of the constitutional text was irrelevant. The "free labor" ideology was so pervasive and the premise of liberty of contract was so fundamental that the precise constitutional basis for that right never came consciously to mind. The Weed and McClatchey editorials, in other words, foreshadowed the shoot-from-the-hip style of the Pennsylvania judges who decided *Godcharles v. Wigeman* two decades later.

This discussion of the "free labor" ideology and the eight-hour movement of the 1860s helps to account for two aspects of the liberty of contract story in American constitutional history. It helps to account for the unelaborated premise in cases like *Godcharles* that liberty of contract was such a fundamental right that the presumption of constitutionality concept did not apply — and need not even be considered — when legislatures interfered with the bargaining relation. It also helps to account for the largely unarticulated assumption that contracts of employment were somehow special and therefore distinguishable from commercial contracts where the presumption of constitutionality had always applied. For the roots of still another crucial dimension of "Lochnerism" — the judiciary's penchant for invoking narrowly defined police power concepts when sustaining protective labor laws — it is necessary to look at another episode in the development of labor law during the period before 1886.

IV

The fellow servant rule is perhaps the best known judge-made doctrine of the nineteenth century, and its implied contract promise is too familiar to require elaboration here. What is not always appreciated, however, is the fact that employers probably could have attained the same result with express contracts immunizing them from liability for injuries sustained by workers in the course of employment. Before the fellow servant rule was established in the Pennsylvania courts, for example, the Pennsylvania Railroad Company required all of its employees to sign a standard agreement providing that "the regular compensation will cover all risk or liability, from any cause whatever, in the service of the company." And in 1853 a Pennsylvania common

pleas judge held that such a waiver was unquestionably valid. The concept of liberty of contract, which figured so dramatically in the eight-hour movement a decade later, supplied the court's premise. The fellow servant rule and the doctrine of contributory negligence eventually made the formality of having workers expressly contract out of their right to recover for job-related injuries quite superfluous; presumably the Pennsylvania Railroad Company ceased to bother with the paper work long before 1860. In some jurisdictions, however, the worker's capacity to bargain away his right to sue his employer reemerged after the Civil War, generated some fascinating case law, and prompted a very suggestive dialogue between judges who later embraced liberty of contract as a constitutional right and at least one commentator who considered that doctrine to be an abomination.

The employers liability laws enacted by Georgia in 1855, Iowa in 1862, Wyoming Territory in 1869, and Kansas in 1874 gave employers new incentives to require their workers to waive their rights at law as a condition of employment. The statutes applied only to railroads and left the contributory negligence defense intact; but they abrogated the fellow servant rule and consequently threatened to enlarge the companies' liability. The railroads apparently resorted to special contracts with workers limiting their liability as a matter of course. The Georgia court was the first appellate tribunal to consider the legality of such agreements. And in *Western & Atlantic R.R. Co. v. Bishop*, a wrongful death case decided in 1873, it assumed that the employee's capacity to contract out of his rights at law was unquestionable. The opinion bristled with "free labor" ideology. "[I]t would be a dangerous interference with private rights to undertake to fix by law the terms upon which the employer and employee shall contract," the court's spokesman explained. "For myself," he added,

I do not hesitate to say that I know of no right more precious, and one which laboring men ought to guard with more vigilance, than the right to fix by contract the terms upon which their labor shall be engaged. It looks very specious to say that the law will protect them from the consequences of their own folly, and make a contract for them wiser and better than their own. But they should remember that the same law-giver which claims to make a contract for them upon one point, may claim to do so upon others, and thus, step by step, they cease to be free men.

Equally significant was the way in which the Georgia court distinguished the Supreme Court's landmark decision in *New York Central R.R. v. Lockwood*, decided earlier in 1873.

At issue in *Lockwood* was the enforceability of a contract between the carrier and a cattle drover in which the latter had waived his right to recover for any loss of livestock caused by the carrier's negligence. As Morton Horwitz demonstrated in *The Transformation of American Law, 1780-1860*, the legality of such agreements had troubled judges and commentators since the 1830s; in some jurisdictions, including New York, "the dominant contractarian ideology" that had generated the fellow servant rule also "seduced" appellate courts into sustaining contracts that limited liability for the carrier's own negligence. Since *Lockwood* was a diversity case with a commercial law context, the doctrine of *Swift v. Tyson* came into play. As a result, counsel for the New York Central not only had to defend the New York decisions on the subject but also had to show that their underlying logic was so persuasive that the Supreme Court ought to adopt the New York rule as a matter of "general jurisprudence." And in the mind of counsel, the fellow servant rule provided a compelling analogy for the commercial contract practices of the New York Central. "The only objection to [the contract]," counsel contended, "is that it would violate public policy; but this objection would equally forbid the rule, now long established, that a servant . . . impliedly engages to bear the risk of injuries from fellow servants."

Mr. Justice Bradley, speaking for a unanimous Court, was so unimpressed with the fellow servant analogy that he did not even allude to it. And in the Court's view, the New York decisions in cases involving a carrier's capacity to contract out of liability for negligence were simply wrong. Bradley explained that such contracts were against public policy for two reasons. First he emphasized that the common carrier's business was essentially a public one and that the public, generally, had an interest in maintaining the carrier's attention to matters of safety and care in the operation of its dangerous machinery. If carriers were permitted to contract out of liability for negligence, however, they would have no incentive for exercising the care on which the public depended. Consequently such contracts were "repugnant to . . . the public good." Furthermore, Bradley emphasized:

[t]he carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business.

It followed, Bradley added, that "contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness." The Court concluded that waivers of liability for negligence in situations involving carriers and shippers were neither fair nor reasonable.

Just as counsel for the carrier in *Lockwood* assumed that the fellow servant rule was a compelling analogy in the shipper-carrier context, counsel for the deceased railroad worker in the Georgia case assumed that *Lockwood* was a compelling analogy in the employment context. But the Georgia court set a face of flint against any penetration of the *Lockwood* doctrine into the law of employment. "None of [the Supreme Court's] reasoning applies to the case before us," the Georgia court explained. "This suit is not against the railroad company as a carrier" but against the railroad company as an employer. The deceased worker's "relation to the company was strictly a private one. His contract of service was a free one. He did not stand in the situation of a traveler, or a shipper of goods, 'who cannot stop to higggle . . .'" because, in its capacity as an employer, "the railroad company has no monopoly of service. It is only one of a million of employers with whom the husband of the plaintiff might have sought employment. He deliberately, and for a consideration, undertook that he would not hold the company liable for the negligence of its servants, or even for the negligence of the company itself." With disarming candor, the Georgia court thus enunciated two closely related propositions that later infused "Lochnerism." The labor contract was distinguishable from other types of private agreements in which the public might have an interest. And the concept of unequal bargaining power, though it might come into play in some bargaining contexts, could never penetrate the law of employment because workers had "million[s]" of choices when they entered the labor market.

What makes this problem especially useful for my purposes, however, is that the Georgia court did not have the last word on the subject. By the mid-1880s scores of carriers had begun to require their employees to contract out of their rights at law in order to evade judgments not only under employers liability laws but also under new judge-made doctrines such as the safe-tool and vice-principal rules. The bench and bar responded to these developments in two ways, foreshadowing, in effect, the subsequent dialogue on the doctrine of liberty of contract in constitutional law.

In 1886 Seymour Thompson published a treatise on *The Law of Negligence* in which he strenuously argued that the contract of employment was no different than contracts between shippers and carriers. And like counsel for the deceased worker in the Georgia case, Thompson contended that the conceptualization in *Lockwood* ought to govern relations between the parties in both contexts. The Georgia judges who handed down *Western & Atlantic R.R. v. Bishop*, Thompson complained, were wrong on two counts: "They ignore[d] the unequal situation of the laborer and his employer. They depart[ed] from the analogy of the rule of law which denies to carriers the right to enter into contracts with those whom they serve, stipulating against liability for their own negligence; and in so doing, they place[d] the life of a man upon a lower footing than the proprietary interest which a man may have in his chattel." Six years later, Thompson criticized the doctrine of liberty of contract doctrine in constitutional law on the same grounds. For courts "[t]o talk about freedom of contract" in cases like *Godcharles* "is the veriest sham," Thompson wrote in the *American Law Review*. "It is not even truthful or sincere. No such freedom of contract exists. Every judge knows it; every other man knows it; and it is the duty of judges in framing their decisions to take judicial notice of what everybody knows." Before 1937, however, courts never did invoke inequality in the labor market as a legitimate rationale for the exercise of the police power. Although some judges on some occasions did "take notice of what everybody knows," they did so only in *dicta*. Courts always found an independent ground for the decisions sustaining protective labor legislation. And those grounds, as I suggested previously, were always very narrow.

Thompson's critique of *Bishop* failed to catch

on for the very reason that his critique of the liberty of contract doctrine failed to catch on. Judges were simply not prepared to use the concept of unequal bargaining power as a major premise in cases involving the employment relation. But in two leading cases decided in 1886, the courts of Ohio and Arkansas did reject the Georgia court's holding in *Bishop*. In each instance *Lockwood* figured prominently in oral argument and in each instance the court appropriated one but only one of Mr. Justice Bradley's justifications for declaring contracts that limited liability to be against public policy. The neglected justification, of course, was inequality in the bargaining relation.

In *Lake Shore & Michigan Southern Ry. v. Spangler* the Ohio court considered the case of a brakeman who had been seriously injured due to the negligence of the train's conductor. Since the Ohio court had previously adopted the vice-principal doctrine, the railroad company's liability ordinarily would have been unquestionable. But in the contract of employment the plaintiff had stipulated that "while the company will be responsible to me . . . for any neglect of its own, yet it will not be responsible to me for the consequences of my own fault or neglect, or that of any other employees of the company, whether they . . . are superior to me in authority, as conductor [or] foreman, or not." The contract, said a unanimous court, was against public policy; consequently plaintiff's right to recover under the vice-principal doctrine remained unimpaired. "Such liability is not created for the protection of the employees simply," the court explained, "but has its reason and foundation in a public necessity . . . which should not be asked to yield or surrender to mere private interests and agreements." For the Ohio court, the public interest in this particular type of labor contract was so "obvious" that no further elaboration of its potentially baneful effect on the public safety seemed necessary. In *Little Rock & Fort Smith Ry. v. Eubanks*, decided several months later, the Arkansas court provided a somewhat different justification for its holding that railroad corporations could not contract out of their liability for injuries sustained because of defective machinery. "[I]t is for the welfare of society," generally,

the Arkansas court observed, that employers "shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties." If courts enforced such contracts, the "natural tendency would be to relax the employers' carefulness in those matters of which he has ordering and control . . . and thus increase the perils of occupations which are hazardous even when well managed. And the final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity." In Ohio and Arkansas, in sum, courts found narrow public policy grounds for their refusal to enforce contracts limiting the employer's liability just as courts in other jurisdictions, including the Supreme Court of the United States, often found narrow public policy grounds to sustain certain types of protective legislation following the birth of the liberty of contract doctrine.

At this point, the question that immediately comes into mind is, of course, why courts were so hesitant to invoke the concept of unequal bargaining power either in the liability-waiver cases or in the subsequent protective legislation cases. Why, in other words, did so few judges listen to commentators like Seymour Thompson? Fear of socialism was an answer that the progressive generation retailed from time to time. And they may have been right. But it is doubtful, I think, that judges consciously thought in terms of where the unequal bargaining power concept might ultimately lead if the principal penetrated the law of employment. It would be far more plausible to suggest that judges steeped in the "free labor" ideology instinctively resisted the very idea of essentially unfree labor contracts. Language to that effect certainly dominated the Georgia court's opinion in *Bishop*, and there is no reason to suppose that judges elsewhere thought any differently. One thing, however, seems absolutely certain to me. If the habits of thought and action we now term "Lochnerism" can be described as I have described them, albeit from the shoulders of Mensch, Friedman, and Nelson, then those very habits were deeply imbedded in the American consciousness well before the liberty of contract doctrine entered American constitutional law in 1886.

Some Comments on Chief Justice Hughes

by John Knox

Charles Evans Hughes was born in the year 1862 and died full of years and honors at the age of eighty-six in 1948. He came into the world during the very week that the immensely important Battle of Shiloh was being fought in Western Tennessee during our Civil War. He died three years after mankind entered the Atomic Age.

The great Chief Justice was, in fact, a first generation American on his father's side of the family. The elder Hughes was born in England of Welsh descent and was known as the Reverend David Charles Hughes, D.D. He came to the United States in the year 1855 and supported himself by preaching and teaching school. At the first opportunity, however, he enrolled as a student at Wesleyan University in Middletown, Connecticut, and his course of study included Latin, Greek and even Hebrew. Rev. Hughes soon met a teacher named Mary Connelly who had established a school of her own. She was of Irish, Dutch and German extraction, and she and the Rev. Hughes were married in Kingston, New York in the year 1860. Both were Protestants, but he was a Methodist and she was an ardent Baptist. She was so "ardent," in fact, that she convinced her husband to leave the Methodist Church and become ordained as a Baptist minister. His first parish was in Glens Falls, New York, and during his lifetime as a Baptist minister his annual salary never exceeded the sum of \$2,000.00. There was always something to preach about as the Civil War had begun in April, 1861. Just a year later—on April 11, 1862—Mrs. Hughes gave birth to a boy who would be her only child and who was named Charles Evans.

One of the most charitable things that can be said about the parents of the future Chief Justice is that they were religious fanatics, and life in their household must have been appallingly dull and restricted. It is true that they were hardworking and of fine character, and in the year 1984 it is



At 13 young Charles Evans Hughes graduated from high school.

difficult to comment impartially upon the actions and beliefs of this strange Puritanical couple. They interpreted the Bible literally, believed in a personal Devil and an actual Hell—which, of course, they were entitled to do. But they also made it plain to their young son, Charles Evans, that he would certainly experience the eternal pangs of Hell itself if he ever played billiards or cards or danced or attended the theatre. When there was the slightest evidence of "rebellion" on the part of the growing boy, he was made to feel that he would bear a heavy burden of guilt if he questioned in any way the teachings of his parents. He was also told by his father that his mother—who was born in 1830—was in such

delicate health that she could not live long anyway and, therefore, her beliefs must never be disputed. Of course, the mother lived until the age of 84 and died in December, 1914 — more than four years after her son had become a Justice of the Supreme Court of the United States. And the father continued to preach his fundamentalist "fire and brimstone" beliefs from the pulpit as long as he lived. As late as 1908 he was demanding that the police of New York City stop the "indecent and demoralizing" Salome dance at Hammerstein's Opera House. In June 1909, the Rev. Hughes suffered a stroke while preaching in New York, and he died the following December at the age of 77. After his stroke both he and his wife went to live with their famous son.

By the time Charles Evans was three and one-half years of age he is reputed to have been able to read. At the age of five his parents decided to take him out of school and tutor him at home. When he was eight he began reading Shakespeare and studying classical Greek, and he was taught at home by his parents until he re-entered school at the age of nine. At thirteen he graduated from High School 35 in the State of New York. By then he had written essays on such subjects as "The Evils of Light Literature," "Self Help" and "The Limitations of the Human Mind." At the age of fourteen — in the year 1876 — young Charles Evans left home to enter college. He had managed to survive that long — perhaps despite his parents and not because of them. From the beginning he had given evidence of being a child prodigy interested in a vast number of subjects — notwithstanding the oppressive, restricted and bigoted atmosphere in his home life. He had promised his father, for instance, that he would not be so frivolous as to read any novel until he first graduated from college. Yet this was a period in the Nineteenth Century when some of the greatest novels were being written and published. At first young Hughes entered a college that subsequently became known as Colgate University, but two years later he transferred to Brown University in search of a broader intellectual outlook in his continuing efforts to break away from his parents. Even while in college, however, his parents sought to "run his life" by sending voluminous written instructions which sound unbelievable today. Finally he even became so unworldly as to join a fraternity — Delta Upsilon — and in the fall of 1877 young Hughes attended a convention of

the organization which impressed him and which he enjoyed. The fact that he had derived any worldly pleasure from this affair, for instance, caused his mother acute distress. Some months before the convention his father had also written him that he (the father) was living under a "shadow of great sorrow" and that he was very "apprehensive that you may be turned from the path of rectitude by the influence of your worldly associates . . ." Hughes' subsequent adjustments to life displayed his self-discipline, his intellectual interests and his ability to work hard. But one of the legacies that his parents left him was Hughes' development of definite anxieties later on in life and of often working until he was near "the breaking point." For decades he struggled to surmount all problems, drove himself too hard and finally developed a duodenal ulcer late in life. When in college he had laid down very exacting standards for himself, and he experienced many tensions over the years in an effort to avoid falling short of these standards. In many respects he was eminently successful in achieving most of the goals he had originally set for himself.

While a student at Brown University Hughes studied French, German, Italian, Latin, classical Greek, mathematics, economics, etc. By then he had become a true "bookworm type" with few close friends. At the age of nineteen he received his degree from Brown with high honors. The following year was spent as a teacher of Latin, Greek, algebra and plane geometry at the Delhi Academy of Delhi, New York. Then Hughes gave up teaching, moved to New York City and entered the Columbia Law School in the fall of 1882 at the age of twenty. By that time he had accumulated a vast storehouse of knowledge gained from books, and once in law school he sought to achieve a mastery of his subjects so that no problem would be too complicated to understand.

During his years as a student at Columbia, Hughes spent two summers in the law office of Chamberlain, Carter & Hornblower. The senior partner of that firm was Walter S. Carter, and after Hughes graduated with honors from the law school he married Carter's daughter Antoinette. This marriage was a true love match and was to endure for fifty-seven years. The couple were married on December 5, 1888, and Mrs. Hughes died on December 6, 1945 — one day after her wedding anniversary. They were the parents of

four children—three daughters and a son.

Charles Evans Hughes' career was a brilliant one from the beginning. After graduating with honors from Columbia Law School Hughes practiced law with eminent success from 1884 until he became Governor of the State of New York on January 1, 1907—with the exception of a two-year interval when he was a Professor of Law at Cornell University. He was twice elected Governor of New York but resigned in 1910 when appointed by President William Howard Taft to the Supreme Court of the United States. Hughes re-

mained on the Court for six years, and during this period he wrote 151 opinions that were a blend of conservatism and liberalism. He also produced 32 dissenting opinions—making a grand total of 183 opinions written during six years. This was a greater number than that written by any other Justice during the same period—and one of these Justices was Oliver Wendell Holmes, Jr.

The premature end of Hughes' judicial career occurred on June 10, 1916, when he resigned from the Court in order to accept the Republican nomination for President of the United States.



In this symbolic cartoon, both party's mascots breathlessly awaited the outcome of the 1916 Hughes-Wilson election. Though losing to Wilson by a mere three percent of the popular vote, it was perhaps the single greatest setback in Hughes' public career.

On election night — November 7, 1916 — it seemed almost certain that he would be declared the winner. However, when Hughes went to bed that night the election results were still in doubt. When he awoke on the morning of November 8th many newspapers printed that morning assumed he had been elected. By the end of the day, however, Hughes was credited with 247 electoral votes and his opponent — Woodrow Wilson — had 251 electoral votes. Four states were still in doubt — California, Minnesota, North Dakota and New Mexico. The final count in California — which was delayed — indicated that Hughes had lost that state by only 3,775 votes. It was not until two weeks after the election before Hughes sent a telegram to Wilson conceding the election and congratulating the occupant of the White House on his narrow victory — an electoral vote of 277 to 254. The loss of California had cost Hughes the Presidency and altered the future course of American history. Woodrow Wilson had won a second term in office — two years after World War I had begun in Europe.

After his defeat Hughes quietly returned to New York City to resume the practice of law. From time to time, however, he entered public service. He never actively sought any office, but he also never failed to respond to any call to useful public service. Four years were spent as Secretary of State in the cabinets of Presidents Harding and Coolidge (1921-1925). In 1926, President Coolidge appointed Hughes as a member of the Permanent Court of Arbitration at The Hague. In 1928 the Council and Assembly of the League of Nations elected Hughes as a Judge of the Permanent Court of International Justice, and he served in this capacity from 1928 until 1930. On February 3, 1930, President Herbert Hoover appointed Hughes as the eleventh Chief Justice of the Supreme Court of the United States. He served as our highest judicial officer until his retirement on July 1, 1941. The economic conditions of the 1930's subjected the Court to its severest test since the Civil War. After retiring "for reasons of health and age" he lived another seven years and died on August 27, 1948, in his 87th year. His brilliant intellect had been spent in a lifetime of devoted service to his profession and to his country. At his death he was widely admired and universally considered to be one of the most distinguished and brilliant Americans who ever lived.

Once in the privacy of his home I asked Chief

Justice Hughes the following question: "Are you sorry that you lost the Presidency in 1916?" In his prior conversation he had been displaying an unexpected sense of humor, and this question brought another laugh as he replied, "No, I really am *not* sorry that I lost that election!" He spoke at once and without the slightest hesitation, and his voice seemed so sincere that I believed him immediately. "It is true the election was won by Woodrow Wilson," Hughes continued, "but where is Wilson now? Why he's dead! He's buried out there in the Cathedral, but I am alive and talking here with you! He has been gone for some years, but I am now the Chief Justice! I feel that if I had won that election I would be dead, too, by this time. So I am not at all sorry that I lost in 1916 to become Chief Justice later on!"

In December of 1932 I wrote to Hughes and asked him if he would consider writing an article which could ultimately be printed in the *Illinois Law Review*, a legal magazine published from time to time by the students at the Northwestern University School of Law in Chicago. Within a few days the following reply — signed by him — arrived at my home. It was not just a stereotyped note written by his secretary, but the letter was a prompt and sincere answer from the Chief Justice himself.

SUPREME COURT OF THE UNITED STATES
Washington, D.C.

December 12, 1932

My dear Mr. Knox:

You make such a straightforward, obviously sincere, appeal that I am most reluctant to refuse you. But the work of the Court, with the added responsibility at this time of a difficult international arbitration, makes it impossible for me to give attention to anything outside. Apart from this, I am constantly receiving requests for special messages, statements, and articles which I have no time to prepare, and to avoid a discrimination which would not be easily understood by my good and insistent friends, I feel compelled to decline all such requests alike. I must confine myself to what I find it appropriate to say in occasional public addresses.

I am sorry to disappoint you and I take pleasure in noting your interest in your work and send you my best wishes.

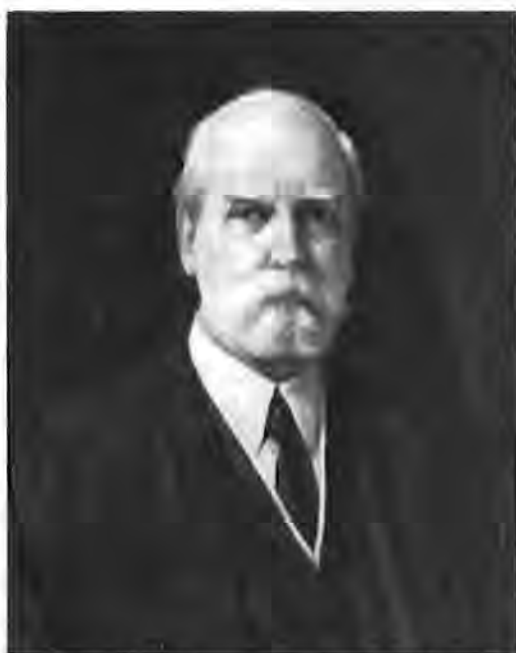
Very sincerely yours,
(Signed) Charles E. Hughes

John Knox,
321 Wesley Avenue
Oak Park, Illinois.

When I received this reply it was, of course, no surprise that he had found it necessary to send me a negative answer. The letter, however, caused me to be more impressed than ever by Hughes the man. I now knew for a certainty that despite a reputation for being austere and rather aloof in public, the Chief Justice was really a warm and sincere personality. The country at large saw him as a great intellect, a remarkable lawyer, a distinguished jurist and an internationally known statesman, but he was also something more. He was, in short, a "fine character" and thereafter Hughes always had a particularly warm spot in my heart.

This letter was also written at a time of great crisis in our nation's history. I do not know what particular international arbitration Hughes was referring to, but during the previous month Herbert Hoover had lost the election of 1932 and his bid for a second term in the White House. By December the country was in a state bordering on economic chaos. And during the first week of January former President Calvin Coolidge was destined to die suddenly from a heart attack. Chief Justice Hughes would travel in haste to New England to attend Coolidge's funeral. Then during the same month of Coolidge's death — January, 1933 — a man named Adolf Hitler would become Chancellor of Germany. On the following March 4th Franklin D. Roosevelt would enter the White House as Hoover's successor, and almost immediately the banks would be closed and shortly thereafter the United States would "go off" the gold standard. In many ways the month when this letter was written marked the very depth of the Depression's troubles which were so afflicting this country and the rest of the world. Yet Hughes found time to dispatch a personal and prompt note in answer to a request sent him by a young student.

In June 1936, Justice James C. McReynolds signed an official parchment-like sheet of paper which was to be filed with the Clerk of the Supreme Court. Before filing, however, it was also signed and approved by Chief Justice Hughes. This paper was my official appointment as a law clerk and private secretary to Justice McReynolds. However, McReynolds was just leaving for Europe, and with his approval I returned home to Illinois and did not go back to Washington until late in August of 1936. The following month — September, 1936 — I accidentally met the Chief Justice in the office of the



Hughes rejoined the Court as Chief Justice in 1930 after a 14 year absence.

Pearson Printing Co. — a small firm that for years had handled all the printing of confidential Supreme Court opinions. This Company was headed by a Mr. C. E. Bright. He was an elderly printer who was at that time one of approximately twenty-five persons who had advance knowledge of Supreme Court opinions before they were made public and announced from the bench. I had taken a taxi to the printing firm to talk with Mr. Bright and to meet him for the first time. He was someone whom I was destined to see many times during the coming year, and it was necessary that I make his acquaintance before the October, 1936, Term of Court began.

On that particular day in September, I called unexpectedly and "after hours" at the office of the Pearson Printing Co. The front door was unlocked, and when I entered I noticed only two men in sight. All of the regular printing employees had gone home. One of the men was, as I soon learned, Mr. Bright, and he was busily talking with Chief Justice Hughes. Neither man recognized me from a distance, and both stopped talking immediately. I stood by the door and called out that I was Justice McReynolds' new secretary. When the door had first opened Hughes looked up with an expression of considerable anxiety — as if an intruder were entering. In fact, the street address of the printing company was so confidential that the number was not

even listed on the typewritten sheet circulated among Court personnel and containing the names and addresses of all the employees of the Court—including the Justices. Apparently it had been an oversight on Mr. Bright's part not to have bolted the front door of the establishment as soon as Chief Justice Hughes entered.

As soon as I called out my identification I closed the door and began walking towards the two men who were in the back of the shop. Hughes' expression relaxed immediately, and when I was near him I said, "Well, I recognized you!" He laughed and said, "You did?" "Yes," I replied, "as soon as I opened the door I knew who it was from your beard!" I then reminded him of the first time I had met him nearly five years before. By this time Mr. Bright had joined in the conversation, and I had introduced myself to him. None of the three of us realized, however, that the 1936 Term would undoubtedly be the most momentous in the history of the Court, that during this period the Justices would be violently attacked by the President of the United States, that the most far-reaching opinions would be handed down in the glare of much publicity, that the Justices would be in a serious disagreement among themselves and divided into two hostile factions, etc.

I wish that this article could be long enough to describe in detail some of the enormous problems that the Chief Justice faced during that October, 1936, Term. Suffice it to say, however, that no man was better fitted to preside over the Court and to handle its administrative details than Charles Evans Hughes. When he returned to the bench on February 24, 1930, to become Chief Justice, there were still three men on the Court who were there when Hughes resigned in 1916 to run for the Presidency. These three were Holmes (appointed 1902), Van Devanter (appointed 1910) and McReynolds (appointed in 1914). In 1930 the new Chief Justice was also well acquainted with some of the other members of the Court. When Hughes had served as Secretary of State, for instance, Harlan F. Stone had been Attorney General during the last year that Hughes headed the State Department. Hughes had also known Justice Brandeis for years. (The Senate confirmed Brandeis' nomination on June 1, 1916, and Hughes had resigned from the Court on June 10, 1916.) The new Chief Justice also was acquainted with Owen J. Roberts who would soon become a Justice himself. (Roberts' nomination

was confirmed on May 21, 1930). In fact, Roberts soon developed a great admiration and respect for the new Chief Justice and years later stated that he felt toward Hughes much as a son or a younger brother might feel. In short, the new Chief Justice was fortunate to be on the best of terms with all of the 1930 members of the Court. He had also often argued cases before them during the years of his private practice in New York City. From the very beginning, however, the most serious trouble was brewing. The stock market crashed only four months before Hughes entered upon his new duties as Chief Justice. Each day the economic situation grew worse, and a very serious Depression was spreading across the land. Finally, many problems continued to grow in intensity until they simply exploded during the 1936 term.

As far as the other eight Justices were concerned, Hughes gradually found himself in the storm center of two different and opposing factions. There were four extreme conservatives—Butler, McReynolds, Sutherland and Van Devanter. There were also three liberals who generally stood together—Brandeis, Holmes and Stone. Holmes soon retired, however, and in 1932 another liberal succeeded him—Benjamin N. Cardozo. The eighth man was Roberts who sometimes voted with the liberals and sometimes with the conservatives. He ultimately became known as the "swing man," and by 1936 there was such an intellectual and social chasm between the conservatives and the liberals that the Chief Justice was forced to give two court dinners annually. The liberals were invited to one dinner along with carefully selected guests, and the conservatives were invited to another dinner with a different group of guests. I never did inquire which group was tendered the first of the two annual dinners and which repast Roberts was expected to attend. Perhaps Hughes rotated the two factions from year to year, and I assume that Roberts was invited to join the liberals at their dinner.

For years Justice McReynolds had refused to have anything to do socially with Justices Brandeis and Cardozo. In 1922, for instance, McReynolds had declined to attend a ceremonial occasion in Philadelphia with other members of the Court because he had refused to travel in the same company with Brandeis. And in 1924 the annual photograph of the Justices could not be taken because McReynolds would not sit next to



The Hughes Court of 1932 became the "Nine Old Men" of 1937, when a frustrated President Roosevelt cited the justices age as a rationale for his proposal to expand the Court's bench. Hughes privately foreswore his willingness to "preside over a convention" if need be, but publically disputed the age question by noting the Court was up to date with its docket.

Brandeis for the official Court picture. And in 1932 McReynolds had read a newspaper in Court while Cardozo was being sworn in as a new Justice. This was an example of the appalling situation which Hughes inherited when he became Chief Justice. Yet while Court was in session, the Justices did eat in the same room together from two until two-thirty o'clock in the afternoon. Justice Roberts years later described how skillful Hughes was in presiding at these luncheons and in handling conversation. Justice Stone also said that Hughes' influence upon the "efficiency and morale of the Court" could not be exaggerated. In other words, Charles Evans Hughes literally held the Supreme Court of the United States together by the force of his personality — especially during the 1936 term when the Court not only was suffering from very grave internal problems but also was forced to defend itself from outside attacks.

During that very important term I also found myself in a delicate position as I was assigned to the arch conservative member of the Court — McReynolds — and yet I had been well acquainted with a majority of the justices for some years before being appointed a law clerk and private secretary. I was undoubtedly the only clerk who circulated regularly between the homes of

some of the liberals and some of the conservatives, but my calls were always made in the strictest privacy. During these conversations with other Justices — which not even McReynolds ever knew about — no one was present except the particular Justice and myself. Once, however, a maid came into the room and served me ice cream while I was talking with Justice Cardozo, but she left at once. And I always had a very pleasant chat with my valued friend, Gertrude Jenkins, before being ushered into a room to speak with Justice Stone in private. For years she served both Stone and his wife as a confidential and very efficient secretary. Justice Brandeis also, for instance, talked with me alone in his apartment. No one was ever present during these conversations, but once when I was leaving I accidentally met his law clerk — Willard Hurst — who was entering the apartment carrying an armful of books. It was my first and last glimpse of Hurst during the entire term. I was also very close to Justice Van Devanter, but no one was ever aware that I called on him in the evening except the switchboard operator in the building where he lived. She would ring his apartment first and say that I was on my way up. This was the situation that prevailed for me during the Court-packing controversy which President

Roosevelt had launched so unexpectedly.

In November 1936, Brandeis also celebrated his 80th birthday, and I sent him some flowers for the occasion. To receive a birthday remembrance from anyone in the McReynolds household must have been an unbelievable experience for Brandeis. The relations between McReynolds and Brandeis were about as cordial as those between South Korea and North Korea are at the present time. Brandeis, of course, wrote me a note at once thanking me for remembering his anniversary. Strange to say, however, I never once asked to call on Chief Justice Hughes after I became a law clerk. I knew he already had enough problems to contend with in trying to keep the two Court factions at peace and in seeking to prevent the judicial ship from sinking in the 1936-1937 hurricane. I just did not wish to intrude upon him during such a grave crisis.

Many intimate details of that term of Court could be described here, but unfortunately they would make this article too lengthy to publish. I might mention one devastating crisis, however, when McReynolds and I caused the Chief Justice the most enormous inconvenience and disappointment. I felt sorry for Hughes at the time but could not very well go to his home and tell him so as I was too deeply involved with McReynolds and the three other conservative Justices. On February 5, 1937, for instance, President Roosevelt sent to the Hill his sweeping plan to reorganize the federal judiciary and the Supreme Court. Roosevelt evidently felt that in the immediate past the Court had vetoed too many New Deal laws, and for once the Court was going to be "brought into line and taught a lesson" so to speak. A mighty battle then began between the President and the Justices. Hughes was suddenly a general on the defensive, and it was necessary for him to undermine the position of the White House as soon and as effectively as possible. He had to demonstrate that the Court was abreast of its work, or virtually so, and it would also be of immense help if some of the most important cases before the Court would be decided in favor of the Government. It was obvious that the four conservatives would undoubtedly vote against the New Deal regardless of what happened. In some ways they resembled the last of the Bourbons in the year 1789, but fortunately the justices had voted 5 to 4 shortly before the President's plan was announced to sustain Washington state's minimum-wage law for women in *West Coast Hotel v. Parrish*. How-

ever, due to Justice Stone's illness this decision could not be immediately announced, and the decision did not become public until March 29, 1937.

One of the most important of the New Deal laws, however, was the National Labor Relations Act of 1935 — the Wagner Act as it was known. The constitutionality of this Act was challenged in five immensely important "Labor Board Cases" that were argued before the justices on February 9, 10 and 11 of 1937 — just a few days after the announcement of the President's Court-packing plan. At one of the Saturday conferences not long after these dates the justices cast their votes and once again Roberts sided with the liberals and the final vote stood at 5 to 4 — the same as in the *West Coast Hotel* case. The Chief Justice decided to write the majority opinions in three of the five cases, and Roberts was designated by Hughes to write the opinion of the majority in the other two cases. Soon both Hughes and Roberts were busily at work. The Chief Justice began composing a majestic draft of his three opinions — the proofs of which he circulated to the other eight justices. Roberts also sent proofs of his two opinions to the other members of the Court. Hughes reviewed the facts, examined the constitutional arguments, launched into a discussion of the interstate commerce clause and its applicability to the Jones and Laughlin Steel Corporation, and he finally declared in favor of labor regulation by the Federal government and in a new interpretation of the commerce clause. He discarded the earlier doctrines of the Court and decided in favor of the New Deal. If this 5 to 4 decision could be made public *as soon as possible*, it would be of immense help to the Court in defending itself against the President's plan.

There was, however, one difficulty which was overlooked at first. The senior dissenting justice was Van Devanter, and it was his obligation to determine which one of the conservatives would be assigned to write the dissent or dissents in four of the five "Labor Board Cases." (The fifth case was a unanimous opinion so no dissent in it was required.) I gave no particular thought to the matter one way or the other and assumed that Sutherland would be assigned to write whatever dissenting opinions might be necessary. He was a good reliable wheel horse whom the conservatives could always depend upon in an emergency. It never occurred to me that Van Devanter might select McReynolds as well as Sutherland, but this

is exactly what Van Devanter did. McReynolds, in fact, was chosen to write a dissent which would apply to three of the cases, and Sutherland was to write the dissent in the fourth disputed case. When McReynolds was informed of Van Devanter's decision I was astounded, and it was evident that the Justice himself was considerably disgruntled by the choice that had been made. The news that he had been selected as the white hope of the conservatives was just about the last thing he wanted to hear. It would have to be a very lengthy dissent. The writing of it would be very arduous and time consuming. It would be, in effect, the final "swan song" of the four conservative members of the Court. It would also mark the end of an era, and composing it would mean hours and hours of work which McReynolds had not been planning on doing. But Van Devanter soon made it clear that he would assist McReynolds and, in fact, the four conservatives eventually decided to hold conferences in McReynolds' apartment—in the room right next to where I was working.

And so work on the great dissent began, but McReynolds moved like a dinosaur while Hughes and Roberts were busily at work on their majority opinions. Hughes finished his three, Roberts completed his two, all five opinions were circulated and the "Labor Cases" were ready to be announced as far as the five majority justices were concerned. Sutherland then concluded his dissent, but McReynolds had not completed his assignment. Finally one of the Chief Justice's law clerks telephoned me at a time when McReynolds just happened to be out of his apartment. "Say, when are you going to finish that dissent?" I was abruptly asked. "The Chief completed his opinions days ago, and you have the final drafts. What is holding up your Justice? Can't you get those four fellows together long enough to decide what to say?"

"Just give us time," I replied, "Just give us time. After all Rome was not built in a day." Or perhaps I should have said "unbuilt."

The whole nation was—or so it seemed—anxiously awaiting the decision in the labor cases, and the fact that McReynolds had not completed his assignment was delaying the entire proceedings and enormously inconveniencing the Chief Justice. McReynolds had, in fact, burned the preliminary drafts of Hughes', Roberts' and Sutherland's opinions, but he did not destroy their final drafts which had been printed by Mr. Bright, the Supreme Court



Associate Justice James C. McReynolds
(1914-1941)

printer. Yet McReynolds did not want to keep these drafts in his desk for fear that his two servants might find them. He just did not trust them and felt that there would be a fearful scandal if any "leak" in information developed. Nor did he wish me to keep the drafts in my desk either. Finally McReynolds handed the drafts to me and said, "Here, see that they are hidden away where no one can ever find them!" He left the decision solely up to me where I was to put them. I then wrapped the opinions in a piece of brown paper and carried them to my apartment, and there I hid them in the closet among my belongings. Not even the maid who cleaned the room ever disturbed anything in that disorganized closet. And there the opinions rested—for days and days—while the country, the Chief Justice and the entire Court waited and waited. During this time McReynolds fumed and labored, and the four conservatives continued to hold conferences about what should be said in the dissent.

To make a long story short, all of March went by and still I could not inform the Chief Justice that we had finished the dissent. On Wednesday, March 24th, Justice Van Devanter arrived again at McReynolds' apartment to discuss the dissent in even more detail. And at 8:30 that evening I called at Justice Cardozo's for another visit with him—but there was no mention of the labor

cases. Instead we merely laughed and chatted about the latest books, about literature in general and about some of his early experiences. And a day or so later I made another hurried call on Justice Stone at his beautiful home on Wyoming Avenue. When we were alone he sat down in a chair, leaned back and asked me to be seated nearby. Looking me squarely in the eye he then began the conversation by exclaiming, "I suppose you know that Justice McReynolds has set the law of Admiralty back a full century!" But on that day I wasn't worried about Admiralty but about the "Labor Board Cases."

Then the four conservatives came to McReynolds' apartment again and held another conference. Each one arrived separately and was solemnly ushered into the living room by Harry Parker—the Justice's negro messenger. Once all four conservatives were assembled together, Van Devanter, Sutherland, and Butler each contributed something to the conversation in an effort to help McReynolds with his dissenting opinion. No one, however, led the discussion. There was no argument, no raising of any voice and all statements were made in solemn tones. The four Justices were obviously in agreement on what to say, but the problem was just how to say it! And while I kept typing one draft after another of the dissent, the Chief Justice was still waiting!

After March slipped away without the dissenting opinion being completed, the next opinion day was scheduled for Monday, April 5th. Once again, however, the Chief Justice had to be informed that the dissent would not be ready by that date. Finally, however, it did seem possible that the "Labor Board Cases" might be announced in Court on Monday, April 12th, if all went well. This meant that the final deadline for last-minute proof changes would be Saturday, April 10th, and Hughes was so informed. The week before that date proved to be a nightmare for me. On the afternoon of the 10th, the Chief Justice personally went to the Pearson Printing Company, and soon I hurried there with the latest copy of the dissenting opinion which I had just finished typing again for the -nth time.

I told both the Chief Justice and Mr. Bright that there might even be another last-minute change in the dissent! And there was, in fact, another such change. It was nearly 10 o'clock that evening when I once more arrived at Mr. Bright's office with another "final typed dissent." Mr. Bright was alone and waiting for me.

The Chief Justice had, of course, left hours before. At 10 o'clock that evening Mr. Bright began work once more in setting up the new changes on the linotype machine, and the next morning (Sunday) new proofs of the dissent were hand delivered to both Hughes and to McReynolds—and, apparently, to all the other members of the Court. By the afternoon of Sunday, April 11th, Hughes finally knew that he could announce the 5 to 4 decision in Court the next morning.

Another enormous crowd was in the Supreme Court building on the morning of the 12th. Two seats were held for me in the reserved section of the Court room, and I had invited a Phi Delta Phi friend to meet me at the Marshal's office at 11:30 A.M. His name was Travis Brown, and though I did not tell him why I had asked him to come to Court he undoubtedly guessed that the 12th was to be an important opinion day. Travis and I were then escorted into the Court room, which was rapidly filling with people. When we sat down I noticed that we were in the same pew and only a few feet from Mrs. Charles Evans Hughes. Her husband had evidently suggested that she watch the proceedings too. I also turned and looked at her as the Justices filed into the Courtroom on the stroke of twelve. She was gazing intently at Hughes with an expression of endearment as he was walking slowly to the chair reserved for the Chief Justice. Her appearance in Court on April 12th was also a signal to those "in the know" that the long-delayed Wagner Act cases would probably be handed down on that day—and so they were.

Some time later I typed a description of what happened in Court on that day. In part it reads as follows:

As Roberts finished speaking, the Chief Justice then straightened up in his seat with an Olympian dignity and began to read the first of his three opinions in the 'Labor Cases.' It was the *Jones & Laughlin Steel Corporation* decision. The audience showed intense interest as soon as Hughes identified the case by name. Those present seemed to understand at once that long-awaited decisions of the greatest importance were now to be announced. . . . I then glanced from the audience to the attorneys and from the attorneys to Justice McReynolds. His face was set in granite, and he was staring straight ahead—seeing nothing. Already the news that the Court had upheld the National Labor Relations Act had been sent through the tubes by the reporters present and was being carried to Capitol Hill and to every other part of the country. And the telephone must now be ringing in the White House to let Mr. Roosevelt know that a majority of the justices had reversed them-

selves in the midst of the Court-packing controversy—or so it might appear. In any event, the Chief Justice now sat enthroned upon his assaulted bench, and it was obvious that the liberals had won a resounding victory. The four conservative justices had suffered a final and total defeat. . . .

Thus was judicial history made in the Spring of 1937! On May 24, 1937, the Court, for instance, upheld the constitutionality of the Social Security Act of 1935 in *Steward Machine Co. v. Davis, Collector of Internal Revenue*. This was another extremely important 5 to 4 decision involving the tax imposed by the Social Security Act, etc. Justice Cardozo read the decision for the majority, and May 24th happened to be Cardozo's 67th birthday. After this particular session of Court it became obvious that Roosevelt's "Court-packing plan" was doomed. Yet McReynolds and I had labored on another dissenting opinion, and this dissent occupies eleven pages in the official Supreme Court reports beginning at 301 U.S. 598. There was also a six and one-half page dissent by Justice Sutherland — in which Justice Van Devanter joined. Then follows a two and one-half page dissent by Justice Butler. The four conservatives, in other words, did not "give up easily."

The Supreme Court of the United States had finally been "saved"—thanks in large part to the masterly efforts of Charles Evans Hughes! Once again I realized how fortunate the country was to have Hughes serving as Chief Justice in the midst of the Court-packing controversy. And on the evening of May 31, 1937 — Memorial Day — I called once again at Justice Cardozo's apartment. My term as a law clerk was almost at an end. "You certainly had a busy birthday last Monday!" I exclaimed. "Oh yes," replied Cardozo with a rather shy smile. "I never expected to achieve such prominence on the day I was

67!" This, however, was to be my last meeting with Cardozo. He also realized that it might be our final meeting and he said that on such an occasion he wished to read to me from a favorite book of his. I can still see him sitting now in front of me — reading quietly from "Goodby Mr. Chips." A short time later I left Washington and returned home to Illinois. The following January Cardozo suffered a stroke. His 68th birthday was spent in a wheelchair, and a few weeks later he died—on July 9, 1938. Even then Hughes' problems in keeping the Court functioning efficiently presented themselves once again. On October 3, 1938, for instance, the Chief Justice and his Associates expressed in open court their profound sorrow at Cardozo's death. Justice McReynolds, however, absented himself from Court on that day. In keeping with his policy of having nothing to do with Justices who were Jewish, he had consistently ignored both Brandeis and Cardozo.

Of the nine Justices in the 1930s, two were lifelong bachelors—Benjamin Nathan Cardozo and James Clark McReynolds. Cardozo died surrounded by loving friends and mourned in every section of the country. McReynolds died in 1946 — alone in a hospital room — without a single relative or acquaintance nearby. His funeral services in Kentucky lasted less than five minutes — or so the newspapers reported. Only his aged brother was left to mourn his passing.

Charles Evans Hughes lived on another two years. As he lay dying — surrounded by tearful relatives and friends — I often thought of his enormous accomplishments during the difficult 1936 term of the Supreme Court of the United States. It has now been more than thirty years since his passing, but time can never dim the magnitude of his great judicial accomplishments.

The Hughes Biography: Some Personal Reflections

Merlo J. Pusey

Writing a biography can be an interesting adventure, especially when the subject is a great statesman and jurist and an intriguing human being. I had the good fortune, or good judgment, to hitch my biographical aspirations to one of the brightest stars in the judicial firmament at just the right moment in his relaxed retirement. The result was a two-volume, 829-page biography of Chief Justice Charles Evans Hughes published by the MacMillan Company in 1951 which was awarded the Pulitzer and Bancroft Prizes and received the Tamiment Institute Book Award the following year.

My interests in Hughes attained rather extraordinary proportions as early as 1937 when he won the furious fight to save the Supreme Court from being packed without ever losing his composure. President Franklin D. Roosevelt had asked Congress for authority to name up to six additional justices to the Supreme Court because a large part of the legislation his administration had sponsored to cope with the Great Depression of the thirties had been found to be unconstitutional. Hughes had led the Court in upsetting some of this legislation, but he had also used his resourceful judicial reasoning and his high personal prestige to save some unorthodox New Deal legislation, and in some cases, had dissented from extremely conservative rulings of a majority of his brethren.

As a journalist with a special assignment to keep an eye on the Supreme Court, I was much interested in Hughes' heroic efforts to steer the Court away from the leanings of its four ultra-conservatives who seemed to construe the Constitution as if it were set in concrete. The Chief Justice himself viewed it as a living document intended to guide the governmental action of the United States throughout the ages. Along with the great Chief Justice John Marshall, he was fond of saying, "... it is a Constitution we are expounding," and that the Constitution made



Charles Evans Hughes

Curator's Office, Supreme Court

ample allowance for "experimentation and progress." Along with millions of Americans, I felt a vital interest in seeing that judicial philosophy prevail, while at the same time retaining the basic framework of our constitutional system.

When President Roosevelt bid for six new justices of his own choosing, for the obvious purpose of eliminating the restraints that the Court had placed on his administration's hastily drafted legislation, I feared that the result would be the destruction of the Supreme Court as an institution. For some months my chief preoccupation was the writing of editorials opposing the court-packing bills and praising the Supreme Court as it increasingly supported Hughes' concept of "a marching constitution." Not content with that effort, I decided to write a small book about the

gress to regulate interstate commerce.

In both his factual testimony of the Court's operations before the Senate Judiciary Committee and in his leadership of the Court through one of the most difficult periods of its history, Hughes emerged as a jurist of remarkable poise and statesmanship. From that period to the end of his service as Chief Justice in 1941, I maintained a special interest in Hughes' career. After finishing work on my volume entitled *Big Government: Can We Control It?*, which was published by Harper and Brothers in 1945, I mentioned to Ordway Tead that I would like to write a biography of Hughes. Tead expressed interest in such a project, and it was he who made the first approach to the retired Chief Justice. Later he sent me a copy of a letter from Hughes saying that he was preparing some biographical notes but did not wish any biography of himself to appear during his lifetime.

At that time I knew Hughes only as the Jovian figure who had presided from the center of the Supreme Bench. He had written me a complimentary note when I sent him a copy of *Big Government*, but I was reluctant to approach him about writing the story of his life because I had never written a biography and I felt deeply that his should be one of the best judicial biographies ever written. When at last I called at his home I found only his secretary, Wendell E. Mischler, present. Mischler said Hughes was in Pennsylvania. I asked for an appointment on his return.

"What do you want to see Mr. Hughes about?" Mischler probed.

"I want to ask him about the possibility of writing his biography," I replied.

"There would be no point in talking to him about that," Mischler responded with the air of one obviously devoted to saving his chief from wasting his time. "I already have a list of twenty persons who want to write his biography, and some of them are *distinguished writers*."

"That lets me out," I replied, "but I would still like to talk to Chief Justice Hughes. When will he be back in Washington?"

Not being willing to trust Mischler to set up an interview, I obtained Hughes's address in Pennsylvania and wrote him a note asking if I might have access to his papers and to himself for the purpose of writing the biography that Harper was eager to publish. His reply was an invitation to come and see him on his return, and I arranged an appointment for October 24, 1945. It proved

to be a very pleasant and encouraging experience. Hughes talked fluently and freely about his career, asked questions about myself and, after about an hour of such chat, said that he was leaving the question of his biography largely in the hands of his son, as he did not want anything to be published during his lifetime. Would I like to meet his son?

That seemed to be a hopeful beginning, and I expressed great interest in meeting his son. Before leaving, however, I reminded him of how important it would be for his biographer, whoever he might be, to have access to himself to ask questions that only he could answer. Hughes replied that he fully understood the desirability of personal contact between a biographer and his subject and indicated that he would be available for personal interviews.

Charles Evans Hughes, Jr., argued a case in the Supreme Court some ten days later and then came to his father's home on R Street. Both father and son put me through a rather severe examination as to education, previous writing, time available for a biographical task and so forth. Charles Junior wanted to know if I was experienced in research and in organizing vast amounts of data, calling attention to enormous sources of material available about his father. The family, he said, was interested in "a scholarly, complete and definitive biography."

That sounded rather intimidating, but I mentioned the two books that I had written, involving lesser amounts of research and organization of material. When both father and son replied that they had never seen *The Supreme Court Crisis*, I promised to supply them with copies the following day. As soon as he had had time to read the little volume Hughes called me on the telephone and asked me to come to see him.

As I entered the door he pointed a finger at me and boomed in that magisterial voice that had often caused lawyers to quake in arguing before the Supreme Court, "You were wrong about . . ." As more than eight years had elapsed since I had written the book, I could not immediately determine what I had been wrong about but concluded that it must have been something serious to cause so vehement a reaction. "Well," I said to myself, "I guess I blew it."

As the former Chief Justice continued to talk I gleaned that his irritation centered on a single sentence in the book in which I had indulged in what had seemed a bit of reasonable speculation.

That speculation was that "the criticism which followed invalidation of the New York minimum wage law was a factor in inducing the Court to re-examine the Adkins case when an opportunity arose." I had not known at the time the book was written that Justice Roberts had switched his vote in regard to the validity of state minimum-wage laws *before* the court-packing bill had been disclosed. Indeed, the fact was not known outside the Court until the Hughes Biography was published. But the offending sentence had spoken only of a general criticism of the decision invalidating the New York minimum-wage law, and some of that criticism — indeed, the most effective part of it — was an echo of Hughes's own dissenting opinion. Hughes may have been more interested in testing my mettle than in hanging a blooper around my neck. In any event my offense appeared to be not very critical, for he was soon saying that he had found the book as a whole to be constructive and sound in principle. Then he went on to chat cordially about the Supreme Court and himself.

Before I left his office on this occasion Hughes told me that both he and his son had decided to give me access to his papers, and he repeated that he would be available for interviews. I asked if he wanted a written contract providing that the biography would not be published in his lifetime. "No," he replied, "a verbal understanding is sufficient."

"Is it also understood," I asked, "that I shall have exclusive access to your Biographical Notes, your papers and yourself for this purpose while the book is being written?"

"That," he replied, "is the understanding of both myself and my son."

Before I left his office that day Hughes turned over to me some of the Biographical Notes (500 pages in all) he had written since his retirement, with a very emphatic statement that the Notes themselves were never to be published. "I have consistently refused," he said, "to write an autobiography because autobiography tends to become apologia, and I have no interest in apologizing for what I have done." He also handed me a paper giving me access to his restricted papers in the Library of Congress.

Delighted though I was by this outcome, I remained curious as to why he had entrusted this obviously difficult task to one as inexperienced in biographical writing as myself when there were ample alternatives available. I later learned



Chief Justice Hughes and his wife Antoinette outside their Washington home.

that one of the "distinguished writers" who had approached Hughes about his biography was Allan Nevins, an able historian and Pulitzer Prize winner, who was associated with Henry Steele Commager at Columbia University. Hughes feared that such an association might make it difficult for Nevins to write objectively about the controversial years through which Hughes had piloted the Supreme Court.

Hughes had the reputation of taking considerable care in all that he did. When I talked to Justice Roberts in the course of gathering material for the biography he commented: "Don't you ever think that Hughes didn't investigate you thoroughly before entrusting you to write his biography." As time went on Hughes did talk about some of the writers who had approached him about his biography long before I did. In most instances he was not sure they understood what he was trying to do as Chief Justice. Having some familiarity with my writing as a journalist, he said, he concluded that I was a reliable fact finder and that I would deal objectively with a highly controversial period of judicial history.

Hughes's Notes and my weekly visits with him brought some radical changes in the way I had originally viewed my task of writing his story. Previously I had known him only as the stern,

bewhiskered "Mr. Authority" who presided over the Supreme Court. Delving into his letters, papers and Notes and chatting with him across his desk revealed a warm personality who told sophisticated jokes, laughed heartily and exhibited warm sentimentality whenever his family came into the discussion. Instead of being a judicial automaton, he was a very sensitive man, who was still deeply in love with his wife of fifty years, Antoinette Carter Hughes, and vitally concerned about the welfare of humanity.

I remember only one of my numerous visits to the Hughes home as difficult or unpleasant. As I was admitted to his office on the evening of December 5, Hughes looked particularly tired and worn. Almost the first thing he said to me was that Mrs. Hughes, who had been ill for some time, was "very low." I tried to excuse myself, saying that I would come back at his convenience, but he insisted that the interview go forward, no doubt thinking that it would relieve his troubled mind. Unfortunately, the period I was prepared to discuss with him was about his early life, courtship and marriage. He endured my questions for a while, but then gruffly broke off the interview.

Antoinette Carter Hughes died the following day. With full allowance for the grief of the former Chief Justice, I worried about the consequences of my unintentional intrusion into his hours of sorrow. Three weeks later, however, his poise and affability were fully restored, and I caught only glimpses of the grief that weighed on him when he would sigh and say, "You've no idea of how lonely it is here without Mrs. Hughes." Perhaps for this reason, if not for any other, he welcomed my visits, and I spent a couple of hours with him every week, when he was in Washington, for the next two and a half years.

Most of these interviews lasted for two hours, with Hughes in a comfortable chair at his desk; I sat on the other side of the desk asking questions and scribbling notes as he talked. Usually, I would break off the interviews out of fear of wearying him, but often he would say: "If you have any more questions go right ahead and ask them." As soon as I arrived home after an interview, I would type out the pertinent parts of my notes. It was not necessary to type everything, for Hughes inevitably covered in his talks much that was already available in his Notes and in his papers. Nevertheless, the interviews were in-

valuable for rounding out details and giving a clearer picture of why he had acted as he had in many complex situations. All my notes were submitted to him for correction and approval the next time I went to see him. Since he had been a great legal investigator, governor of New York, a candidate for the Presidency of the United States, Secretary of State, twice a member of the Supreme Court and a member of the Court of International Justice, the areas of history I found it necessary to explore sometimes seemed endless. But I had the good fortune of being able to consider each of these experiences with him in substantial detail, along with many phases of his personal life.

At the Library of Congress, Dr. Luther Evans introduced me to the Hughes papers that were not yet available for public use. David Mearns assigned me to a desk and chair deep within the bowels of the library, and I spent many of what otherwise would have been free days there for several years. The Hughes papers filled two large filing cases, six big wooden boxes, twenty large filing boxes, thirty-six volumes of clippings and a vast miscellany of books, pictures and other data. One of the most valuable sources of information was a lengthy manuscript by Henry C. Beerits covering most of Hughes' career, except his service on the Supreme Court. Hughes' more recent papers were stored at his home, and when I went there for an interview I often spent the remainder of the day exploring these.

Since a statesman or jurist can be understood only in relation to the times in which he functions, I also read a great deal of recent history, as well as the available biographies of other public men with whom Hughes had been associated. For more intimate details I wrote or interviewed dozens of officials and others who had served with Hughes in his various capacities, friends and opponents alike. This was a particularly fascinating aspect of my project, for it brought me into contact with Justices Owen Roberts, Robert H. Jackson, Felix Frankfurter and Hugo L. Black, with John Lord O'Brian, Roscoe Pound, G. Howland Shaw, J. Reuben Clark, Sumner Welles, Henry P. Fletcher, Francis White, William R. Castle, Charles Cheney Hyde, Joseph C. Grew, Judges John J. Parker and D. Lawrence Groner, former President Herbert Hoover and many others. Each one contributed facts, comments or anecdotes that were invaluable in rounding out the story.

For several years while working on the biography I spent my vacation time in places where Hughes had lived and worked so as to absorb in some measure the atmosphere he had experienced. At Glens Falls, N. Y., where he was born, I visited the old church where his father, the Rev. D. C. Hughes, had been pastor, checked the files of the *Messenger and Republican* and chatted with a few old timers who remembered the Hughes family. At Oswego, New York, I delved into books and records of the West Baptist Church, gleaned bits of history from the files of the *Palladium Times* and chatted with an old-timer who had known Charley Hughes when he was five.

These nostalgic jaunts also took me to Hamilton, N. Y., where young Hughes went to Madison (now Colgate) University, and to Brown University in Providence where he finished college. In Greenpoint, Brooklyn, I looked up the old houses where the Hughes family had lived. I spent a week at the New York Public Library exploring the Robert Fuller Collection of clippings dealing with Hughes's governorship of New York. At Cornell University I found some who remembered Hughes as a law professor there. Unfortunately, Hughes's hope that his son would be of great help to me was not to be. Although my family and I spent a few pleasant hours with Charles Junior and his family at their vacation retreat in the Adirondack Mountains, he died of a brain tumor before I was able to tap his obviously rich store of information about his father.

It became apparent very early in my research that Hughes had a keen sense of privacy regarding his personal affairs. His love letters to Antoinette Carter had been burned long before I began my work. On several occasions I asked about other letters that might help throw light upon his emergence as a gifted youth and upon his later career. His daughter, Catherine Waddell, had told me about a packet of letters that was nowhere to be found in the papers to which I had access. Hughes suffered a recurrence of his bleeding duodenal ulcer early in 1948, and Catherine came down from New York to be with him. During her stay she found a bundle of letters that Hughes had written to his father and mother while he was in college. Showing them to her father, she told him she had made a great discovery. Hughes responded that he was too sick to review them and instructed that they should be

burned. Catherine replied that she could not endure the thought of burning anything so precious. An argument ensued, but she promised nothing. After her father's death, Catherine allowed me to read the letters, which disclosed an invaluable close-up view of Hughes' young manhood.

As to Hughes' public life, his attitude was always to let the facts speak for themselves. While he strictly protected the confidentiality of the judicial conferences of the Supreme Court, he did make available some of the confidential notes that the Justices occasionally circulated among themselves. When I got to know him well, I sometimes probed for information as to what had been said in the judicial conferences when cases of great moment were under discussion. While always reminding me that the judicial conferences are confidential, he would sometimes say: "You ought to know more than you can write." Particularly if it seemed to throw light on the point under discussion, he would go ahead and tell me what Brandeis, or Cardozo, or Van Devanter had said. This appeared to be solely for my education so that I would understand why the case had been decided as it had.

Hughes was deeply troubled by the general public interpretation of what the Court had done in some of the New Deal cases. It hurt his judicial pride to be put down as one who took a narrow view of constitutional powers, especially the power to regulate interstate commerce which the Constitution specifically assigned to Congress. During his service on the Supreme Court as an Associate Justice from 1910 to 1916, Hughes had invested an enormous amount of effort in expounding the scope of the commerce power. His opinion in the *Shreveport Case* stood for many years as the Court's guideline in adjudicating the right of Congress to regulate many activities impinging on interstate commerce. Congress could protect interstate commerce from injury, he had said in effect, no matter what the source of that injury might be.

But in its hurry to pass emergency legislation in the depression years, Congress chose to base several regulatory acts on the taxing power. This troubled Hughes and a majority of the Court; not, if Congress could use the taxing power as a base for controlling economic activity, it could reach everything. Hughes interpreted the Tenth Amendment as a bar against such a sweep of power into the federal maw. The Tenth Amend-

ment, however, would not have a similar restricting effect on the commerce power, as it was specifically allotted to Congress by the Constitution for regulatory purposes.

When I visited Hughes on January 2, 1947, he expounded at some length on this distinction between the taxing and commerce powers. I had asked him to comment on a professor's conclusion that the Court had made a sweeping adjustment of its views expressed in *United States v. Butler* decided in 1936 and *United States v. Darby* in 1941. In the *Butler* case the Court had held that the Agricultural Adjustment Act invaded the rights reserved to the states by the Tenth Amendment but found no such invasion in the *Darby* case upholding the new AAA or in *Jones and Laughlin* involving the Fair Labor Standards Act.

"It must be remembered," Hughes said, "that the two acts did not rest on the same foundation. The Agricultural Adjustment Act invoked the taxing power; the Fair Labor Standards Act, the power to regulate interstate commerce. In the *Butler* case the Supreme Court said that Congress had no authority to deal with agricultural production as such. In spite of the Court's broad interpretation of the national taxing power, first officially enunciated in this case, it concluded that Article I, Section 8 (1) of the Constitution gave Congress no warrant for the control of agriculture and that the processing taxes collected by the AAA were not true taxes to provide for the general welfare in the constitutional sense but exactions from one group for the benefit of another. The Court also concluded in the *Butler* case that farmers were being economically coerced by the act. Hughes observed:

When the Court came to deal with the agricultural act subsequently passed by Congress and with the Fair Labor Standards Act, the issues before it were entirely different. It was then confronted by the question of how far the commerce power extended. Unlike the taxing power, the power to regulate commerce among the states was specifically put into the Constitution as a regulatory and protective power. Obviously the Tenth Amendment reserving to the states, or to the people, powers not delegated to the United States would not operate to shrink the specifically delegated commerce power, although that amendment has been and can be used to upset the invocation of non-regulatory powers for regulatory schemes that reach out into local activities.

It has long been established that the power of Congress to regulate commerce among the states includes the power to protect that commerce from injury no matter what the sources of injury may be

... Once this principle is accepted, then the question for the Court in passing on the constitutionality of an act of Congress based on the commerce power is not the Tenth Amendment but the reach of this dominant and paramount national power.

No one can say with finality just what the boundaries of this power are, except in terms of principle. Indeed, the boundaries of the commerce power may change from decade to decade as the impact of local interference upon interstate commerce is intensified because of the closer integration of the economy. Each case coming before the Court must stand on its own merits. But if the Court is to avoid a confused jumble of interpretations, it must have some guidelines in terms of principle to distinguish between interferences with interstate commerce that Congress may properly reach and other remote interferences with which Congress has no proper concern. The guideline to which I adhered was that which separates direct and substantial interferences with interstate commerce from indirect and unsubstantial interferences.

Hughes candidly recognized that the difficulties of applying this rule are great. But what, he asked, is the alternative? The very nature of our political institutions and the whole of our national experience, he argued, militate against the sweep of every local economic activity under the control of Congress. So he continued to argue for a case-by-case application of his rule without any blanket obliteration of the distinction the founding fathers drew between national and wholly local economic activity.

Near the end of my task came an incident that is perhaps more amusing than historically significant. Shortly after the death of Chief Justice Harlan F. Stone in April, 1946, Hughes had a call from the White House.

"May I come over to see you?" President Truman asked.

"By no means, Mr. President," Hughes replied. "If you want to see me, I'll come to the White House."

Truman was seeking advice on the appointment of a new Chief Justice. After responding to the President's questions about the members of the Supreme Court and various other judges, Hughes told the President what he had said to F.D.R. when he had sought advice as to Hughes' successor. Roosevelt had talked favorably of both Justice Stone and Justice Jackson. Hughes had replied that he had been very favorably impressed by Jackson's legal ability, but Stone had been a stalwart member of the Court for many years and thus had earned first consideration. As Justice Stone had died in 1941,



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John Kneass



Curator's Office, Supreme Court

The death of Chief Justice Stone (center) prompted President Truman (left) to ask Hughes for advice in choosing a successor. Hughes spoke in favor of Associate Justice Robert Jackson (right) but Truman ultimately chose Treasury Secretary Fred Vinson for the post.

Hughes told Truman that his choice would be Jackson.

After talking to former Justice Roberts and others more fully aware of the feud that had developed on the Court, to which Jackson was a party, President Truman decided to name his Secretary of the Treasury, Fred M. Vinson, as the new Chief Justice. Eager though I was to know what Hughes had recommended, I refrained from asking him about his visit to the White House as long as there was any news value in the incident. When I did raise the question, however, Hughes candidly shared what he had said to the President. He asked, however, that I not use it in the book without the President's permission. I made careful notes of what he told me and submitted them for his approval, which he readily gave.

A few years later, however, I encountered a very different story at the White House. Adhering to Hughes's request, I wrote the President a letter setting forth details of my interview with Hughes and the recommendation he had made in regard to the chief justiceship, and asked for Truman's permission to publish the information. The letter came back with Truman's comments on the margin. He agreed with everything except Hughes's recommendation of Jackson. At that point he scribbled in the margin: "No. He recommended my Secretary of the Treasury Fred Vinson."

The President's memory had slipped. It was inconceivable that, if Hughes had recommended Vinson, he would not have accepted credit for making the suggestion. Likewise it was inconceivable that he would have recommended for the highest judicial position in the land a man whom he scarcely knew. In dealing with the inci-

dent in the biography I made mention of Truman's contradiction of Hughes but gave it no weight. This produced a minor ruckus when the biography appeared in print.

Asked about the discrepancy at a news conference, Truman reiterated that Hughes had recommended Vinson. The Associated Press distributed a story to that effect on November 15, 1951, but also took note of the Hughes version. In the interest of historical accuracy I wrote a letter to the President citing additional evidence. Hughes had told his daughter Catherine that he recommended Jackson. He emphatically repudiated a story by Marquis Childs saying that he had advised the President to choose a Chief Justice "from outside the Court." After Vinson's appointment, Hughes told Frankfurter he was not sure whether he had ever met the new chief. All this I put into a letter to Truman, along with a copy of the notes that Hughes had approved, and asked if he would give me access to any notes he might have in the interests of historical accuracy. I never received a reply.

Charles Evans Hughes died on August 27, 1948 while vacationing at Asterville, Massachusetts with his family.

It was a great relief to see *Charles Evans Hughes* finally in print in 1951, six years after I had begun my research. These were fascinating years and highly rewarding in terms of association with fertile minds and of broadening my understanding of how our government works. With all its foibles and problems, the United States has had some giants in its service during the present century. It is richly rewarding to follow their trails and try to isolate the qualities that bring them to the top.

Styles In Constitutional Theory

by Judge Robert H. Bork

There is probably more debate today than ever before about the duties of judges, and indeed about the freedom of judges, in deciding constitutional cases. Though there is much to be said on the topic of the actual performance of our courts and the theories of adjudication they appear to be following, this paper is not a critique of the courts. I intend to focus instead upon the theorists of constitutional law, the legal intellectuals, these days mostly to be found in the academy. Their styles of argument tell us something about the attitudes of intellectuals not only toward law but toward the American polity and American society. We may also discern what is being taught in the law schools and hence what may be the views of the profession and the judges of the next generation.

Differing styles of constitutional theory are best examined in the context of the Bill of Rights and Fourteenth Amendment, for it is there, in the tension between governmental authority and individual liberty, rather than in questions of governmental structure and operation, that styles differ most radically and that the most interesting inferences are to be drawn.

The problem in this area of constitutional theory always has been and always will be the resolution of what has been called the Madisonian dilemma. The United States was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second tyranny by the minority.

It is not all clear that the framers assigned the federal judiciary a major role in the resolution of this dilemma. Indeed, it is good for any incipient judicial hubris to recall that in Federalist 78, Hamilton, misquoting Montesquieu only slightly, said that "Of the three powers . . . , the judiciary is

next to nothing."¹ The framers attempted to balance majorities and minorities primarily by such strategies as enlarging the political unit, federalism, separation of powers, and the structure of representation. But over time it came to be thought that the resolution of the Madisonian problem—the definition of majority power and minority freedom—was primarily the function of the judiciary and, most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory.

For most of our history, theorists found resolutions of the Madisonian dilemma no particular problem. Men such as Joseph Story, James Kent, James Bradley Thayer, and Thomas Cooley viewed the Constitution as law—a unique form of law, perhaps, one requiring special handling—but law nonetheless. The primary problems were the usual ones of interpretation and construction.

It was not until the latter half of this century, so far as I can tell, that it began to be suggested seriously, and with elaborate argument, that courts had power to create and enforce against the majority will values that were not in some real sense to be found in the Constitution. The distinction between the theory of our first century and one half and the last thirty years is by no means absolute. There have always been suggestions that courts might apply natural justice. Indeed, Chief Justice Marshall may have suggested extra-constitutional powers when he wrote in *Fletcher v. Peck*: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power. . . ."² And it is certainly true that courts from time to time did create extra-constitutional rights, as the defunct doctrine of economic substantive due process reminds us. But there was no theory of judicial behavior that justified such departures, at least none that I have been able to find. The reigning theory was that the Constitution is law and is to be interpreted.

Today, the reigning theory is that interpretation may be impossible and is certainly inadequate. The majority of theorists would assign to judges not the task of defining values found in the Constitution but the task of creating new values and hence new rights for individuals against the majority. These value-creating theories are sometimes referred to as non-interpretivism.

We have, therefore, a major shift in the styles of constitutional argument. I want to examine this shift in terms of the content of theory, the mode of discourse, the legitimacy of the theories put forward, the attitude of legal intellectuals toward American society, and, finally, the possible effects upon our constitutional liberties.

In 1833, Joseph Story, an Associate Justice of the Supreme Court of the United States and the Dane Professor of Law at Harvard, could introduce his three-volume *Commentaries on the Constitution of the United States* with the following words:

The reader must not expect to find in these pages any novel views and novel constructions of the Constitution. I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts. . . . Upon subjects of government, it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common-sense of the people, and never was designed for trials of logical skill or visionary speculation.³

When he came to the role of the courts, he assumed that their task was to interpret: "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties."⁴

You will find that same interpretivist assumption in Kent, Cooley, and other writers of the last century and the first half of this. That assumption was the premise for Thayer's end-of-the-century dictum that a court must not overturn a statute unless it was convinced not merely that the legislature had probably exceeded its constitutional powers but had made a clear mistake in supposing its act constitutional. Courts must not, he said, "even negatively, undertake to legislate."⁵

I would like to quote extensively from the writers of the older tradition in defense of a strictly interpretivist theory of constitutional adjudication, but I can't, for the simple reason that they took the theory for granted and had no op-



"A constitution of government is addressed to the common-sense of the people . . .," observed Justice Joseph Story.

posing school to rebut. That fact, while it may create a certain imbalance in this talk, underscores the radical and unexpected nature of the shift that has occurred.

When theorists began to view the constitutional judge as properly a legislator I do not know, but that position seems not to have achieved its full articulation until well after World War II. The most influential theorist of this new school was my good friend and colleague, Alexander M. Bickel. He did not hesitate to assert that the judge must create rights not found in the Constitution, indeed, should create rights the written Constitution clearly assumes not to exist. The judge was to become the scholar-king. It is little short of astounding to reread today the wide-ranging, free-handed task Bickel would then — he had second thoughts in later years — have assigned to the Supreme Court:

The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law and . . . in the thought and the vision of the philosophers and the poets. The Justices will then be fit to extract "fundamental presuppositions" from their

deepest selves, but in fact from the evolving morality of our tradition.⁶

I was tempted to say at this point that nothing could be further from the theories of Story, Cooley, and Thayer than constitutional law, if it can be called, that drawn from prolonged immersion in the visions of poets. I was tempted to say that, but, as you will see, it is possible to get still further away from the old tradition.

You are doubtless familiar with the next stage of theory. Dean Harry Wellington would create new constitutional rights by employing "the method of philosophy"⁷ to determine the "conventional morality"⁸ of our society. Professor Ronald Dworkin seeks a "fusion of constitutional law and moral theory."⁹ His judge is to determine the principles that underlie and explain the nation's moral judgments and then apply those principles against any particular moral judgment made by a legislature to decide whether the latter is consistent or aberrational. Professor Thomas Grey suggests that there is a "higher law" of unwritten "natural rights" which courts are to enforce.¹⁰

Professor Richard Parker promises a new constitutional theory which will "take seriously and work from (while, no doubt, revising) the classical conception of a republic, including its elements of relative equality, mobilization of the citizenry, and civic virtue."¹¹ This, it seems, is to be constitutional theory as written by the Committee on Public Safety. It is to be hoped Professor Parker has heard of Thermidor.

These, as you know, are only a few of the theorists of this sort. The groves of legal academe are thick with young philosophers who propose various systems of morality that judges must use to create new constitutional rights. An important feature of these systems is that they not only control democratic choice but that they purport to have sufficient rigor so that they can control the judge. The judge is, the theorists claim, prevented by their systems from simply imposing his own views of policy and morality.

The progression by no means stops there. It could not stop there. The nature of the non-interpretive enterprise is such that its theories must end in constitutional nihilism and the imposition of the judge's merely personal values on the rest of us. The reason is that none of these theorists has been able — and I venture to suggest none ever will be able — to build a philosophical structure that starts from accepted premises and logically

demonstrates the answers, or the range of allowable answers, to questions not answered by the written Constitution. Nor has anyone managed to connect all the moral judgments embodied in our laws to state more basic principles that themselves decide concrete cases. Nothing less than this power and rigor is required if we are to accept government by judges who are not applying the Constitution. Yet no theologian, no moral philosopher, no social philosopher has achieved that hegemony in the recorded history of human thought. That does not prove conclusively it cannot be done, perhaps, but it does give some reason to suspect that no law professor is going to accomplish the task anytime soon.

This failure will become apparent — indeed, it is already apparent as each of the non-interpretive theorists convincingly destroys all the others' systems — and that is why the inevitable end to non-interpretivist, value-choosing theory is constitutional nihilism. Professor Paul Brest, a non-interpretivist, bravely acknowledges this: "the controversy over the legitimacy of judicial review in a democratic polity . . . is essentially incoherent and unresolvable"¹² since "no defensible criteria exist"¹³ "to assess theories of judicial review,"¹⁴ and, therefore, "the Madisonian dilemma is in fact unresolvable."¹⁵

One might suppose that a constitutional theorist who concludes that value-choosing constitutional theory cannot be coherent, that it cannot satisfy its own criteria of legitimacy, and that all existing theory is debased one might suppose that such a theorist would entertain the idea of judicial restraint, or judicial modesty, or even judicial abdication in favor of the democratic process. One might suppose that, but one would be quite wrong. Nihilism turns instead to advocacy of opportunistic judicial authoritarianism precisely because what fuels the non-interpretivist impulse in the first place is a desire to change society in ways that legislatures won't. The desire for results is greater than the respect for process, and, when theory fails, power remains.

Professor Brest seems to call at a minimum for judicial action that serves the public good as he perceives the good, and, apparently still in the context of constitutional theory, he states that, "if it would be arrogant to think that we could change the world, it would be even more irresponsible to act as if we couldn't."¹⁶ He speaks, approvingly, of working "toward a genuine reconstitution of society."¹⁷ His despairing view of our society

seems to couple nihilism with apocalypticism.

A second reason that non-interpretivism ends in nihilism is that it has proved wholly unable to meet a condition most theorists have accepted as indispensable — consistency with democratic control of government. Alexander Bickel explained why that is essential:

[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.

... [D]emocracies do live by the idea, central to the process of gaining the consent of the governed, that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy. With that idea, judicial review must achieve some measure of consonance.¹⁸

In short, a value-choosing theory must give a satisfactory reason why it is legitimate for a court to impose a new value upon a majority against its wishes.

Bickel not only posed the problem; he essayed an answer, which, I think, no one writing afterward has improved upon. That answer came in two parts. The first was one of relative institutional capacities: courts are simply better than legislatures in dealing with principles of long-run importance as opposed to immediate problems. He said:

... [C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.¹⁹

Other than to heave a wistful sigh, I will pass by this vision of a judge's life without comment.

The second step in Bickel's argument is that the courts' commands are not really final. Speaking of the resistance to the decision in *Brown v. Board of Education*, Bickel wrote:

The Supreme Court's law ... could not in our system prevail — not merely in the very long run, but within the decade — if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country. This, in the end, is how and why judicial review is consistent with the theory and practice of political democracy. This is why the Supreme Court is a court of last resort presumptively only.²⁰

I have quoted Bickel because he expressed the

arguments so well. Others, including Wellington, have employed essentially the same strategies to escape the charge that non-interpretive review is unacceptably anti-democratic.

Both steps in the argument — superior institutional capacity and lack of finality — are essential, but, unfortunately, neither can survive examination.

Even if we assume that courts have superior capacities for dealing with matters of principle, it does not follow that courts have the right to impose more principle upon us than our elected representatives give us. Governmental decisions will involve a mix of, or a tradeoff between, principle and expediency. By placing decisions in the legislative arena, the Constitution holds that the mix or tradeoff we are entitled to is what the legislature provides. Courts have no mandate to impose a different mix merely because they would arrive at a tradeoff that weighed principle more heavily. This keystone of the Bickel-Wellington thesis must be judged to fail.

A similar failure attends the argument of those who, like Dworkin and Perry, suppose that a system of morality may override legislative outcomes.²¹ Democratic decisions are not required to conform to any moral system. If they were, there would be no need for the legislatures contemplated by the Constitution, we would need only moral philosophers. The same may be said for Parker's notion that the nation must move toward something called the "classical conception of a republic" with such revisions as he deems appropriate.²²

Some theorists seek to avoid this difficulty by claiming that they would have courts make democracy more democratic. Professor, now Dean, John Hart Ely, who is a non-interpretivist whether he knows it or not, takes this tack.²³ The difficulty is that there is neither a constitutional nor an extra-constitutional basis for making the Constitution more democratic than the Constitution is. The Constitution prescribes the outlines of the ways we govern ourselves. Within that frame, we arrange our political processes as we see fit. Nobody has yet made legitimate an authority in the judiciary to stop what the Constitution allows.

The non-interpretivist's contention that the Court is not final and hence is not undemocratic, or at least not unacceptably so, must also be rejected. It is true that an outraged people can, if it persists, overturn a Supreme Court decision. That necessarily means that there would be little demo-



Thomas M. Cooley

rather than in the political branches.

Many non-interpretive theorists have responded to this anti-democratic difficulty by simply dropping Bickel's condition from the discussion. Perry, who has begun to suspect that this problem is looming on his horizon and that Article III does not provide an adequate nexus between non-interpretive theory and democratic theory, has added a footnote to his latest effort which runs as follows: "If I were unable to defend constitutional policymaking by the judiciary as consistent with the principle of electorally accountable policymaking, then, given my commitment to constitutional policymaking, I would have to question the axiomatic character of the principle of electorally accountable policymaking."²⁶ In a word, if judicial rule and democracy come into conflict, Perry will have to question the desirability of democracy.

The fact of the matter is that there are no really effective means by which the people or the political branches can respond to constitutional policymaking of which they disapprove. The mechanisms now at hand that might work would have the effect not merely of limiting the Court's capacity for improperly infringing the rights of majorities but also of damaging, perhaps destroying, the rights of minorities. No one wants to do that. In this sense, the Court's vulnerability makes it well-nigh invulnerable.

Though I have had to sketch the progression quickly, you will have discerned several trends and themes in these changes in styles of constitutional theory. The content has moved from conventional legal argument, which relies on text, structure, and legislative history to discern the intent of the framers, to various forms of moral philosophy, to reformist demands for more equality, more participation, etc. Each of these has not only a distinctive substance but a distinctive rhetorical style. The older writers, with occasional flights of lyricism about American liberties, by and large display a plain, direct, lawyerlike prose. The style of the philosophers, on the other hand, is often abstract, complex, even convoluted. It could hardly be otherwise; it takes laborious analysis to unpack the concepts the philosophers deal with and to show their varying applications to moral problems. This literature is as difficult to read as it must be to write. The reformers' tones vary from dismay to anger; they show disapproval and dislike for the world as it is constituted.

cratic control over a non-interpretivist court. Given the number of decisions to be scrutinized, the political process would have to focus upon only two or three or else exist in a state of permanent convulsion. As we know from history, moreover, it may take decades to accomplish the reversal of a single decision. And even then the reversal cannot be forced if a substantial minority supports the result. The theory assumes, as one of my clerks put it, that in the long run none of us will be dead.

Professors Charles Black²⁴ and Michael Perry²⁵ rest the democratic nature of judicial review upon Congress' power under Article III to remove the jurisdiction of the Supreme Court and of the lower federal courts. The support is too slender. Whatever the constitutionality of the proposal, jurisdiction removal is unusable where uniformity is crucial. If a Court proposed to rule upon a war or a draft plan, Congress, no matter how incensed, could hardly use a power that would result in control of the issue by the varying decisions of fifty state supreme courts. Nor would the principle of democratic supremacy be vindicated since the decision would still be lodged in the judiciary, albeit state judiciaries,



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James Kent



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James B. Thayer

A related change is one of attitudes toward democratic government and politics. The older writers accepted completely that the primary form of policymaking was to be through representative institutions accountable to the electoral process. I do not know whether this was because they were themselves devoted to the majoritarian principle or because they accepted the Constitution as law and knew that the Constitution, with important exceptions, which are nonetheless exceptions, prescribes representative democracy as the primary mode of making policy.

Certainly the older theorists were not naive about the defects of democracy. Thayer was not, but he thought that a court must be. In his essay he stated:

... [I]n a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent — but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs, — what such persons may reasonably think or do, what is the permissible view for them.²⁷

Thayer sees the defects in our representatives but holds that the form of government prescribed

by the Constitution requires the judge to ignore the imperfections. Perhaps he thought that for judges to examine and take account of the actual processes of representative government in their constitutional decisions would be to start down a dangerous path leading to judicial oligarchy. If so, the modern theorists tend to prove the soundness of his judgment. The most moderate of the value-choosing theorists, Bickel and Wellington, make the defects of legislatures and the superiority of judges in matters of principle their starting point.

At times the search for a policymaking body, any policymaking body, other than a legislature displays a strain of desperation. To illustrate my point, I will quote my friend, Dean Wellington, who, on the current academic spectrum, is by no means an extremist in these matters. In analyzing the abortion decisions in the light of conventional morality, which he equates with the criterion for constitutionality, Wellington states that he takes "some comfort" in the fact that his own conclusions agree with those of the American Law Institute, and then states:

The work of the Institute is a check of sorts. Its conclusions are some evidence of society's moral position on these questions. It is, indeed, better evidence than state legislation, for the Institute, while not free of politics, is not nearly as subject to the pressures of special interest groups as is a legislature.²⁸

I yield to no one in my admiration for the ALI's profound and pathbreaking work in such matters as the Restatement, Second, of Property (Donative Transfers) and International Aspects of United States Income Taxation, but the thought that a small collection of judges, professors, and practitioners is better able to reflect the moral consensus of our entire society than are elected legislatures boggles the mind. To have a court listen to the Institute in preference to the legislature is, by constitutional legerdemain, to make the ALI the legislature.

Other theorists are extreme. Parker finds our present democracy in a state of "corruption," which is warrant enough for courts to remake it.²⁹ Perry is willing to entertain the idea that judicial governance is better than democratic governance.³⁰ Brest simply asserts criteria which courts should impose.³¹ Brest's position is, in a real sense, the most extreme, being no more than an assertion of will. It is not, in any sense of the words, a "constitutional theory"; indeed he denies the possibility of any theory. The position is instead both anti-democratic and anti-constitutional, and we need spend no time worrying over its legitimacy or intellectual coherence because it pretends to neither.

A change related to these is that constitutional scholarship has become much more explicitly ideological. This is inevitable when theory becomes non-interpretive, for the theorist must argue for the imposition of new values upon the society and those values will come out of a system of philosophy which, by definition, most of us do not accept. The argument will, therefore, have a distinctive political and moral cast. The writer, because he insists upon his all-encompassing philosophical system, will appear tendentious and highly ideological.

Indeed, one of the interesting things about the modern, non-interpretive theorists is that no matter the source from which they purport to derive new rights, no matter the method of argument they pursue, they all come out in approximately the same place. Their results cluster closely about the same set of social and political values. John Hart Ely purports not to make substantive policy choices, merely to be reinforcing the process of representation, but it is notable that a court following his prescriptions would come out about where a court would come out by following Grey's natural law, Wellington's conventional morality, Dworkin's moral philosophy of our society, or the

system of almost any non-interpretive writer. There is food for thought in that.

One explanation for this remarkable similarity is that all respectable modes of constitutional theorizing lead to approximately the same place, and that place is a much more egalitarian and socially permissive position than a majority of Americans desire. If this hypothesis is correct, then certainly the American electorate is seriously deficient in its moral sense.

There is, however, an alternative hypothesis. The results of these various constitutional theories are almost entirely compatible with the political and social stance, which, as every study shows, is characteristic of the professoriate. If this correlation between constitutional theories and personal preferences has any significance, it may suggest that, probably unconsciously, many theorists have come to see courts as merely a superior route to the political ascendancy of their own views. Brest seems to adopt this analysis, saying that scholarship in this area is mostly advocacy to persuade courts to adopt the writer's notion of the public good.

I leave it to you to decide which of these hypotheses best explains the remarkable similarity of the outcomes prescribed by professors who engage in constitutional theorizing.

Finally, we may consider briefly the effects that may be produced by the dominance of non-interpretive theory among professors of constitutional law. They are, after all, training the lawyers and judges of the next generation.

From this perspective, perhaps the most important shift in the style of American constitutional theory is the change in what the theorists regard as the legitimate underpinning for constitutional liberties. For Story, Kent, Cooley, and Thayer, the source was the intent of the framers and ratifiers and that was to be discerned from text, history, structure, and precedent. What is important about the non-interpretivists is not that they added moral philosophy but that moral philosophy displaces such traditional sources as text and history and renders them unimportant. That is necessarily the case despite occasional protestations that it is not. Interpreting the Constitution locates certain values that are to be protected and sets limits to the range of circumstances over which those values will be enforced by a court. Moreover, interpretation shows that other values do not have constitutional protection. It is important to the value-creating or non-interpretive theorists, however, to establish

the legitimacy of a drastic expansion of a limited value or the creation of a right protecting a value that the framers ignored or intended to leave to the political process. That can only be done if moral philosophy trumps text, history, structure, and precedent. The latter becomes unnecessary to constitutional liberties. Soon, the theorist begins to speak less and less of them, and abstract moral argument comes to be the foundation of constitutional liberties.

It is no small matter to discredit the traditional foundations upon which our constitutional liberties have always rested. Should those liberties come under attack, they would then be sustained only by rather abstract moral philosophy. We have seen nations in which rights were so derived and supported, and we have seen how easily abstract reasoning can turn and produce tyranny in the name of the rights of man. Liberties have proved most stable and enduring when they rested on history and long custom and when the area of absolute freedom grew by consensus rather than Diktat.

The institutions and traditions of the American republic, including the historic Constitution, are

our best chance for happiness and safety. Yet it is precisely these institutions and traditions that are weakened and placed in jeopardy by the habit of abstract philosophizing about the rights of man or the just society. Our institutions and traditions were built by and for real human beings. They incorporate and perpetuate compromises and inconsistencies. They slow change, tame it, deflect and modify principles as well as popular simplicities. In doing that, they provide safety and the mechanism for a morality of process. It follows that real institutions can never be as pure as abstract philosophers demand, and the philosophers' abstractions must always teach a lesson in derogation of our institutions for that reason. This is a dangerous lesson to teach the future lawyers and judges of our republic.

It is at least worth considering that Justice Story may have had hold of a profound truth when he said that "[u]pon subjects of government . . . metaphysical refinements are out of place. A constitution . . . is addressed to the common-sense of the people, and never was designed for trials of logical skill or visionary speculation."³²

Footnotes

¹ *The Federalist* No. 78, at 519 n.* (A. Hamilton) (P. Ford ed. 1898).

² *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810).

³ J. Story, *Commentaries on the Constitution of the United States* x (1891).

⁴ *Id.* § 400, at 305.

⁵ Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 129, 150 (1893).

⁶ A. Bickel, *The Least Dangerous Branch* 236 (1962) [hereinafter cited as *The Least Dangerous Branch*].

⁷ Wellington, "Common Law Rules and Constitutional Double Standards," 83 *Yale Law Journal* 221, 246 (1973).

⁸ *Id.* at 243-49, 284.

⁹ R. Dworkin, *Taking Rights Seriously* 149 (1977).

¹⁰ Grey, "Do We Have an Unwritten Constitution?" 27 *Stanford Law Journal* 703, 715 (1975).

¹¹ Parker, "The Past as Constitutional Theory—and its Future," 42 *Ohio State Law Journal* 223, 258 n.146 (1981).

¹² Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship," 90 *Yale Law Journal* 1063, 1063 (1981).

¹³ *Id.* at 1065.

¹⁴ *Id.*

¹⁵ *Id.* at 1097.

¹⁶ *Id.* at 1108.

¹⁷ *Id.* at 1109.

¹⁸ *The Least Dangerous Branch*, *supra* note 6, at 17.

¹⁹ *Id.* at 25-26.

²⁰ *Id.* at 258.

²¹ R. Dworkin, *Taking Rights Seriously* (1977); M. Perry, *The Constitution, the Courts and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (1982) [hereinafter cited as Perry].

²² Parker, *supra* note 11, at 259.

²³ J. Ely, *Democracy and Distrust* (1980).

²⁴ C. Black, Jr., *Decision According to Law* 17-18, 37-39 (1981).

²⁵ Perry, *supra* note 21.

²⁶ *Id.* at 10 n.*.

²⁷ Thayer, *supra* note 5, at 149.

²⁸ Wellington, *supra* note 7, at 311.

²⁹ Parker, *supra* note 11, at 259.

³⁰ See *supra* note 26.

³¹ Brest, *supra* note 12, at 1108-09.

³² J. Story, *supra* note 3, at x.

The "Imperial Judiciary" in Historical Perspective

by William M. Wiecek

No one need be surprised by the current eruption of criticism directed at the Supreme Court of the United States and the American judiciary generally. Such criticism is endemic to our national experience. In historical perspective, the only new element today is the catchy phrase, "imperial judiciary."¹ Those attuned to the echoes of the past will recognize that the present criticism is but the latest imprecation that will fall on the heads of judges as long as American courts exercise the power of judicial review. Indeed, could it be otherwise? Could American courts wield the awesome powers that so impressed Alexis de Toqueville and James Bryce without often coming under fire for what one prominent southern senator recently denounced as "judicial usurpations of power?"² This recurrent criticism of American courts clearly deserves scholarly investigation in its own right.

Seven discrete phases of opposition to judicial power can be discerned since the founding of the American republic. As state courts in the first years of independence tentatively asserted the power of judicial review, some state legislatures vigorously resisted. This reaction was exclusively concerned with separation-of-powers problems, rather than with the issues of federalism, because no real federal courts yet existed. After the Supreme Court of the United States began to wield its powers under section 25 of the 1789 Judiciary Act, state courts and spokesmen, led by Virginians, vociferously objected.³ Resistance in the form of demands for repeal or modification sputtered on until the Civil War. This second phase of opposition to judicial authority was predominantly concerned with issues of federalism.

The Supreme Court's increasing involvement with slavery matters, culminating in the *Dred Scott* decision of 1857, provoked noisy but ineffectual criticism of the high court by abolitionists, Republicans and northerners generally. This

criticism ranged from the carefully circumscribed program of Abraham Lincoln in 1860 to the indiscriminate and intemperate abuse heaped on the Court and the justices by Charles Sumner and Horace Greeley. Both federalism and separation-of-powers issues were involved.

Criticism of the Court was quickly muted during the Civil War and the American judiciary enjoyed a generation free of captious criticism, except for the expectable and reasoned critiques of specific decisions. This honeymoon lasted until the unbridled activism of formalist judges, especially those of the Supreme Court of the United States, the Illinois Supreme Court and the New York Court of Appeals, provoked a reaction. The fifth phase of criticism, which made itself felt between 1890 and 1920, was anything but restrained, and was in fact quite explosive. The arrogantly obstructive attitude of the "Four Horsemen," who thwarted popular legislation at both the federal and state levels, provoked fierce condemnation of judicial power from the political branches, from the law schools, and in the popular press.

The penultimate phase of criticism of the Court began with the *Brown v. Board of Education* decision in 1954, and was pervaded with a Cold War mentality, in which the dark currents of McCarthyism and racism flowed not far below the surface. As Cold War enthusiasm waned around 1960, criticism of the judiciary shifted to different levels and subjects, becoming more reasoned and temperate as it did so. This phase culminated in Illinois Senator Everett Dirksen's proposal for a constitutional amendment to reverse the Supreme Court's decision on reapportionment. Finally, as an outgrowth of the Cold War era hostility to a liberal activist judiciary, recent conservative critics have articulated the "imperial judiciary" hypothesis.

Thus, criticism of judicial power is not new, and attended the tentative, diffident debut of the



power itself in the 1780's. Some eight or nine cases in eight states are sometimes considered to have claimed the power of judicial review for courts, or at least to have broached the subject.⁴ Of these, only four are of interest to us, because they alone provoked surviving critiques.

The earliest of them, the widely noted case of *Rutgers v. Waddington*, was argued by Alexander Hamilton in 1784 before the Mayor's Court of New York City, with James Duane as the presiding judge.⁵ The case involved the validity of a state statute invalidating the law of nations defense that exonerated seizure and use of real property by military authority of occupying forces, as against a challenge that the statute was inconsistent with common law, which was adopted by the New York Constitution of 1777.⁶ The litigation was the object of extensive notice and commentary. The case was thus doubly controversial, presenting the issues of the supremacy of a statute over unwritten law, and of state legislation over national treaties. Chief Judge Duane conceded that judges could not set aside a law merely because it seemed to them "unreasonable," "... for this were to set the judicial above the legislative, which would be subversive of all government." But he went on to hold that where the operation of a statute on some collateral point

In this mid-nineteenth century political cartoon, Dred Scott plays the tune to which the politicians of the day danced. Dred Scott (below) helped fuel the conflict between North and South by bringing his suit for freedom to the Supreme Court.



appeared contrary to legislative intent, the courts could give an equitable interpretation to the statute" and only *quoad hoc* to disregard it."⁷

Duane's opinion, popularly but incorrectly read to have invalidated the statute, was condemned in an "Address to the People" drafted by a committee headed by Melancthon Smith, a prominent New York Son of Liberty and later Anti-Federalist leader. The "Address" insisted that courts were able only "to declare laws, not to alter them." To concede the latter power would result in "the most deplorable and wretched dependency of the People," and the lawmaking power would be transferred to judges "who are independent of the People." Such a power would be "inconsistent with the nature and genius of our government, and threatening to the liberties of the People."⁸ The New York legislature put in its oar, considering a resolution that would have ejected the Chief Judge and recorder from their posts because the decision was "subversive of all law and good order, and leads directly to anarchy and confusion."⁹ But the move came to nothing because Hamilton, sensing the unpopularity of his position, counselled his client to settle, thus terminating the controversy.

A state legislature also struck out at the judges in the New Hampshire *Ten Pound Act Cases* of 1786. These cases, unreported, remain shadowy and may have nothing at all to do with judicial review.¹⁰ The New Hampshire General Court (the legislature) enacted a statute abolishing jury trial in certain petty causes. A New Hampshire Superior Court may have held the statute unconstitutional, or have refused to give it effect. The General Court thereupon unsuccessfully attempted to impeach the judge(s). Much better reported was the Rhode Island case of *Trevett v. Weeden* (1786), in which the Supreme Court of the state refused to take cognizance of a case arising under one of the state's notorious paper-money statutes. The case is unusual and ambiguous in several respects: Rhode Island at the time (and until 1842) lacked a written and republican state constitution, making do with its old royal charter of 1663. The extraordinarily sophisticated argument of James Varnum, who contended the statute was unconstitutional because it deprived defendants in a criminal proceeding of the right of jury trial, was printed and thus survives as an invaluable insight into the development of American thinking about judicial views in the pre-1787 period.¹¹ The repeated conflicts

between legislature and judges ended inconclusively but they remain relevant for us. The General Assembly, dominated by paper-money advocates, was called into special session after the decision and promptly voted a resolution declaring that the judgment was "unprecedented in this state and may tend directly to abolish the legislative authority thereof;" and the resolution commanded the judges to appear before the bar of the assembly to explain the reasons for their decisions.¹² The judges did so, insisting that the judicial function was vested exclusively in the judiciary. Varnum appeared, this time to defend the judges against a motion to dismiss them from their posts. The motion failed, but four of the five judges were not re-elected to their positions by the legislature.

The premier early controversy over judicial power before adoption of the Constitution occurred while the Philadelphia Convention was sitting: the North Carolina case of *Bayard v. Singleton*.¹³ This case, like so many others of the period testing the scope of judicial power, arose from the aftermath of wartime confiscation of Loyalist property. The three-judge North Carolina Supreme Court flatly and explicitly held a statute unconstitutional that required an automatic dismissal of all suits involving land sold by the commissioner of forfeited estates, on the ground that it deprived persons of property without jury trial. The *Bayard* case produced a debate, partly carried on in the newspapers, between James Iredell, later a justice of the United States Supreme Court, who defended the exercise of judicial review, and Richard Dobbs Spaight, later North Carolina governor and congressman.¹⁴ Spaight at the time was a North Carolina delegate to the Philadelphia convention. He criticized the implications of Iredell's argument, warning that the logical outcome of Iredell's ideas was judicial supremacy. The decision in *Bayard* constituted an "usurpation" of authority, producing "an absolute negative on the proceedings of the Legislature, which no judiciary ought ever to possess." "The state," Spaight insisted, "instead of being governed by the representatives in General Assembly, would be subject to the will of three individuals [i.e., the judges of the state Supreme Court] who united in their own persons the legislative and judiciary powers."¹⁵ Americans elsewhere eyed the new power uneasily. Spaight's convention colleague, John Dickinson of Pennsylvania,

flatly denied its existence, while a year later James Monroe commented that so controversial an innovation would "create heats & animosities that would produce harm."¹⁶ Thus even before the Constitution of 1787, several foundations of the modern "imperial judiciary" argument had been laid, and the rhetoric of Spaight, Smith, and others anticipated some of the views of modern critics. State legislative resistance to judicial review by state appellate courts did not cease in 1787; on the contrary. The struggle continued unabated, especially in the frontier states of Kentucky and Ohio.¹⁷

II.

After Enactment of the 1789 Judiciary Act and the creation of the United States Supreme Court, the argument over judicial power began to shift its focus and emphasis, from separation-of-power questions to those involving federalism.¹⁸ The controversy promptly began in the 1793 case of *Chisholm v. Georgia*,¹⁹ where the United States Supreme Court accepted jurisdiction in a suit by two citizens of South Carolina against the state of Georgia. Georgia refused to appear, and the court entered judgment against the state. Georgia exploded. The lower house of its legislature enacted a measure, not passed by the senate, that in effect outlawed any federal marshal attempting to levy execution on the state: such a person was prospectively declared guilty of felony, and was to be hanged.²⁰ In concert with other states fearing suit, Massachusetts introduced what became the Eleventh Amendment, ratified in 1798, which declared the "Judicial power of the United States" did not extend to any suits against a state brought by aliens or citizens of another state.

State-sovereignty advocates expected that the Amendment would defang the federal courts. To their dismay, the United States Supreme Court drastically reduced its scope in the next three decades. In *Ware v. Hylton* (1796),²¹ it invalidated a 1777 Virginia statute that sequestered debts owed to British subjects. Justice William Paterson, on circuit, instructed a jury that a Pennsylvania statute voiding title to real estate was unconstitutional.²² Justice Paterson there articulated higher-law doctrines that were expressed in Justice Samuel Chase's *seriatim* opinion in *Calder v. Bull* (1798), a classic debate between him and Justice James Iredell on the power

of judicial review.²³ The conflict over judicial power flared dramatically in Pennsylvania in the famous and seemingly interminable litigation revolving around Gideon Olmstead's attempt to secure prize money from the old proto-federal Court, the Committee of Appeals organized under Article IX of the Articles of Confederation. The state of Pennsylvania refused to pay the judgment until 1809, when Chief Justice John Marshall ordered a writ of mandamus to compel United States District Judge Richard Peters to enforce the 1779 judgment.²⁴ When Peters did so, the governor called out a brigade of state militia to resist, while the federal marshal summoned up a posse to back his authority. Pennsylvania authorities averted bloodshed only by cautious maneuvering, but the Pennsylvania legislature adopted vigorous states-rights resolutions demanding a constitutional amendment that would create an "impartial tribunal" to mediate conflicts between the states and the federal government.²⁵ This idea of a super-Supreme Court has shown a curious persistence. Delegates to the Massachusetts and New York ratifying conventions recommended creation of a commission that would review decisions by the Supreme Court²⁶ and in 1826, Senator John Holmes of Maine suggested appeal of Supreme Court decisions to the United States Senate.²⁷

At the time, the Virginia General Assembly sneered at the Pennsylvania proposal, but soon lamented the trust it placed in the "eminently qualified" high court.²⁸ The occasion for this change of heart in the Old Dominion was the famous litigation over the Fairfax lands in the Northern Neck. After the United States Supreme Court held in 1813 that the state had not acquired title to the land,²⁹ Chief Judge Spencer Roane of the Virginia Supreme Court of Appeals rejected the mandate of the High Court. He held that the appellate jurisdiction of the United States Supreme Court did not extend to the Virginia court and that section 25 of the 1789 Judiciary Act was unconstitutional.³⁰ This action called forth Justice Joseph Story's magisterial dissertation on federal judicial power, *Martin v. Hunter's Lessee*, in 1816.³¹ Congressional Jeffersonians responded first by pushing schemes for removal of Supreme Court justices by address of both houses of Congress, reviving an idea they had earlier pushed unsuccessfully after the failure of the impeachment effort for Justice Samuel Chase.³² This led nowhere again, and the controversy returned

to the judicial arena.

Judge Spencer Roane bided his time until the United States Supreme Court handed down its decision in *McCulloch v. Maryland* in 1819, adopting Hamiltonian principles of construing the Constitution. Roane was provoked to write anonymously the "Hampden" series in the *Richmond Enquirer*, published by his cousin Thomas Ritchie.³³ These articles were widely reprinted in the South and the West. "Hampden" began to sketch out constitutional ideas that came to fruition in the thoughts of John C. Calhoun, proceeding from a denial of federal judicial authority over the states to a suggestion that the United States was a "confederal" "league," not a "consolidated," unitary national government. In such an arrangement, the United States Supreme Court was at most a coordinate body, not one having final appellate authority over state courts. Yet it "claims the right, in effect, to change the Constitution." The remedy, Roane argued, was a recurrence to the Kentucky and Virginia Resolutions of 1798-1799, with their embryonic doctrines of interposition and nullification.

McCulloch, together with the subsequent debates over the admission of Missouri as a slave state (1819-1821), had ever-widening repercussions. Chief Justice Marshall suspected Jefferson's hand behind the obdurate resistance of Roane and other Virginia judges. The former president was in fact becoming ever more doctrinaire on the subject of federal judicial power, concluding with disgust in 1820 that the federal judiciary were a "subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated republic."³⁴

Marshall found his opportunity to strike back at his Virginia critics in *Cohens v. Virginia* (1821), his powerful coda to Story's *Martin* opinion.³⁵ His insistence on federal judicial supremacy provoked Roane to re-enter the polemical contest, this time under the *nom de plume* "Algernon Sidney" in the *Richmond Enquirer*.³⁶ Here he reasserted the states-rights arguments, insisting that the Constitution was only a "compact" or "treaty" among wholly sovereign states who had formed a "league," not a government. He again denied federal appellate authority altogether. Another powerful voice of by-now-antique Virginia republicanism, John Taylor of Caroline, joined Roane in the polemical battle.³⁷

In a series of book-length essays published shortly before his death, Taylor, as Roane had done before him, carried his criticism of the federal courts' power into a more wide-ranging discourse on the nature of the American union.³⁸ A political economist who anticipated George Fitzhugh by a generation, Taylor loathed the economic and constitutional principles of the North. He saw the Supreme Court as one of the most dangerous threats to republicanism and the sovereignty of the people of the states, because it was not subject to popular control and was distant from the states themselves. Together with Roane and Jefferson, who injected the word into political discourse, and Thomas Cooper of South Carolina who popularized it, Taylor saw the Supreme Court as a vehicle for "Consolidation:" the ever-expanding encroachment of national authority on the liberties of the people through nationalizing and commercial influences such as corporations and broad construction of the Constitution. He proposed a novel remedy, later refined by Calhoun, to get around the nationalizing influence of the Supreme Court: a state veto on federal legislation. Roane proposed an amendment, endorsed only in Virginia, that would exclude federal courts from hearing any cases in which a state is party (with certain exceptions) and prohibiting appeal to the United States Supreme Court from any decision rendered by a state court.³⁹

Another consequence of *McCulloch* was western resistance to the United States Supreme Court. After the decision, the auditor of the state of Ohio nevertheless seized \$100,000 in assets from the Ohio branch of the Bank of the United States in payment of taxes *McCulloch* had declared invalid. The state legislature adopted resolutions endorsing Roane's position, denying that a state could be an involuntary appellee in an appeal in federal courts; denying final appellate authority to the United States Supreme Court in interpretation of the federal Constitution; and denying finality to U.S. Supreme Court decisions even as to the parties of the cases decided.⁴⁰ Marshall refuted this position again in *Osborn v. Bank of the United States* (1824),⁴¹ holding that a public official (the auditor) is personally responsible for actions in his official capacity, a holding that further restricted the scope of the Eleventh Amendment.

Ohio's resistance was decorous compared to that of Kentucky. After the United States Su-

preme Court, in *Green v. Biddle* (1823), held that Kentucky's "occupying claimant" statutes were unconstitutional,⁴² the state legislature adopted a bill requiring a super-majority in the Court to hold a state statute void. The Kentuckians were nettled because *Green* was a 3-1 decision, with three of the justices absent for various reasons.⁴³ Their resentment was reflected in proposals in Congress for the next three years requiring six, seven (all), or two-thirds of the justices to concur in a decision holding a state statute void.⁴⁴ These proposals went nowhere, while the local controversy became caught up with the intense internal political struggle known in Kentucky as the "Old Court" battle. The state legislature recommended using state militia to resist enforcement of the Court's judgment,⁴⁵ and the Kentucky Court of Appeals (the commonwealth's highest appellate tribunal), refused to be bound by any United States Supreme Court judgment that did not have the concurrence of a majority of the whole court.⁴⁶

Beyond this point in time, state resistance to federal appellate authority proliferated in several directions simultaneously. One originated in Georgia's drive to secure Indian lands within its jurisdiction. After the conviction of the Cherokee Corn Tassel for murder, the United States Supreme Court issued a writ of error to bring his case before the high court for review. Both the legislature and the governor of Georgia asserted that they intended to resist the mandate of federal courts. Georgia authorities hanged Corn Tassel. After the subsequent rebuffs to the Supreme Court in the aftermath of *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832),⁴⁷ and President Andrew Jackson's apocryphal remark, "John Marshall has made his decision, now let him enforce it," the controversy between Georgia, the Cherokees, and the federal authority was resolved in accordance with the state's desires.

Andrew Jackson was not yet through with the Supreme Court. He had openly sided with Georgia in its resistance to the federal judiciary, and, emboldened by the success of the state's stance, he turned in his Bank Veto Message of 1832 to the problem of *McCulloch* that had so exercised the Old Republicans and the proto-Democrats of the frontier states. In portions of the message written by Attorney General Roger B. Taney, Jackson denied the binding authority of Supreme Court decisions on a coordinate branch of the federal government, insisting that each branch had au-

thority to make its own determinations for itself.⁴⁸ Georgians, meanwhile, remained diehards in their opposition to the appellate powers of the United States Supreme Court. As late as 1854, Judge Henry L. Benning of the Georgia Supreme Court held that U.S. Supreme Court decisions were not binding on the state court, the two bodies being "co-ordinate and co-equal."⁴⁹

The states' frustration in being unable to find some method of trimming the Supreme Court's appellate jurisdiction over cases decided by the state supreme courts led to repeated efforts, culminating in 1831; to repeal or drastically modify section 25 of the 1789 Judiciary Act. In 1822 Jeffersonian congressmen who shared Roane's sentiments after the *Cohens* decision unsuccessfully proposed repeal of section 25.⁵⁰ After the failure of that attempt, they tried less drastic remedies, such as requiring a majority of five (out of a seven-man Court) for the resolution of constitutional questions, or technical modifications of the process by which a case came to the high court on a writ of error.⁵¹ The Maryland House of Delegates proposed a novel amendment that would require all cases involving the constitutionality of state legislation to be heard by the United States Senate rather than the Supreme Court, and to require a two-thirds vote if such legislation was held unconstitutional.⁵² Partisan animosity and local or sectional political conflict played a principal role in keeping this controversy heated for a decade. In fact, the seemingly technical subject of the jurisdiction of the federal courts was, second only to the tariff, the principal topic of controversy in Congress for the years 1822-1831.

During the course of this debate, Democrats worked out an ideological position that became something of a shibboleth for party members, especially those of the South and West. They began with Jefferson's disgusted and embittered charge that the power of the federal courts was the last surviving legacy of the politically-discredited Federalist party, engrafting the alien, monarchic stock of Federalist principles on the otherwise sound republican tree. Jacksonian Democrats like Martin Van Buren and Louis McLean claimed that federal judicial power was threatening both to the sovereignty of the states and to popular government. Van Buren, in his book on *Political Parties*, published in 1867, offered a comparatively calm and reasoned expression of this view. Lumping together Federalists,



disciples of Alexander Hamilton, Whigs, and some segments of the American economic elites, he wrote:

President Andrew Jackson brought his conflict with the Bank of the United States to a head by withdrawing federal deposits. Satirizing his "imperial rule," the cartoon below dubbed him "King Andrew the First."

In a large degree wealthy and proud of their social position, their fear of the popular will and desire to escape from popular control . . . is increased by the advance of the people in education and knowledge. Under no authority do they feel their interests to be safer than under that which is subject to the judicial power, and in no way could their policy be more effectually promoted than by taking power from those departments of the Government over which the people have full control and accumulating it in that over which they may be fairly said to have none.⁵³

BORN TO COMMAND.



HAD I BEEN CONSULTED.

KING ANDREW THE FIRST.

Such views, widely shared among Democrats, kept the issue of judicial power alive in Congress, and Democrats violently assailed federal courts as enemies of the states. Ironically, these congressional partisans included three future Justices of the United States Supreme Court: John McKinley, Philip Pendleton Barbour, and Levi Woodbury. Whigs, out of a mixture of opportunism and principle, fervently supported the federal courts. This partisan division lay at the root of the famous Webster-Hayne debates of January, 1830. Hayne touched off that oratorical duel by putting forth a variant argument of the southern and Democratic critique of the courts: the states could veto, nullify, or refuse to enforce laws whose constitutionality had been upheld by federal courts.

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Missouri as the sort of "Bills of Credit" prohibited by Article I, section 10 of the Constitution. This decision was immensely unpopular in the specie-starved, capital-hungry states of the South and West, and it touched off a ferocious round of attacks on the Court and on section 25. *Craig* focused disparate local and sectional grievances: Virginia's still-festering resentment at *Martin* and *Cohens*; Ohio's indignation at the Bank and at *Osborn*; Kentucky's internal political animosities over the Bank, its debtor legislation, its "Occupying Claimant" laws and the "Old Court" controversy; South Carolina's anxieties over slavery and nullification; Georgia's obduracy on the Indian question. The attacks peaked in a bill reported out of the House Judiciary Committee in 1831 that would have repealed section 25.⁵⁵ Whigs were horrified. One of their organs, the *National Intelligencer*, anticipated Justice Oliver Wendell Holmes' famous aphorism about the need for Supreme Court authority over the laws of the states when it declared: "repeal the vital part of the Judiciary Act and we would not give a fig for the Constitution. It will have become a dead letter."⁵⁶ The full House voted down the bill by more than a 2-1 margin, and repeal efforts gradually sputtered out after that failure. Yet according to Herman Ames' enumeration, in the next thirty years, Congressmen proposed no less than nineteen constitutional amendments to restrict or control the power of federal courts, eleven of them dealing with the judges' terms of office.⁵⁷ And this figure does not include the innumerable bills that would have repealed section 25.

After the failure of repeal in 1831, attacks on section 25 became sporadic and issue-specific, rather than ideological. Often, a specific decision of the high court would re-ignite anti-section 25 spirits, as after its holdings in *Bronson v. Kinzie* (1843),⁵⁸ voiding Illinois insolvency legislation, and *Piqua Bank v. Knoop* (1854),⁵⁹ the first of the series of 1850s cases to come to the high court from the so-called Ohio "Bank Wars" of the previous decade. In a subsequent Bank Wars case, *Dodge v. Woolsey* (1856), the peculiar violence of political rhetoric produced by the Ohio controversy found an echo on the Supreme Court itself. From the majority opinion voiding a provision of Ohio's constitution, three justices dissented with unusual vehemence. Justice John A. Campbell, joined by John Catron and Peter V. Daniel (all prominent for their states-rights orien-

tation), rejected the claim that the United States Supreme Court should have the final say on questions of what he termed "political power."

The acknowledgement of such power would be to establish the alarming doctrine that the empire of Ohio, and the remaining States of the Union, over their revenues, is not to be found in their people, but in the numerical majority of the judges of this court.⁶⁰

In a rebuttal to the United States Supreme Court, a lower Ohio court denied the validity of section 25 and refused to perfect the record of the case, an action necessary to permit it to go to the high court for review.⁶¹ The California Supreme Court similarly held section 25 to be unconstitutional in 1854 only to reverse itself four years later, over the dissent of Judge David Terry, who bluntly claimed that "the political sentiments of the Judges [of the United States Supreme Court] in such cases necessarily gave direction to the decisions of the Court."⁶²

Charles Warren, the great conservative historian of the United States Supreme Court, suggested that opposition to its appellate jurisdiction was largely opportunistic, rather than principled, citing instances of sections reversing themselves in their attitudes toward the Court's power.⁶³ The most spectacular reversal came in the aftermath of *Dred Scott*. Northerners, especially Republicans of Whig ideological antecedents, suddenly began to sound like Judge Roane. Witness Philemon Bliss, Republican congressman from Ohio, a judge of the Missouri Supreme Court and later Dean of the University of Missouri Law School, who offered a bill to repeal section 24 of the 1789 Judiciary Act. Speaking of the old Supreme Court chamber in the basement of the Capitol:

From yon mysterious vault, the enrobed nine send forth their tomes, befogging by their diffuseness, . . . essaying some new constitutional construction, as they call their attacks upon the rights of the states and their citizens.⁶⁴

Concurrently, former Democratic critics of the Court from Virginia, Georgia, and Kentucky now found themselves sounding like Daniel Webster in his reply to Hayne, fervently defending the integrity of the justices.

While the controversy over section 25 noisily blew over in Congress, concurrent movements to restrict the scope of judicial power went forward less spectacularly at the state level. None of these



Library of Congress

David Dudley Field, brother of Justice Stephen Field, spent much of his legal career codifying the laws of the State of New York.

quarters were another matter. Legal reformers like the extraordinary Irish-American lawyer William Sampson and the anonymous lawyer who wrote under the pen name "P. W. Grayson" attacked the common-law, lawyers, and judges as anti-democratic, subversive of the republic, and biased toward wealth and power.⁶⁶ Only slightly more moderate were the codification demands from the small reformist segment of the American bar, personified in the Massachusetts Democrat and liberal reformer Robert Rantoul. In his famous "Oration at Scituate" (1836), Rantoul provided a rationale for codification that rested on a mistrust of the power of judges: "the bench takes for its share more than half of our legislation, notwithstanding the express provisions of the [Massachusetts] Constitution that the judiciary shall not usurp the functions of the legislature." Judges "usurp legislative power;" they operate on the basis of personal bias; and judge-made law is inherently *ex post facto* "and therefore unjust." The remedy was the reduction of all laws into a code accessible to all.⁶⁷

David Dudley Field, New York legal reformer and brother of U.S. Supreme Court Justice Stephen J. Field, devoted most of his professional career to a more systematic development of what came to be called the "Field Codes," and was the pivotal figure in nineteenth-century codification. Field was not as hostile to the common law as Rantoul; in fact he was the most conservative of reformers, seeking to strengthen rather than leash the common law. But he also held firmly to the doctrine of separation of powers, and saw judge-made law as inaccessible and irrational, in the sense that it lay scattered unsystematically throughout the ever-proliferating reports.⁶⁸

Before the Civil War, doctrinal developments also contributed to braking judicial power. Two judge-made doctrines provided justification, or at least rationalizations, for those occasions when judges chose not to wield their power. The first was the political question doctrine. The vague conception that certain issues were political, and thus not suitable for resolution through the judicial process, had appeared in scattered cases throughout the early nineteenth century. Chief Justice John Bannister Gibson's famous dissent in *Eakin v. Raub* (1825), for example, posited a distinction between "political" and "civil" power of the judiciary; only the latter

proceeded from hostility to judicial review as such, and they are therefore somewhat more peripheral to our story than overt attacks on the judiciary. First were the related legal reform efforts to codify the common law and to establish an elective judiciary.

Codification had numerous roots in America. It had been part of the legislative process since the seventeenth century, as colonial, provincial, and state legislatures periodically consolidated provisions of their session laws dealing with a particular topic like slavery or intestate succession. Codification of this sort was non-controversial, and even conservatives like Joseph Story could recommend its extension to whole bodies of law, such as civil procedure or commercial paper. Story in fact made just such a recommendation as chairman of a commission appointed by the Massachusetts General Court on codification, recommending codes embodying the "general principles" of the laws of real property, contracts, criminal law, and evidence.⁶⁵ Obviously, coming from such a source, codification proposals did not emanate from hostility to judicial power.

Codification proposals from more radical



The Fugitive Slave Law placed Northern states' governments on the side of slave catchers and bounty hunters — an anathema to Northern abolitionists. Though many of the escaping slaves could not read, abolitionist groups responded by placing posters like the one below in prominent places around Boston—a major way station on the route to Canada.

were inherent in the judicial office.⁶⁹ Gibson defended his distinction on the grounds that legislatures were responsive and responsible to the people, whereas judges were insulated from popular control.

Chief Justice Roger B. Taney extended Gibson's distinction in *Luther v. Borden* (1849),⁷⁰ where he formally enunciated the doctrine of "political questions." He conceded the point repeatedly made by Chief Justice Marshall in response to his Virginia critics, that courts must not evade questions properly before them under the Constitution. But "it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums." Concurring in part and dissenting in part, Justice Levi Woodbury provided a more extended explanation of the doctrine and suggested reasons for judicial self-restraint that remain relevant today. Judges, Woodbury maintained, must confine themselves to questions of "private rights," of "what is *meum* and *tuum*." If they were to take up political questions, they would make themselves "a new sovereign power in the republic, in

CAUTION!!
COLORED PEOPLE
OF BOSTON, ONE & ALL,
 You are hereby respectfully CAUTIONED and
 advised, to avoid conversing with the
Watchmen and Police Officers
of Boston,
 For since the recent ORDER OF THE MAYOR &
 ALDERMEN, they are empowered to act as
KIDNAPPERS
 AND
Slave Catchers,

And they have already been actually employed in
KIDNAPPING, CATCHING, AND KEEPING
SLAVES. Therefore, if you value your LIBERTY,
 and the *Welfare of the Fugitives* among you, *Shun*
 them in every possible manner, as so many *HOUSES*
 on the track of the most unfortunate of your race.

Keep a Sharp Look Out for
KIDNAPPERS, and have
TOP EYE open.

APRIL 24, 1851.

most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy. . . ."⁷¹

The political question doctrine has had a variegated history, in part because it is inherently nothing more than a rationalization for what is usually a judge's intuitive sense that courts ought not to get involved in a particular controversy, for prudential or other reasons. It has constantly been available to judges inclined to judicial self-restraint, and provides support for critics of courts who allege that certain decisions, like the reapportionment cases, are inherently political in nature and unsuited for resolution by judges for the reasons sketched by Justice Woodbury. That, to cite just one recent example, was the position of Justice Felix Frankfurter in *Colegrove v. Green* (1946).⁷²

In several decisions, Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court created the doctrine of the police power for American courts. Faced with repeated challenges to statutory regulation of real property on the grounds that such regulation constituted a "taking" of the property, Shaw declined to hold the regulations void.⁷³ On the contrary: he developed a sweeping definition of the police power as "the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances. . . not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth."⁷⁴ The police power doctrine provided American courts with a broad justification for not overturning a legislative policy judgment. It was eclipsed in the late nineteenth century, first in the attacks of conservative treatise writers like Thomas M. Cooley and Christopher Tiedemann, then by reactionary jurists like Rufus Peckham of the New York Court of Appeals and the United States Supreme Court. But like the political question doctrine, the concept of police power remained available to judges who sensed that, for whatever reason, they should not overturn a legislative policy.

III.

The third phase of criticism of judicial power grew out of the slavery controversy, and blighted the reputation of Chief Justice Taney for the better part of a century. It also marked an

ideological reversal, because the courts' principal critics after 1850 were mostly former Whigs, the foremost friends of the judiciary throughout the ideological confrontations of the 1840s. Jacksonian Democrats, on the other hand, now found themselves defenders of the courts that they had recently criticized.

Abolitionists and other opponents of slavery did not at first have any quarrel with courts as such. On the contrary: during the trying years of anti-abolitionist mobbing, 1835-1840, they looked to courts for protection of person and property against the licentious violence of mobs. But beginning with the capture of the alleged fugitive slave George Latimer in Boston in the autumn of 1842, abolitionists began to believe the judges' dedication to law eclipsed their impulse to justice.⁷⁵ Opponents of slavery came to distrust the judicial process just at the time that the United States Supreme Court and lower federal courts began to develop a pro-slavery judicial posture. Consequently, judges and antislavery critics of the courts entered into a debate on the judicial function that retains a timeless relevance. The challenge first came from abolitionists, who demanded that judges ignore or hold unconstitutional any laws that supported slavery. Wendell Phillips, himself a lawyer, wrote in bitter disappointment at Chief Justice Shaw's refusal to free George Latimer:

when the overbearing insolence of the Slave Power had thrown down, in the usurped name of the Constitution, all the bulwarks of individual freedom, [Shaw] betrayed, without an effort, against law, the honor of Massachusetts. From the battlefields of liberty in every age — from martyrs at the stake and on the scaffold — from the graves of the Puritans, there came a voice which besought him to be faithful to the high trust reposed in his hands. Yielding to bad law and worse morals, he was recreant to all.⁷⁶

Judges spurned this appeal to conscience. Joseph Story, no friend to slavery, wrote in private correspondence that "I have sworn to support [the United States Constitution] and I cannot forget or repudiate my solemn obligations at pleasure. You know full well that I have ever been opposed to slavery. But I take my standard of duty as a Judge from the Constitution."⁷⁷ The successor to his seat on the High Court, Justice Levi Woodbury, a New Hampshire Democrat before his elevation to the bench, made the same response formally in his opinion in *Jones v. Van Zandt* (1847), in response to Salmon P. Chase's

argument that the Fugitive Slave Act of 1793 was unconstitutional.⁷⁸ Woodbury reverted to Taney's political question doctrine to evade the challenge to judicial conscience. The fugitive-slave clause of Article IV, section 2 was:

one of [the] sacred compromises . . . which we possess no authority as a judicial body to modify or overrule. . . . Whatever may be the theoretical opinions . . . as to the expediency of some of those compromises or of the right of property in persons which they recognize, this court has no alternative, while they exist, but to stand by the constitution and the laws with fidelity to their duties and their oaths. Their path is a straight and narrow one, to go where that constitution and the laws lead, and not to break both, by traveling without or beyond them."⁷⁹

Abolitionists responded indignantly to this abdication of the judicial conscience. Fugitive slave captures and rescues throughout the 1850s assured that their indignation would remain fervent. Such episodes provoked Henry David Thoreau to a searing survey of judicial integrity. When the Massachusetts Supreme Judicial Court cooperated in the rendition of several fugitives from Boston, Thomas Sims in 1851⁸⁰ and Anthony Burns in 1854, Thoreau wrote in disgust:

the law will never make men free; it is men who have got to make the law free. . . . I doubt if there is a judge in Massachusetts who is prepared to resign his office, and get his living innocently, whenever it is required of him to pass sentence under a law which is merely contrary to the law of God. [Judges] put themselves, or rather are by character, in this respect, exactly on a level with the marine who discharges his musket in any direction he is ordered to. They are just as much tools, and as little men. . . . Their master enslaves their understandings and consciences instead of their bodies.⁸¹

Federal judges would have remained unimpressed by Thoreau's stunning metaphor, even if they had read it. Jacksonian jurists like Judge John Kane of the United States District Court for the Eastern District of Pennsylvania escalated resistance to the Fugitive Slave Acts to treason against the federal government.⁸² The United States Supreme Court consistently developed an ever-more-dogmatic proslavery constitutional doctrine, from *Groves v. Slaughter* (1841) to *Prigg v. Pennsylvania* (1842), to *Jones v. Van Zandt* (1847) to *Strader v. Graham* (1851).⁸³ This tendency culminated in the opinions of Chief Justice Taney and his colleagues Samuel Nelson, John Catron, Peter Daniel, and John Campbell in the case of *Dred Scott v. Sandford* (1857).

Northern opponents of slavery who read the *Dred Scott* case—which is to say, for most people, the opinion of Chief Justice Taney—believed that the Court had cast aside any pretensions of judicial impartiality and had become a shill for the slavocracy. The northern rhetorical reaction was violent but curiously harmless. The most striking aspect of antislavery criticism of the court is the obvious absence of attacks on the Court as an institution. Chief Justice Taney and his opinion served as a lightning rod, deflecting criticism so that the prestige of the Court itself remained remarkably intact through the storm.

Dred Scott was a landmark decision because it marked the first time that the Supreme Court exercised the power of judicial review over a congressional statute on a matter relating to something other than the Court's jurisdiction and powers. Such a major innovation ought to have excited extensive debate by legal commentators. *Dred Scott* did receive heated notice, to put it mildly, but the criticism was almost exclusively political. Few commentators confined their censures to the innovation in the power of courts as such. Consequently, once the substantive problems of *Dred Scott* had been resolved—slavery in the territories—or brushed aside—black citizenship—the furor aroused by the case dissipated like the morning mist, and judicial power emerged from the episode not only unscathed but even enhanced. While *Dred Scott* provoked ferocious criticism, that criticism was not directed at the power of courts *per se*. Although this point may be obvious, it is important to stress it because of the long-standing historiographical tradition that holds that the power of the United States Supreme Court or federal courts generally was diminished or eclipsed for a generation because of *Dred Scott*. This tiresome and erroneous tradition received the concurrence of, among others, Chief Justice Charles Evans Hughes, who contributed the undying phrase "self-inflicted wound" as a metaphor describing the impact of the decision.⁸⁵ Numerous scholarly and not-so-scholarly commentators have endorsed this view.

The political criticism of *Dred Scott* also had a built-in self-defeating or self-inhibiting quality. Because it was political, it was expressed in a partisan as well as a sectional context, with Democrats tending to support the decision and defend it, while Republicans were forced to criticize it. But the decision hurt as well as helped

both parties; if Democrats could take comfort in the racial aspects of Taney's opinion—that part dealing with black citizenship—which was an embarrassment to Republicans because their criticism of it tainted them with racial egalitarianism, the slavery aspect of the opinion—emphasized in the half dealing with the territories—embarrassed northern Democrats and gave the Republicans an invaluable weapon. Stephen Douglas and Abraham Lincoln exploited these skillfully in the Lincoln-Douglas debates of 1858. Thus, in the free states the decision was not wholly welcome to either party, and criticism of it tended to be selective and more muted than it might have been. Republicans found it a convenient stick with which to beat the Democrats' dog, and vice versa.⁸⁶

Criticism of *Dred Scott's* pro-slavery dogmas might best be ranged along a continuum, from the most moderate to the most vituperative. What determines a place on this continuum is neither the quality of rhetoric, nor the presence or absence of sound reasoning, but rather the substantive content. At the moderate extreme of this continuum is what may be termed the "aberration hypothesis." Two young Boston attorneys, John Lowell and Horace Gray, the first destined to become a judge of federal District and Circuit Courts, the second a justice of the United States Supreme Court, wrote a professional review of the case, supporting the dissenting position of Justice Benjamin R. Curtis. Their critique of Taney's opinion bore the conspicuous tone of more-in-sorrow-than-in-anger and was remarkably level-headed for its time and place. Lowell and Gray regretfully dismissed Taney's opinion as "unworthy of the reputation of that great magistrate."⁸⁷ Implicitly, they suggested that the opinion marked an aberration for both the Chief Justice and the Court, an error inconsistent with the doctrinal tradition of both. This idea, that *Dred Scott* was an almost unprecedented error and deviation, proved to be the most long-lived of the critiques of the decision, underpinning the idea that *Dred Scott* represented an abuse of judicial power.⁸⁸

Next on the continuum is what may be termed the "dictum hypothesis." This is actually a bundle of several different technical arguments, but they all have in common the idea that the bulk of Taney's opinion, having first concluded that the United States District Court had no jurisdiction of the suit because of the status of the petitioner,

consisted almost wholly of dictum. Although careful analysis reveals the error of this argument,⁸⁹ contemporary Republicans found themselves in the difficult position of having to reject the opinion without seeming to reject the Court, lest they be associated in the public mind with the radical position of the Garrisonian sect of the abolitionist movement that condemned the Constitution and all government as a covenant with death and a compact with Hell. The dictum argument proved to be as useful as it was prolific, and expressed itself in numerous forms. Timothy Farrar, a Boston attorney, provided perhaps the most widely read articulation of this idea in the *North American Review*, where he rejected the substantive holdings of Taney's opinion beyond the threshold jurisdictional point as "usurpation."⁹⁰ Having at the outset declared itself to be without jurisdiction to hear the case, everything that followed was the equivalent of *coram non iudice*.

This conclusion allowed critics of the decision to have their cake and eat it: they could reject the decision, yet continue to respect the Court and its power. Taney's associate, Justice John McLean, distinguished or ignored the decision in unreported decisions on circuit in Illinois and Indiana, where he permitted black plaintiffs to sue, according to newspaper accounts, because there was no proof that they were, in the words of Taney's opinion "a negro, whose ancestors were imported into this country, and sold as slaves." This was an obvious loophole in Taney's opinion, because of the difficulty and trouble of tracing back the ancestry of most blacks to African forebears.⁹¹ Taney responded characteristically: he drafted an opinion, to be used when an appropriate case would come before him, refuting McLean's point.⁹² Congress similarly ignored Taney in what was the most conclusive rejection of *Dred Scott*: in 1862, with little fanfare or debate, it simply abolished slavery in all American territories, Taney's opinion notwithstanding.⁹³ United States Attorney General Edward Bates in 1862 explicitly dismissed the bulk of Taney's opinion as *coram non iudice* and "*dehors* the record."⁹⁴

Abraham Lincoln's response to the decision was more straightforward, yet more complex. He did not attempt to distinguish Taney's holdings away as dicta. Rather, in an oddly Jacksonian sounding response, he maintained that the decision was binding only on the parties to it; it

did not constitute a conclusive determination of the meaning of the constitution that would bind the executive and legislative branches, because:

... if the policy of the Government upon vital question affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal.⁹⁵

Stating that he would respect the outcome of a decision as to the parties to it, no matter how much he disagreed with its assumptions, Lincoln added that he would secure that reversal by appointing judges to the Court whose views accorded with his own.⁹⁶ Lincoln never suggested that the Court's power should be diminished; on the contrary, in his first annual message to Congress on December 3, 1861, he recommended that Congress expand the jurisdiction of the federal courts to handle the drastic increase in claims against the federal government.⁹⁷

Still another response to *Dred Scott* echoed earlier Roane state sovereignty themes. The legislatures and supreme courts of free states repeatedly defied the decision, treating it as having no authority within their jurisdictions. Within two months of the *Dred Scott* decision, the Ohio Supreme Court handed down its decision in *Anderson v. Poindexter* (1857),⁹⁸ holding that a Kentucky slave who came into the free state of Ohio with the consent of his master was freed, and that slavery did not reattach upon his return to Kentucky. This holding flew in the face of that segment of Chief Justice Taney's opinion dealing with *Dred Scott*'s sojourn into Illinois. On the citizenship point, the Maine Supreme Judicial Court flatly rejected *Dred Scott*, holding that blacks in Maine were citizens of the state, at least for the purposes of voting.⁹⁹ In *Lemmon v. People* (1860),¹⁰⁰ the New York Court of Appeals held that Virginia slaves coming into the jurisdiction of New York while being shipped to another slave state became free, a similar rejection of the comity aspects of Taney's holding.

An even more extreme response to the *Dred Scott* decision was the conspiracy hypothesis. Northern indignation at the nakedly pro-slavery emphasis of Taney's opinion led to charges of "judicial usurpation" and thence to charges that the *Dred Scott* opinion was the product of a conspiracy among the Chief Justice, Presidents

Franklin Pierce, James Buchanan, and perhaps Senator Stephen A. Douglas.¹⁰¹ Perhaps the most widely noted accusation of such a conspiracy came from Abraham Lincoln, who claimed in the Lincoln-Douglas debates of 1858 that the *Dred Scott* decision was not the ultimate goal of the slave power, adding that the Court and its Democratic abettors would not rest until they had forced slavery into the free states themselves. At Springfield, he declared that:

... we shall lie down pleasantly dreaming that the people of Missouri are on the verge of making the state free, and we shall awake to the reality instead, that the Supreme Court has made Illinois a slave state.¹⁰²

Though largely dismissed as political rhetoric, the fear that the Court could force slavery into the free states was well-founded.¹⁰³ Reasonable men feared that the *Lemmon* case might provide precisely the vehicle that Lincoln feared for getting a Supreme Court decision nationalizing slavery in the free states just as *Dred Scott* had nationalized it in the territories. The appeal of *Lemmon* to the United States Supreme Court never came to anything because of the onset of secession and war, but Republican critics were justified in fearing another pro-slavery Taney opinion, if not in their charges of an overt conspiracy.

Northern state legislatures responded just as fervently to state sovereignty arguments as did their courts. New York enacted a joint resolution in April 1857 defiantly proclaiming that "this State will not allow slavery within her borders in any form or under any pretense, or for any time, however short."¹⁰⁴ Elsewhere, legislatures in Ohio, Connecticut, Vermont, Massachusetts, New Hampshire, Pennsylvania, and Maine enacted statutes or passed resolutions that in one way or another condemned the *Dred Scott* decision, or defied it by various provisions concerning fugitive, sojourning, or *in transitu* blacks. Vermont went furthest of all in its Freedom Act of 1858, which provided, *inter alia*, that slavery was not a bar to citizenship in the state, and that any slave coming into the state for any reason was automatically freed.¹⁰⁵ Such a statute in fact nullified the *Dred Scott* decision, and represented the ultimate in state resistance to the aggressions of Taney's opinion.

Finally, at the far end of the continuum of response were the scattered and exaggerated as-



Library of Congress

Abolitionist editor Horace Greeley condemned the Court's *Dred Scott* decision as being the product of "five slaveholders and two or three doughfaces."

saults on judicial power. Their influence on subsequent historical interpretation resulted primarily from the vehemence of the attack, and the quotability of the critics. Horace Greeley, editor of the New York *Tribune*, is best remembered for his several editorials dismissing the *Dred Scott* majority as entitled to "just as much moral weight as would be the judgment of a majority of those congregated in any Washington bar-room." It was the project, Greeley charged, of "five slaveholders and two or three dough-faces."¹⁰⁶ Charles Sumner contributed a bit of invective in response to a 1865 proposal to appropriate funds for a bust of Taney: "the name of Taney is to be hooted down the pages of history. . . . He administered justice at last wickedly, and degraded the judiciary of the country, and degraded the age." In the same debates Ohio Republican Benjamin Wade commented that his constituents "would pay \$2,000 to hang this man in effigy rather than \$1,000 for a bust to commemorate his merits."¹⁰⁷ Sumner may also have been the author of a scurrilous pamphlet that appeared in 1865, *The Unjust Judge*. The capstone of this *ad hominem* attack on Taney was a resolution offered by New Hampshire Republican Senator John P. Hale in December 1861 that proposed abolishing the United States Supreme Court "and establishing instead thereof another"

Supreme court.¹⁰⁸ The salient fact to be noted about this resolution, however, was not that it was offered, but that it received virtually no support. In fact, the attacks of Greeley, Sumner, Wade, Hale, and others disgusted with the *Dred Scott* decision received near universal condemnation; they were not representative of their era, and are most notable precisely because they were so unrepresentative.

For all its rhetorical violence, the third phase of criticism of judicial power had no more apparent effect than the first two. It was not because the Republicans lacked an opportunity to do substantive damage to the Court—and to federal judicial power generally—if they wished, for in 1862 the Republican-dominated 37th Congress enacted the first reorganization of the federal judicial circuits since 1837. They did restructure the circuit system so that only three of the nine would be composed of slave states; previously five of the nine had included slave states, with the consequence that the majority of the justices of the Supreme Court were residents of slave states.¹⁰⁹ But the prestige and power of the Court as an institution survived the war years intact.¹¹⁰ Between 1862 and 1872, Congress conferred broad new jurisdictional grants to the federal court system in five areas: 1) removal of cases from state to federal courts; 2) *habeas corpus* jurisdiction of federal courts; 3) creation of the United States Court of Claims; 4) bankruptcy; and 5) expanded section 25 "federal question jurisdiction."¹¹¹ Not all of these jurisdictional expansions proved to be permanent: the Court rejected the federal question jurisdiction inadvertently thrust upon it,¹¹² and Congress quickly repealed the new bankruptcy legislation. But removal and *habeas corpus* jurisdiction grew over time; the business of the Court of Claims expanded along with the growth of the nation; and, Congress enacted a permanent bankruptcy law in 1898, while in the interim federal courts wielded extraordinary power in the railroad receiverships.

It should be noted that after Congress expanded the Supreme Court's *habeas corpus* review powers in the Habeas Corpus Act of 1867,¹¹³ the Court agreed to take jurisdiction under its new authority of an appeal of William McCardle from an order of the United States Circuit Court remanding him to military custody.¹¹⁴ Congressional Democrats gleefully taunted their Republican colleagues that the Court was about to hold unconstitutional the military commis-

sions which were indispensable to military Reconstruction. Alarmed Republicans contemplated several super-majority proposals, but abandoned them in favor of removing only so much of the newly granted jurisdiction as was necessary to keep the Court from deciding the *McCardle* case on its merits.¹¹⁵ In *Ex parte McCardle* (1869),¹¹⁶ the Court held that Congress had acted within its authority in repealing a grant of appellate jurisdiction. Far from being intimidated, however, the Court took jurisdiction of a similar appeal one year later under its original grant of *habeas* appellate authority under section 14 of the 1789 Judiciary Act.¹¹⁷

IV.

After the turmoil of Reconstruction, the American judiciary enjoyed a generation relatively free of criticism, except for expectable and usually justified criticism of the results in particular cases. But this proved to be merely the calm before the storm. The fourth phase of criticism of judicial power erupted as the courts extended their power of judicial review to implement the doctrines of substantive due process and liberty of contract. The judicial offensive began with a series of state supreme court cases in the 1880's that either resurrected antebellum vested-rights doctrines or embraced the successor dogma of liberty of contract. In 1886, a young professor at the University of Missouri Law School Christopher G. Tiedeman, published a work which did much to encourage such decisions. Tiedeman's *A Treatise on the Limitations of Police Power in the United States* provided both ideology and rationale for the emergent doctrines of substantive due process and liberty of contract. His introduction suggests the tone that characterized his exposition of the new orthodoxy:

Socialism, Communism, and Anarchism are rampant throughout the civilized world. The State is called upon to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours daily he shall labor. . . . Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.¹¹⁸

Though they attracted little popular notice at

the time, two landmark decisions of the Supreme Court in the 1890's confirmed the doctrine of substantive due process that had been broached in the dissents of Justices Joseph P. Bradley and Stephen J. Field in the *Slaughterhouse Cases* (1873).¹¹⁹ In *Chicago, Milwaukee & St. Paul Railway v. Minnesota* (1890) and *Smyth v. Ames* (1898),¹²⁰ the Court adopted a substantive due process reasoning as an inhibition on state regulatory power. This innovation promptly led to the even more significant doctrine of liberty of contract, first enunciated in *Allgeyer v. Louisiana* (1897), and applied in the notorious case of *Lochner v. New York* (1905).¹²¹ Subsequently, the dogma of liberty of contract was used to void state and federal legislation attempting to protect workers against yellow-dog contracts in *Adair v. United States* (1908) and *Coppage v. Kansas* (1915).¹²²

If the Court's earliest liberty of contract decisions went largely unnoticed by laypeople, its later decisions in *Pollock v. Farmers Loan and Trust*,¹²³ *United States v. E.C. Knight Co.*,¹²⁴ and *In re Debs*,¹²⁵ did not. These decisions provoked an explosion of criticism of the Court that was undeterred by the fact that the Court had sustained most economic regulatory legislation — state and federal — coming before it.¹²⁶ The ensuing storm of hostility to judicial power did not blow over until World War Two. The criticism proceeded at two levels, which were at times only tenuously related. For the first time, judicial power came under scholarly and professional scrutiny, and a minority of scholars and lawyers became critical of judicial review. Second, vigorous political attacks on the power of courts achieved some partial success at the state and federal level.

The nation's centennial in 1876 helped turn popular and learned attention to the question of constitutional origins. Historians were beginning detailed inquiries into America's past. At the same time, lawyers were returning once again to the problem of justifying judicial review. The result was a far-reaching debate on judicial power, which provided a scholarly background for the eruption of popular and political attacks on the United States Supreme Court in 1895.¹²⁷ William M. Meigs, a lawyer, opened the debate with an 1885 article in the *American Law Review*, a journal published in St. Louis that was to carry much of the professional debate on judicial review for the next forty years.¹²⁸ Meigs contended that

judicial review was preceded in colonial and state practice, and thus was not an innovation in 1803. But he then veered from what might have been considered a Hamiltonian position to one that was Jacksonian (or Lincolnian) arguing that the United States Supreme Court's decisions bound only the parties to the controversy, not other branches of government.

Justice David J. Brewer stimulated debate by his dissent in the appeal of the *Budd* case from the New York Court of Appeals. Six of his colleagues affirmed the result below, which had validated a statute regulating warehouse fees on the basis of *Munn v. Illinois* (1877).¹²⁹ Recognizing that *Munn* has been undercut the previous year by the *Chicago, Milwaukee, & St. Paul* decision, Brewer echoed Judge Peckham's dissent on the appeal in the New York court. Proceeding by *argumentum ad consequentiam*, Brewer maintained that if government can regulate one kind of service, it can regulate all, and the socialistic state foretold in Edward Bellamy's *Looking Backward* (1888) was at hand. "The paternal theory of government is to me odious," Brewer declared.¹³⁰ Such an open avowal of ideological bias was too much for Seymour D. Thompson, editor of the *American Law Review*, who condemned the opinion in blunt terms;

like some of his associates, and many of his predecessors, [Brewer] is evidently laboring under the hallucination that he is a legislator instead of being merely a judge. He indulges in such sentences as this: 'The paternal theory of government is to me odious.' What if it is? He was not put there to decide constitutional questions according to his whims, or according to what was or was not odious to him personally.¹³¹

Thompson, like his journal, played a central role in the debate on judicial power until his death in 1904. Previously a judge of the St. Louis Court of Appeals, Thompson retired from the bench in 1892 to devote full time to his editorial duties and his prodigious output of treatises. His consistent criticism of the formalist assumptions and the dogmas of substantive due process provided a counterpart to the reigning ideology of the American bar at the turn of the century.

The legal and political struggles of the 1890s were fought so ferociously that what would have been an heretical utterance in 1890 became commonplace in 1895. Walter Coles observed in 1893, without any apparent disapproval, that the constitutional decisions of the United States Supreme

Court "conformed . . . to be the maxims and traditions of the political party whose appointees have, for the time being, dominated the court."¹³² No one rose to challenge his contention that the history of the Court was marked by three periods of partisan domination, and that political ideology shaped the Court's decisions. Federalist beliefs formed the jurisprudence of the Marshall Court; Jacksonian Democracy informed the Taney Court; and the post-1865 Court was dominated by Republican attitudes.¹³³

In the same year that Coles described a politicized judiciary, James Bradley Thayer of the Harvard Law School published an epochal reconsideration of judicial review. In "The Origin and Scope of the American Doctrine of Constitutional Law," Thayer accepted the legitimacy of judicial review—which he called "a great and stately jurisdiction"—provided it conformed to Thayer's narrow specifications for its exercise. Thayer asserted that courts can disregard a statute only when the legislature "have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question."¹³⁴ Twelve years later, this view was central to Justice Oliver Wendell Holmes, Jr.'s *Lochner* dissent, and in time, has become one of the fundamental tenets of the attitude known as "judicial self-restraint."

The Republican victory of 1896 marked one of the great turning points of American history. It crushed the Populists, demoralized reformers, exalted industrial and finance capitalism, and ratified the perpetual, unquestioning commitment of America to an economic ideology that stressed competition, profit, and the uncontrolled market. In this sweeping victory for economic conservatism, judicial power and its fruits were ratified as a matter of course. America shrugged off, for a time, the Populist critique of the judges as a "judicial oligarchy,"¹³⁵ and turned to other diversions including imperialism. But skepticism and mistrust of judges do not die easily. Justice Peckham's *Lochner* decision in 1905, together with Justice Holmes' dissent laid bare the economic prepossessions that dictated the majority result. Robert Street, a Texas judge, condemned the Court's emergent role in states rights terms and post-Populist rhetoric that denounced "judicial madness" and "judicial supremacy."¹³⁶ William Trickett, dean of the Dickinson Law School, suggested in an influential article that if legislatures are prone to err under the influence of popular majorities, judges

are led astray by the biases that derive from "social and economic power and privilege." Judicial decisions are as vacillating and inconsistent as the behaviour of legislators. The courts had become a functional third legislative chamber, unable to make any believable pretensions to judicial impartiality because they employed no adequate, clear, and objective tests of constitutionality.¹³⁷ Walter Clark, a judge of the North Carolina Supreme Court, challenged the institutional legitimacy of the Supreme Court, with the insuperable advantage of being himself a member of the judicial caste, writing with an insider's perspective.¹³⁸

More lasting than this blast of criticism was a remarkable outpouring of excellent scholarship on judicial review that even now, some two generations later, retains its vitality and relevance. Unlike the *ad hoc* criticism provoked by a particular decision, this scholarly investigation took a broad view of judicial power, producing monuments of scholarly inquiry. Charles G. Haines began his long and productive career with an extensive and pathbreaking study of the origins of judicial review,¹³⁹ as did his contemporary and fellow-political scientist, Edward S. Corwin.¹⁴⁰ Morris Cohen, the great legal philosopher, wrote on "judicial legislation" while Charles Warren, the eminent legal historian, defended what he called "the progressiveness of the United States Supreme Court" in an essay whose thesis has returned to vogue among current constitutional historians.¹⁴¹ James Allen Smith brought out his sparkling *Spirit of American Government* in 1907, which together with the work of Vernon Louis Parrington and Charles A. Beard created the Progressive school of historical interpretation.¹⁴² Gustavus Myers produced what remains today the only useful history of the United States Supreme Court written from the socialist perspective, which needless to say, was not enthusiastic about judicial power.¹⁴³ Roscoe Pound of the Harvard Law School and others worked out the premises of sociological jurisprudence, condemning legal formalism as what Pound called "mechanical jurisprudence."¹⁴⁴

Scholarly debate was accompanied by a variety of political efforts to rein in the federal courts or to make them more responsive to popular will. The critics of the 1890s had by and large limited themselves to calling upon the judges to exercise judicial self-restraint. The *Lochner* case

persuaded critics that pleas for self-restraint were futile, and they turned to more radical remedies. Most controversial, from the viewpoint of the conservative bar, were the novel ideas of recalling judicial decisions or judges themselves. Progressives had for a decade been advocating recall of elected officials, and had succeeded in numerous western states in amending state constitutions to permit recall, initiative and referendum. In *Pacific States Telephone and Telegraph Co. v. Oregon* (1912),¹⁴⁵ the United States Supreme Court had declined to hold the initiative unconstitutional, thereby implicitly accepting all three innovations in principle. Some Progressives took this to mean that the idea of recalling other decisions or the judges who handed down those decisions might find a similar hospitable reception. In 1911, Senator Robert Owen of Oklahoma introduced a bill in Congress (not a resolution for a constitutional amendment) that provided for recall of federal judges and election of all lower federal court judges.¹⁴⁶ Lawyers reacted with outrage to such proposals. President William Howard Taft spoke for them in his veto message of the Arizona Enabling Bill in 1911. In a righteously anti-democratic polemic, Taft condemned "the possible tyranny of a popular majority" because the proposed constitution of the new state permitted recall of judges. "The righteous and just course for a judge to pursue is ordinarily fixed by statute or clear principles of law, and the cases in which his judgment may be affected by his political, economic, or social views are infrequent," the President ingenuously stated. "Individual instances of a hidebound and retrograde conservatism on the part of courts in decisions which turn on the individual economic or sociological views of the judges may be pointed out; but they are not many. . . ." (Taft had in mind the New York *Ives* decision, to be discussed shortly.)¹⁴⁷ The nascent state expunged the offending clause, was admitted in 1912, and promptly reinstated it in its constitution.

Other measures for judicial reform met an equally chilly reception. These included suggestion for repassage of legislation "vetoed" by the Supreme Court, with the requirement that it be by a two-thirds congressional majority, as is the case with an override of a presidential veto. Critics resurrected the old ideas of electing federal judges and abolishing lifetime tenure, substituting for it a term of years (usually seven), as well as the proposal, by then almost a century old, of

requiring a super-majority — a unanimous court or two-thirds of the justices — for any decision holding a federal or a state statute unconstitutional.¹⁴⁸ The Socialist Party, a principal victim of judicial abuse, demanded an elective bench and the abolition of judicial review.¹⁴⁹ Amendments proposed in 1910 would have not only abolished judicial review but would have vacated the office of federal judges who held a statute unconstitutional.¹⁵⁰ Theodore Roosevelt endorsed some of these proposals in speeches reprinted in *The Outlook* during his Progressive Party (Bull-Moose) campaign of 1912.¹⁵¹ For the second time in little over a decade, criticism of courts' power was again found in the platform of a national party.

One reform proposal, however, was not so ill-fated, chiefly because it had the support of conservative lawyers. The New York Court of Appeals once again shocked the nation with its 1911 decision in *Ives v. South Buffalo Railway Co.*,¹⁵² holding the state's workmen's compensation act unconstitutional on substantive due process grounds. Even conservatives like Taft were appalled at this "hidebound and retrograde" decision; court critics naturally were livid. All conceded that some review of the decision by the United States Supreme Court would have been desirable, but review under section 25 of the Judiciary Act was precluded because the state court decision was in favor of, not adverse to, a right claimed under the federal Constitution. Consequently, in the Judiciary Act of 1914,¹⁵³ Congress provided for just that sort of appeal. There were several ironies in this measure, not least of which was that the remedy for an abuse of judicial power at the state level was an expansion of judicial power at the federal level. Judicial power was similarly enhanced by the Judiciary Act of 1925, which diverted much business out of the United States Supreme Court to the federal Circuit Courts of Appeal and which abolished appeal as of right on all constitutional issues, substituting in its stead the discretionary writ of certiorari as the principal procedural vehicle by which cases came up to the High Court.¹⁵⁴ During the same period, Congress also created two new federal courts, the Court of Customs Appeals (1909) and the short-lived Commerce Court (1910-1913). While the establishment of these new tribunals probably implies nothing about judicial power as such, it does suggest that Congress was not palsied by criticisms of the

federal courts.

The Supreme Court itself contributed to this generation of judicial reform by promulgation of the Federal Rules of Criminal Procedure in 1934 and the Federal Rules of Civil Procedure in 1937, actions that greatly regularized proceedings in the federal courts. Finally, as if to demonstrate dramatically a popular reaffirmation of faith in the American court system, the United States Supreme Court moved into its palatial new quarters in 1935.

Judicial critics also diverted the substantive course of law by constitutional amendment and legislation. For the third time in our history, a decision of the United States Supreme Court (*Pollock*) was reversed by formal process when the Sixteenth Amendment was ratified in 1913. The Nineteenth Amendment, ratified in 1920, was not intended to nullify a Supreme Court decision, but it had that practical effect, making a dead letter of *Minor v. Happersett* (1875), which had held that nothing in the Fourteenth Amendment conferred the right to vote on women.¹⁵⁵ In the Clayton Act,¹⁵⁶ Congress tried to reverse the abusive effects of the Court's labor decisions by declaring that the antitrust laws could not be used to prohibit labor organizations because labor is "not a commodity or article of commerce." It also attempted to outlaw the labor injunction. This effort would shortly be frustrated by the Court, however.

After World War I, the United States Supreme Court again provoked its critics by a series of harshly anti-labor decisions. Most prominent in the public mind were the two child-labor cases, *Hammer v. Dagenhart* (1918) and *Bailey v. Drexel Furniture* (1922),¹⁵⁷ which respectively invalidated federal statutes regulating child labor under the commerce and tax powers. Rightly concluding that state regulation would be ineffectual, court critics sought a constitutional amendment empowering Congress to regulate child labor. This proposed Twentieth Amendment came so close to success that in the 1920s a majority of the American people believed, erroneously, that it actually had been ratified. Ignoring the clear legislative command of the Clayton Act, the Court in several decisions between 1917 and 1921 largely re-instated the labor injunction.¹⁵⁸ In *Truax v. Corrigan* (1921), the Court held unconstitutional a state statute prohibiting state court labor injunctions.¹⁵⁹ In the decade's most reactionary decision, *Adkins v.*

Children's Hospital (1923),¹⁶⁰ the Taft Court voided a District of Columbia law establishing a minimum wage law for women, not only reviving the monstrous *Lochner* decision but apparently extending its liberty-of-contract principles to women, a class of laborers implicitly exempted by *Lochner* from its ban on regulation. And in *Wolff Packing Co. v. Court of Industrial Relations* (1923), the Court invalidated a state commission that had power to settle wage disputes and prescribe minimum wages in certain industries.¹⁶¹ *Wolff* not only was anti-labor in its result, but also narrowed the old *Munn* categories of "business affected with a public interest" drastically, thus gratuitously restricting state regulatory power generally.

Progressives struggled ineffectively against this trend of decisions. In Congress, they proposed bills and resolutions that would: permit Congress to "overrule" the Court; deny lower federal courts power to hold statutes unconstitutional;¹⁶² Charles G. Haines proposed the variant of requiring a two-third vote for Congressional override if the judicial decision invalidated state powers, but only a majority vote if federal powers were involved;¹⁶³ permit recall of judges or require their election and limit them to 10-year terms;¹⁶⁴ require either unanimity or a minimum of seven justices for decisions holding statutes unconstitutional; and abolish the power of judicial review altogether. As always, these attracted no support. Recognizing the hopelessness of promoting such reform without broad popular support, Wisconsin's Progressive Senator, Robert LaFollette, tried to forge an alliance between organized labor and middle-class reform groups for the 1924 presidential campaign. For the third time in a generation, judicial power became a campaign issue, with the Progressive Party demanding an elective bench, legislative override of the judicial veto and "abolition of the tyranny and usurpation of the courts," including the labor injunction.¹⁶⁵ The Republican and Democratic parties seemed more intent on defeating the Progressive insurgency than competing with each other. The Progressives were buried by their own divisions and Coolidge prosperity, and their judicial reform demands died along with them.

V.

While the American people seemingly settled into the complacency induced by Coolidge pros-

perity, anti-judicial animus lingered. The sharp Senate struggles in 1930 over the nominations of Judge John J. Parker and former Justice Charles Evans Hughes to the High Court indicated that political controversy over the Court was restlessly dormant, not defunct. This hostility was reawakened whenever the Court obstructed state and federal efforts to cope with the deepening Depression after 1929, as, for example, in the public outcry over the result of *New York Ice Co. v. Liebmann* (1932), which invalidated a state statute regulating the licensing of ice suppliers.¹⁶⁶ The Court's early acquiescence in state economic regulatory efforts, as displayed in the Minnesota mortgage moratorium case and the New York milk case, assuaged public fears.¹⁶⁷ But the old, discredited mechanistic jurisprudence that Dean Pound had derided a generation earlier still survived, and would be flaunted in Justice Owen Roberts' majority opinion in *United States v. Butler* (1936):

the judicial branch of the Government has only one duty — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. . . . This court neither approves nor condemns any legislative policy.¹⁶⁸

Even more dismaying to the progressive outlook was Justice George Sutherland's resurrection of Chief Justice Taney's long-discredited notion that the meaning of the Constitution is unchanging. In his Minnesota moratorium dissent, Sutherland approvingly quoted from Thomas M. Cooley's treatise on *Constitutional Limitations*: "The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."¹⁶⁹

These related jurisprudential ghosts triumphed, first on the day journalists called "Black Monday"—when the Court struck down the NIRA in the *Schechter Case*¹⁷⁰—and then in a series of cases rising to a crescendo of judicial obscurantism throughout the October term of 1935: *Colgate v. Harvey*, *United States v. Butler* (the case voiding the Agricultural Adjustment Act), *Carter v. Carter Coal Co.*, and *Morehead v. Tipaldo*.¹⁷¹ The last two were especially alarming, for different reasons. In *Carter*, the five-member majority of the Court that voided the Guffey Coal Act in effect told Congress that Congress did not mean what it said in the separability clause of the invalidated statute, and in the

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name of states' rights struck down legislation that seven of the major coal-producing states supported by amicus briefs. *Morehead* struck down a model New York women's minimum-wage statute on liberty-of-contract grounds by exhuming *Lochner* and *Adkins*, provoking President Franklin Delano Roosevelt's judgement that the Court was creating a no-man's land that neither state nor federal regulatory authority could reach.¹⁷² Justice Harlan Fiske Stone rightly evaluated the Court's October 1935 term as "in many ways one of the most disastrous in its history."¹⁷³

Stone was not alone in his saturnine view. In the previous two years, a succession of telling critiques of the Court appeared in print. Among the most influential were the books, articles and newspaper series by Edward S. Corwin, the Princeton political scientist who had by then established his reputation as the nation's pre-eminent constitutional scholar. He published in quick succession *The Twilight of the Supreme Court* (1934), *The Commerce Power versus States Rights* (1936), and as a sort of post mortem, *Court Over Constitution* (1938), as well as numerous articles, warning the Court, in his colorful language, not to attempt "putting the future in cold storage" in the name of a specious "super-

If neither the Court nor the federal government in general proved initially sympathetic to state attempts to regulate child labor, the press was more than ready to ignore the constitutional questions at hand in its criticisms. Editorials and satirical cartoons like the three shown here vehemently condemned child labor and the Court's refusal to check its abuses.



"HOW ABOUT ME?"

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constitution."¹⁷⁴

From early 1934 on, FDR and his associates, particularly United States Attorney-General Homer Cummings, toyed with methods of circumventing the Court's obstruction.¹⁷⁵ These schemes fell into one of four categories, and were to be accomplished by either of two methods: constitutional amendment or ordinary legislation. In the first category—the more conservative—were proposals for a constitutional amendment that would reverse a particular decision or some line of decisions. Because so many of the Court's anti-New Deal decisions turned on a restrictive reading of the federal commerce power that went back to *United States v. E.C. Knight* (1895), the most common amendment proposals sought to broaden Congress' power to regulate interstate commerce. In the near-universal revulsion to the decision in *Morehead v. Tipaldo*, even former President Herbert Hoover and the Republican Party endorsed an amendment that would empower states to achieve certain regulatory objectives.

The second category comprised miscellaneous ideas to restrict the appellate review powers of the United States Supreme Court. On several occasions, FDR displayed enthusiasm for a mechanism that would permit Congress to re-enact legislation held unconstitutional by the Court. One such idea called for amending the Constitution to enable Congress to require an advisory opinion from the Court before it enacted a law; others simply permitted Congress to act after the court had actually invalidated a statute. All such proposals required an intervening biennial election, a provision that would create an indirect popular referendum on the Court's decision. Then, if Congress re-enacted the statute, its constitutionality was to be deemed beyond question. Other limitation schemes permitted an immediate appeal to the United States Supreme Court from lower-court decisions holding a federal statute unconstitutional; required some numerical super-majority—from 7-2 to unanimity—to invalidate a statute; denied the power of judicial review altogether; or restricted some segment of the court's appellate power, as had been done in the *McCardle* case.

The principal problem with the first two categories was that most of them could be accomplished only by constitutional amendment, a route that posed daunting tactical obstacles. Roosevelt himself licked them off concisely: the

amendment process was lengthy, it could easily be blocked by lavish spending in thirteen state capitals, and even if successful it left the Supreme Court in a position to block or at least hinder programs the amendment supposedly sanctioned. Besides, Roosevelt firmly believed, the problem lay not with the Court as an institution, but with the majority of men who comprised it. A few convenient deaths or resignations would have obviated the problem, but good health and stubbornness thwarted FDR's prospects for making congenial appointments.

Thus the President and others turned to the third category of reform proposals, court-packing. For some twenty years, various proposals for judicial reform included the idea of encouraging retirement at age seventy, of increasing the number of lower federal-court judges, and of expanding the number of justices on the High Court. By a delicious irony, none other than James C. McReynolds himself, as President Woodrow Wilson's Attorney General, had in 1913 proposed a statute requiring the president to appoint a co-adjutor judge for any federal judge who reached the retirement of 70 and did not resign, the junior jurist to "have precedence over the older one." Eventually FDR and Cummings combined this idea with several other judicial-reform proposals to come up with the 1937 Court-packing idea.

But there was also a fourth possibility that Roosevelt toyed with from time to time: simply disregarding the mandate of the High Court. While he awaited the opinion and results of the Gold Clause Cases of 1935, he and Cummings prepared several contingency plans in case the decisions were adverse to the government, including a fireside chat in which Roosevelt would promise to take unspecified actions to thwart financial catastrophe brought on by the Court. A year later, as part of his congressional-override thinking, Roosevelt contemplated taking a Supreme Court decision holding a federal statute unconstitutional to Congress and requesting instructions whether he should obey the mandate of Congress or the Court.¹⁷⁶

In the end, FDR settled on the Court-packing proposal. The story is well known; its failure, however, has much to say about the ancestors of the "imperial judiciary" school of criticism. What stands out most, from the perspective of nearly half a century, is the solid public support for the United States Supreme Court as an institu-



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The Court's constitutional rejection of much of FDR's New Deal legislation prompted the President to ask Congress for the power to appoint up to six new justices — presumably men more sympathetic to his legislative package.

tion. Most Americans believed in 1937 that the President's proposal was unconstitutional. It was not, but the popular error signified profound reverence for the Court, as much as it did ignorance of technical constitutional procedures. When proposals were being kicked about in 1935 to limit judicial review, a Gallup poll revealed that Americans opposed such a limitation, 31% for, 53% against, 16% undecided.¹⁷⁷ Roosevelt himself shared this popular reverence, attributing the Court's massive failings not to the institution itself, nor to the enormous growth of judicial power over a century-and-a-half, but the personal failings of four or five men who by historical accident happened to occupy the bench in a time of crisis. He viewed himself, as he was prepared to say in the *Gold Clause Cases* fireside chat, in the same position as Lincoln was in 1861, saddled with a judicial decision that could do vast harm and that was opposed by a great majority of the American people. Like Lincoln, FDR saw himself confronted with an obstructionist bench that was prepared to block vital executive action because the judges held to a creed no longer confirmed by the electoral process.¹⁷⁸ Even after the successive shocks of Black Monday and the October 1935 Term, Roosevelt spurned mechanical solutions and radical proposals. In his 1937 annual message to Congress, he declared that "there is little fault to be found in the Constitution of the United States as it stands today," and that therefore constitutional amend-

ments were unnecessary. "The vital need is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it." His criteria for enlightenment were a judicial acceptance of democracy as expressed through the electoral process, a due respect for Congress and the executive as coordinate branches of government, a commitment to "social justice," and a Hamiltonian-nationalist recognition of the need for the effective deployment of national power to cope with national ills.¹⁷⁹

Whatever the Court's excesses in 1935-37, no matter how out-of-touch and unpopular the dogmas of the "Four Horsemen," the United States Supreme Court was enveloped by an aura that exempted it, in the popular mind, from the political processes that controlled the other branches. In this way, the century-old views of Chief Justices Gibson and Taney had sunk deep roots into American national consciousness.

The supposed "switch in time" deflected further criticism by liberals for over a decade, but the political miasma of McCarthyism kept the United States Supreme Court at the center of controversy in the late 1950s. Powerfully abetting the Second Red Scare was reaction to the United States Supreme Court's first desegregation decision, *Brown v. Board of Education* (1954).¹⁸⁰ *Brown* provoked a flood of criticism aimed at the Court. The second *Brown* decision, demanding "good faith implementation of the governing constitutional principles" "with all deliberate speed,"¹⁸¹ seemed to serve as a catalyst that coalesced resistance. The clarion of this resistance was the "Southern Manifesto" signed by ninety-six congressmen and Senators — virtually the entire southern congressional delegation. The Manifesto denounced the desegregation decisions as "a clear abuse of judicial power," a culmination of legislation by judges and a usurpation of the reserved rights of the states. The southern congressmen pledged to secure a reversal of the decision by "all lawful means."¹⁸² Former United States Supreme Court Justice James F. Byrnes demanded that "The Supreme Court must be curbed," but specified no actual measures to do so.¹⁸³

While southern resistance was organizing itself, the Court began to antagonize a much broader segment of the American public with decisions that, its critics charged, imperiled national security. In *Pennsylvania v. Nelson* (1956),¹⁸⁴ the court invalidated most state anti-

subversive legislation (anti-sedition, criminal anarchy, and criminal syndicalist statutes) on the grounds that the field was pre-empted by the federal government through enactment of the Smith Act of 1940 and subsequent anti-subversive legislation. Then in *Cole v. Young* (1956),¹⁸⁵ the Court reinstated a federal employee fired under provisions of the Internal Security Act of 1950 (sometimes known as the McCarran Act), on the grounds that only persons in "sensitive" positions, not all federal employees indiscriminately, fell within the Act's definition of "national security." In the next year, the Court distressed law-and-order forces as well by its decision in *Jencks v. United States* (1957),¹⁸⁶ which required that defendants in criminal prosecutions be allowed to inspect documents in possession of the Justice Department that might contradict government witnesses' testimony at trial. If the Department believed that such disclosure might threaten national security, the only option offered to it by *Jencks* was dismissal of the prosecution. Justice Tom Clark, in a lone and intemperate dissent, urged Congress to reverse the Court's ruling.

Then just two weeks later, on a day that distressed critics promptly called "Red Monday" (17 June 1957), the Court handed down a trio of decisions that undercut anti-subversive witch-hunts. *Yates v. United States* reversed the convictions of fourteen Communist Party members, and suggested to hopeful liberals that the Court might soon either find the Smith Act unconstitutional or might repudiate the retrogressive rule of *Dennis v. United States* (1951), which had produced convictions of the Party's leadership.¹⁸⁷ Cold Warriors found Justice John M. Harlan's distinction between advocacy to action and advocacy of ideas metaphysical. *Watkins v. United States*¹⁸⁸ dealt even more rudely with investigations by the House Un-American Activities Committee, holding that a witness could claim First Amendment privilege in refusing to answer questions before the Committee, that the Committee's definition of the subject matter of its investigation was excessively vague, and that Congress could not expose for exposure's sake. Chief Justice Earl Warren curtly reminded Congress that it is not a law-enforcement agency. Again, liberals saw an augury suggesting that the Court might soon hold HUAC itself unconstitutional. Finally, in *Sweezy v. New Hampshire*¹⁸⁹ the Court reined in the Granite State's witch-hunting Attorney-General, Louis Wyman, by expanding

the bounds of academic freedom at a state university under the First Amendment.

A coalition of outraged segregationists, Cold War hawks, and Republican conservatives promptly moved to curb the Court in a rhetorically violent struggle of the sort that had not been seen in the halls of Congress since 1831. They produced a broad range of proposals, from modest clarifications of statutory intent designed to provide guidelines for judicial construction, to lunatic-fringe ideas that would instruct state courts and lower federal courts to disregard rulings of the United States Supreme Court.¹⁹⁰ Amid barrages of vehement rhetoric about judicial "despotism," "tyranny," "usurpation," "encroachment," "domination," and "oligarchy," Congress and some critics outside Congress put forward innumerable proposals to inhibit the Court or reverse its rulings.

Anti-Court feelings surged again in 1962 in the wake of the Supreme Court's reapportionment and school prayer rulings. Criticism was just as noisy, and arguably as irrational as five years earlier; witness an observation of Representative George W. Andrews, Alabama Democrat: "They have put the Negroes in schools; now they have driven God out."¹⁹¹ But unlike the earlier period, this time resentment produced two proposed constitutional amendments that gained a surprisingly wide range of public support, though one was never sent out for ratification, and the other waned away in the ratification process. The better known was Illinois Senator Everett Dirksen's amendment that would permit states to use factors other than population for apportioning one house of the legislature. The other, offered by Representative Frank Becker of New York, would have permitted school prayer. It failed adoption by Congress, but its popularity has not entirely disappeared. Yet, for all the rhetorical violence, and all the propaganda inundating the Court from the American Right, nothing but the ambiguous *Jencks* Act emerged. Though offered in a spirit of hostility to the Court's decision in *Jencks v. United States* (1957), the legislature tightened procedures for gaining access to information in government files, and it had the effect of affirming the unpopular ruling of the Court. Other measures were offered aimed at limiting the Court's power—frequently by members with little influence in Congress—but they were largely ineffectual fulminations. Commentators attribute the reformers' failure to

curb the Court to another "switch in time," notably several 1959 decisions of the Supreme Court that backed off from the *Watkins-Yates-Sweezy* salient. Herman Pritchett's conclusion, however, is probably closer to the truth: "Basically, the Court was protected by the respect which is so widely felt for the judicial institution in the United States."¹⁹²

Some Concluding Thoughts

Like their ideological predecessors, today's critics of the "imperial judiciary" are starkly result oriented. Their complaint is not with the power of courts *per se*, but with the uses to which that power has been put. They are troubled by judicial actions that have precluded prayer in the public schools, that have limited the power of the states to control abortions, that have inhibited the infliction of the death penalty, that have forced reapportionment of state legislatures, that have created and then confused a law of pornography, and that have tightened the protections that the Fourth through Sixth and Eighth Amendments provide for those caught in the coils of the criminal process.

This result-orientation weakens the "imperial judiciary" critique in vital ways. Its naked opportunism promises that criticism will be muted once results begin to shift around more to the critics' liking. The orientation also forces an undesirable emphasis on doctrines of the United States Supreme Court, which frequently results in a blurred shifting from that Court to courts in general. State courts and lower federal courts have participated significantly in the expansion of judicial power, and it is misleading to attribute such growth to decisions of the Supreme Court alone. Most importantly, concentration on results deprives the "imperial judiciary" attack of a jurisprudential basis respectable enough to give it permanence and persuasive force. Ironically, the "imperial judiciary" criticism falls into precisely the error that it accuses activist courts of: its conclusions appear to be based solely on individual preferences about substantive policy. Such a critique can only be as ephemeral as the policies it criticizes, whereas the substantive criticism of judicial power or its exercise could potentially make a permanent and valuable contribution to the place of the courts in American life.



The Warren Court of 1953 was, to many pro-segregationists, an "imperial judiciary." Seated, left to right are: Associate Justices Felix Frankfurter and Hugo Black; Chief Justice Warren Burger; and Associate Justices Stanley Reed and William O. Douglas. Standing, left to right, are: Associate Justices Tom C. Clark, Robert Jackson, Harold Burton and Sherman Minton.

Footnotes

¹The phrase itself is obviously adapted from Arthur Schlesinger, Jr., *The Imperial Presidency* (Boston, 1973). A generation earlier, Schlesinger had anticipated himself, writing in *The Age of Jackson* (Boston, 1945), p. 486, of Chief Justice Roger B. Taney's "judicial imperialism." Conservatives smarting under Schlesinger's centrist-liberal critique of executive power have attempted to turn their tormentor's sword back on him, first condemning congressional efforts to restrict presidential war-making (the "imperial Congress"), and now by attacking an "imperial judiciary." But the idea is much older than that: as part of his 1892 campaign for the presidency, the Populist James B. Weaver criticized what he termed the "Imperial Supreme Court": Weaver, *A Call to Action* (Des Moines, 1892), p. 133.

²127 Cong. Rec. S1281-1284 at p. 1283 (daily ed., 15 Feb. 1981). The quoted phrase appears in a speech where Senator Helms introduced a resolution proposing a constitutional amendment that would have withdrawn jurisdiction from federal courts over cases challenging prayers in public schools. Helms relied on the "Exceptions and Regulations" clause of Art. III, sec. 2.

³Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass., 1977).

⁴In addition to the four cases discussed *infra*, the following have been noted in William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago, 1953), I, pp. 942-975:

- 1) the Josiah Phillips outlawry, Virginia, 1778 (unreported);
- 2) *Holmes v. Walton*, New Jersey, 1780 (unreported);
- 3) *Commonwealth v. Caton*, Supreme Court of Appeals of Virginia, 1782 (summarized, not reported, in 4 Call 5 [Va. 1782]);
- 4) the Symbsbury Patent case, Connecticut, 1785 (not reported);
- 5) a phantom Massachusetts case sometime in the 1780s, existing only as an isolated reference in a letter to Thomas Jefferson; it has never been found. However, William Nelson suggests that it might have been *Goddard v. Goddard*, a 1789 case decided by the Supreme Judicial Court: "Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860," 120 U. Pa. L. Rev. 1166-1185 (1972) at p. 1167.

⁵The Rutgers case is unreported, but is extensively discussed in Julius Goebel, ed. *The Law Practice of Alexander Hamilton* (New York, 1964-1981), I, pp. 282-543.

⁶New York Constitution of 1777, Art. 35, in Francis N. Thorpe, comp., *The Federal and State Constitutions* (Washington, 1909), V, pp. 2635-2636.

⁷The opinion is reprinted in Goebel, *Law Practice of Alexander Hamilton*, I, pp. 393-419; quotation at p. 415. *Quoad hoc* "as to this particular matter."

⁸Quoted in Goebel, *Law Practice of Alexander Hamilton*, I, p. 313.

⁹Quoted in Goebel, *Law Practice of Alexander Hamilton*, I, p. 312.

¹⁰They discussed in Crosskey, *Politics and the Constitution*, II, pp. 968-971.

¹¹James M. Varnum, *The Case, Trevett against Weeden*... 1786 (Providence, Rhode Island, 1787).

¹²Rhode Island Acts and Resolves... 1786, quoted in Crosskey, *Politics and the Constitution*, II, p. 967.

¹³1 Martin 42 (N.C., 1787).

¹⁴I am grateful to W. Thomas Boyd, Esq. of the North Carolina bar for permitting me to make use here of his unpublished paper, "Against Legislative Tyranny: James Iredell's Role in the Development of Judicial Authority in North Carolina, 1773-1788."

¹⁵Spaight to Iredell, 12 Aug. 1787, quoted in Griffith J. McRee, *Life and Correspondence of James Iredell* (New York, 1857), II, pp. 168-170.

¹⁶Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, 1911), II, p. 299; James Monroe to James Madison, 22 Nov. 1788, in Stanislaus M. Hamilton, ed., *The Writings of James Monroe* (New York, 1898-1903), I, p. 196.

¹⁷These are discussed in Charles G. Haines, *The American Doctrine of Judicial Supremacy*, 2nd ed. (Berkeley, 1932), pp. 254-261.

¹⁸This phase of criticism of federal court power is surveyed in Charles Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act," 47 Am. L. Rev. 1-34 161-189 (1913).

¹⁹2 Dall. (2 U.S.) 419 (1793).

²⁰This bizarre measure, a prospective and contingent act of legislative trial and judgment, is reprinted in Herman V. Ames, ed., *State Documents on Federal Relations: The States and the United States* (Philadelphia, 1906), p. 10.

²¹3 Dall. (3 U.S.) 199 (1796).

²²*Van Horne's Lessee v. Dorrance*, 2 Dall (2 U.S.) 304 (1795).

²³3 Dall. (3 U.S.) 386 (1798).

²⁴*United States v. Peters*, 5 Cranch (9 U.S.) 115 (1809).

²⁵The resolution is reprinted in Ames, *State Documents on Federal Relations*, pp. 46-48.

²⁶Jonathan Elliott, comp., *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia, 1901), II, p. 409; I, p. 331. An incomplete but nonetheless useful overview is in Maurice S. Culp, "A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States," 4 Ind. L. Rev. 386-398, 474-490 (1929).

²⁷*Register of Debates*, 19 Cong. 1 sess., p. 458 (10 Ap. 1826); see also proposal to give United States Senate, rather than Supreme Court, jurisdiction of suits where a state is a party: *Annals of Congress*, 17 Cong. 1 sess., p. 68 (14 Jan. 1822); and a proposal for a tribunal composed of one member from each state to hear constitutional questions: *Congressional Globe*, 40 Cong. 2 sess., p. 196 (16 Dec. 1867). The former two proposals had some scattered support; the last, none at all.

²⁸Virginia resolution of 1810 excerpted in Ames, *State Documents on Federal Relations*, pp. 49-50.

²⁹*Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch (11 U.S.) 603 (1813).

³⁰*Hunter v. Martin*, 4 Munf. (18 Va.) 1 (1813).

³¹1 Wheat. (14 U.S.) 304 (1816).

³²*Annals of Congress*, 14 Cong. 1 sess., p. 170 (6 Mar. 1816); 17 Cong. 1 sess., p. 113 (15 Jan. 1822).

³³*Richmond Enquirer*, June 11, 15, 18, 22, 1819; quotations from June 22 essay.

³⁴Jefferson to Thomas Ritchie, 25 Dec. 1820, in Paul

L. Ford, ed., *The Works of Thomas Jefferson* (New York, 1904-1905), XII, pp. 175-178 at p. 177.

³⁵ 6 Wheat. (19 U.S.) 264 (1821).

³⁶ *Richmond Enquirer*, May 25, 29, June 1, 5, 8, 1821.

³⁷ Cf. generally the excellent study of Taylor's thought: Robert E. Shalhope, *John Taylor of Caroline: Pastoral Republican* (Columbia, S.C., 1980).

³⁸ *Construction Construed and Constitutions Vindicated* (Richmond, Va. 1820); *Tyranny Unmasked* (Washington, 1822), *New Views of the Constitution of the United States*, (Washington, 1823).

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⁴¹ 9 Wheat. (22 U.S.) 738 (1824).

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⁴³ Charles Warren argues, however, that in fact six justices were present at argument, and that four, not three, made up the majority; "Legislative and Judicial Attacks," p. 23. The Supreme Court in 1823 consisted of seven justices.

⁴⁴ *Annals of Congress*, 18 Cong. 1 sess., p. 28 (10 Dec. 1823); *ibid.*, p. 2527 (3 May 1824); *ibid.* p. 2635 (17 May 1824); *Register of Debates*, 19 Cong. 1 sess., p. 423 (7 April 1826); *ibid.*, p. 1124 (25 Jan. 1826).

⁴⁵ Excerpt of resolution quoted in Ames, *State Documents on Federal Relations*, p. 112.

⁴⁶ *Bodley v. Gaither*, 3 T.B. Mon. 57 (Ky. 1825).

⁴⁷ 5 Pet. (30 U.S.) 1 (1831); 6 Pet. 31 U.S.) 515 (1832).

⁴⁸ James D. Richardson, comp., *The Messages and Papers of the Presidents* (Washington, 1897-1914), III, pp. 1139-1154, at p. 1145.

⁴⁹ *Padelford, Fay & Co. v. Savannah*, 14 Ga. 438 (1854).

⁵⁰ *Annals of Congress*, 18 Cong. 1 sess., p. 915 (2 Jan. 1824).

⁵¹ These are discussed in Charles Warren, *The Supreme Court in United States History*, rev'd ed. (Boston, 1926), I, p. 562.

⁵² *Niles Weekly Register*, 15 Jan 1831.

⁵³ Martin Van Buren, *Inquiry into the Origin and Course of Political Parties in the United States* (New York, 1867), p. 352.

⁵⁴ 4 Pet. (29 U.S.) 410 (1830).

⁵⁵ *Register of Debates*, 21 Cong., 2 sess., p. 532 (24 Jan. 1831).

⁵⁶ Quoted in Warren, *Supreme Court in United States History*, I, p. 736. In "Law and the Court" (1913), Holmes stated: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make the declaration as to the laws of the several states." In Oliver Wendell Holmes, *Collected Legal Papers*, (New York, 1920), pp. 295-296.

⁵⁷ Herman V. Ames, "The Proposed Amendments to the Constitution of the United States During the First Century of Its History" (*Annual Report of the American Historical Association for the Year 1896*, vol. II) (Washington, 1897), pp. 344-386.

⁵⁸ 1 How. (42 U.S.) 311 (1843).

⁵⁹ 16 How. (57 U.S.) 369 (1854).

⁶⁰ *Dodge v. Woolsey*, 18 How (59 U.S.) 331 (1856); Campbell, J. dissenting at p. 326.

⁶¹ *Stunt v. The Steamboat Ohio*, 3 Ohio Dec. Reprints 362 (Ohio D.C., 1855); see also Bartley, C. J. dissenting in *Piqua Bank v. Knoup*, 3 Ohio St. 343

(1857).

⁶² *Johnson v. Gordon*, 4 Cal. 368 (1854); rev'd, *Ferris v. Coover*, 11 Cal. 175 (1858), Terry, J., dissenting at p. 184.

⁶³ Warren, *Supreme Court in United States History*, II, p. 336.

⁶⁴ Quoted in Warren, *Supreme Court in United States History*, II, 335. Warren was in error in stating that the Bliss bill was to repeal section 25; it was actually section 24. See *Congressional Globe*, 35 Congress, 1st session, p. 1131 (15 Mar. 1858).

⁶⁵ Joseph Story, "A Report of the Commissioners . . . 1837," in William W. Story, ed., *The Miscellaneous Writings of Joseph Story* Boston, 1852), pp. 699-734.

⁶⁶ See William Sampson, "Progress, Antiquities, Curiosities, and the Nature of the Common Law" (1824) and P. W. Grayson, "Vice Unmasked, an Essay: Being a Consideration of the Influence of Law Upon the Moral Essence of man" (1830), excerpted in Perry Miller, ed., *The Legal Mind in America: From Independence to the Civil War* (New York, 1962), pp. 119-134, 191-200.

⁶⁷ The "Oration at Scituate" is excerpted in Miller, *Legal Mind in America*, pp. 220-228.

⁶⁸ David Dudley Field, "Reasons for the Adoption of the Codes," (1873), in A. P. Sprague, ed., *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field*, (New York, 1884), pp. 361-374.

⁶⁹ 12 Serg. & R. 330 at p. 375

⁷⁰ 7 How. (48 U.S.) 1 (1849).

⁷¹ 7 How. at p. 19.

⁷² 328 U.S. 549 (1946).

⁷³ *Commonwealth v. Tewksbury*, 11 Metc. (52 Mass.) 55 (1846); *Commonwealth v. Alger*, 7 Cush. (61 Mass.) 53 (1851).

⁷⁴ 7 Cush. at 85.

⁷⁵ On this incident, see William M. Wiecek, *Latimer: Lawyers, Abolitionists, and the Problem of Unjust Laws*, in Lewis Perry and Michael Fellman, eds., *Antislavery Reconsidered: New Perspectives on the Abolitionists* (Baton Rouge, 1979), pp. 219-237.

⁷⁶ *The Liberator*, 18 November 1842.

⁷⁷ Story to Ezekiel Bacon, 19 Nov. 1842, in William W. Story, ed., *The Life and Letters of Joseph Story* (Boston, 1851), II, p. 431.

⁷⁸ Act of 12 February 1793, ch. 7, 1 Stat. 302.

⁷⁹ 5 How. (46 U.S.) 215 (1857) at p. 231.

⁸⁰ See Thomas Sims' Case, 7 Cush (61 Mass.) 285 (1851).

⁸¹ Thoreau, "Slavery in Massachusetts" (1854), in Thoreau, *Miscellanies* (vol. X of *The Writings of Henry David Thoreau*) (Boston, 1893, pp. 181-191).

⁸² Charge to Grand Jury, Treason, 30 Fed. Cas. 1047 (No. 18276) (C.C.E.D. Pa. 1851).

⁸³ Respectively: 15 Pet. (40 U.S.) 449 (1841); 16 Pet. (41 U.S.) 539 (1842); 5 How. (46 U.S.) 215 (1847); 10 How. (51 U.S.) 83 (1851). See generally William M. Wiecek, "Slavery and Abolition Before the United States Supreme Court," *Journal of American History*, 65 (1978), pp. 34-59.

⁸⁴ 19 How. (60 U.S.) 393 (1857). See generally Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York, 1978).

⁸⁵ Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation* (New York, 1928), p. 50.

⁸⁶ Fehrenbacher, *Dred Scott Decision*, pp. 437 and 450-291 *passim*.

⁸⁷ [Horace Gray and John Lowell,] "The Case of Dred Scott," *Monthly Law Reporter* (June 1857), pp.

L. Ford, ed., *The Works of Thomas Jefferson* (New York, 1904-1905), XII, pp. 175-178 at p. 177.

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³⁶ *Richmond Enquirer*, May 25, 29, June 1, 5, 8, 1821.

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⁵⁰ *Annals of Congress*, 18 Cong. 1 sess., p. 915 (2 Jan. 1824).

⁵¹ These are discussed in Charles Warren, *The Supreme Court in United States History*, rev'd ed. (Boston, 1926), I, p. 562.

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⁵⁷ Herman V. Ames, "The Proposed Amendments to the Constitution of the United States During the First Century of Its History" (*Annual Report of the American Historical Association for the Year 1896*, vol. II) (Washington, 1897), pp. 344-386.

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⁵⁹ 16 How. (57 U.S.) 369 (1854).

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⁶² *Johnson v. Gordon*, 4 Cal. 368 (1854); rev'd, *Ferris v. Coover*, 11 Cal. 175 (1858), Terry, J., dissenting at p. 184.

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⁸⁷ [Horace Gray and John Lowell,] "The Case of Dred Scott," *Monthly Law Reporter* (June 1857), pp.

61-118 at p. 67.

⁸⁸ Fehrenbacher, *Dred Scott Case*, chs. 7 and 8 and *passim*; Wiecek, "Slavery and Abolition Before the United States Supreme Court."

⁸⁹ Edward S. Corwin, "The Dred Scott Decision in the Light of Contemporary Legal Doctrines," *American Historical Review*, 17 (1911), pp. 52-69; Fehrenbacher, *Dred Scott Case*, chs. 14-16.

⁹⁰ Timothy Farrar, "The Dred Scott Case," *North American Review*, 85 (October 1857), pp. 392-415, at p. 399.

⁹¹ Fehrenbacher, *Dred Scott Case*, p. 445.

⁹² This prefabricated opinion is reprinted in Samuel Tyler, *Memoir of Roger Brooke Taney, LL.D.* (Baltimore, 1872), pp. 578-605.

⁹³ Act of 19 June 1862, ch. 111, 12 Stat. 432.

⁹⁴ "Citizenship," in 10 Op. A.G. pp. 382-413, at p. 412.

⁹⁵ Lincoln's First Inaugural, in Richardson, *Messages and Papers of the Presidents*, VII, pp. 3206-3213 at p. 3210.

⁹⁶ See his Chicago speech of 10 July 1858, in Roy P. Balser, ed. *The Collected Works of Abraham Lincoln* (New Brunswick, N.J., 1953-55), II, p. 495.

⁹⁷ Balser, ed., *Collected Works of Abraham Lincoln*, V, p. 44.

⁹⁸ 6 Ohio St. 632 (1857).

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¹⁰⁴ Resolution of 18 April 1857, *Laws of the State of New York*, . . . 1857, p. 797.

¹⁰⁵ "An Act to Secure Freedom to All Persons within this State," *Acts and Resolves of . . . Vermont . . . 1858*, no. 37.

¹⁰⁶ *New York Tribune*, 7 March, 5 March 1857.

¹⁰⁷ *Congressional Globe*, 38 Cong. 2 sess., pp. 1012-1017 (23 Feb. 1865).

¹⁰⁸ *Congressional Globe*, 37 Cong. 2 sess., pp. 8, 26-28 (4, 9 December 1861).

¹⁰⁹ Act of 15 July 1862, ch. 178, 12 Stat. 576.

¹¹⁰ Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (Chicago, 1968), esp. ch. 1.

¹¹¹ William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1975," 13 *Am. J. Legal Hist.* 333-359 (1969); Kutler, *Judicial Power and Reconstruction Politics*, ch. 8.

¹¹² *Murdock v. Memphis*, 20 Wall. (87 U.S.) 590 (1875).

¹¹³ Act of 5 Feb. 1867, ch. 28, 14 Stat. 385 (to be distinguished from the immediately preceding statute

on the same page, ch. 27, which also happens to be a habeas statute).

¹¹⁴ On the significance of the McCordle case generally, see Stanley I. Kutler, "Ex parte McCordle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered," *American Historical Review*, 72 (1967), pp. 835-851.

¹¹⁵ *Congressional Globe*, 40 Cong. 2 sess., pp. 478, 503, 616 (13, 14 Jan. 1868).

¹¹⁶ 7 Wall. (74 U.S.) 506 (1869).

¹¹⁷ *Ex parte Yerger*, 8 Wall. (75 U.S.) 85 (1869).

¹¹⁸ (St. Louis, 1886), pp. vi-viii.

¹¹⁹ 16 Wall. (83 U.S.) 34 (1873).

¹²⁰ 134 U.S. 418 (1890); 169 U.S. 466 (1898).

¹²¹ 165 U.S. 578 (1897); 198 U.S. 45 (1905).

¹²² 208 U.S. 161 (1908); 236 U.S. 1 (1915).

¹²³ 157 U.S. 429 (1895); 158 U.S. 601 (1895).

¹²⁴ 156 U.S. 1 (1895).

¹²⁵ 158 U.S. 564 (1895).

¹²⁶ E.G.: *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), *Swift & Co. v. United States*, 196 U.S. 375 (1905), *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (federal anti-trust enforcement); *Holden v. Hardy*, 169 U.S. 366 (1898), *Muller v. Oregon*, 208 U.S. 412 (1908), *Bunting v. Oregon*, 243 U.S. 426 (1917) (state regulation of the conditions of labor and women's labor).

¹²⁷ For an excellent survey of judicial reaction through 1895 and the responses to it, both favorable and hostile, see Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Ithaca, 1960).

¹²⁸ William M. Meigs, "The Relation of the Judiciary to the Constitution," 19 *Am. L. Rev.* 175-203 (1885), at p. 202.

¹²⁹ *Munn v. Illinois*, 94 U.S. 113 (1877).

¹³⁰ *Budd v. New York*, 143 U.S. 517 (1892) at 551 (Brewer J., dissenting, joined by Field and Brown, JJ.).

¹³¹ [Seymour D. Thompson,] "Constitutional Law . . .," 26 *Am. L. Rev.* 766 (1892).

¹³² Walter D. Coles, "Politics and the Supreme Court of the United States," 27 *Am. L. Rev.* 182-208 (1893) at p. 207.

¹³³ Boyd Winchester, "The Judiciary: Its Growing Power and Influence," 32 *Am. L. Rev.* 801-813 (1898) at p. 803.

¹³⁴ James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harv. L. Rev.* 129-156 (1893) at pp. 152, 144.

¹³⁵ Sylvester Pennoyer, "The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress," 29 *Am. L. Rev.* 550-558 (1895) at p. 558. See also, John W. Akin, "Aggressions of the Federal Courts," 32 *Am. L. Rev.* 669-700 (1898) at p. 700.

¹³⁶ Robert G. Street, "The Irreconcilable Conflict," 41 *Am. L. Rev.* 685-695 (1907) at p. 695.

¹³⁷ William Trickett, "The Great Usurpation," 40 *Am. L. Rev.* 356-376 (1906) at p. 376; Trickett, "Judicial Dispensation from Congressional Statutes," 41 *Am. L. Rev.* 687-694 (1918).

¹³⁸ Walter Clark, "Is the Supreme Court Constitutional?" *The Independent*, 63 (1907), pp. 723-726; Clark, "Back to the Constitution," 50 *Am. L. Rev.* 1-14 (1916); Clark, "Where Does the Governing Power Reside?" 52 *Am. L. Rev.* 687-694 (1918).

¹³⁹ Charles G. Haines, *The Conflict Over Judicial Powers in the United States to 1870* (New York, 1909); "Judicial Criticism of Legislation by Courts," 11 *Mich. L. Rev.* 26-49 (1912); *The American Doctrine of Judi-*

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⁸⁸ Fehrenbacher, *Dred Scott Case*, chs. 7 and 8 and *passim*; Wiecek, "Slavery and Abolition Before the United States Supreme Court."

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¹¹³ Act of 5 Feb. 1867, ch. 28, 14 Stat. 385 (to be distinguished from the immediately preceding statute

on the same page, ch. 27, which also happens to be a habeas statute).

¹¹⁴ On the significance of the McCordle case generally, see Stanley I. Kutler, "Ex parte McCordle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered," *American Historical Review*, 72 (1967), pp. 835-851.

¹¹⁵ *Congressional Globe*, 40 Cong. 2 sess., pp. 478, 503, 616 (13, 14 Jan. 1868).

¹¹⁶ 7 Wall. (74 U.S.) 506 (1869).

¹¹⁷ *Ex parte Yerger*, 8 Wall. (75 U.S.) 85 (1869).

¹¹⁸ (St. Louis, 1886), pp. vi-viii.

¹¹⁹ 16 Wall. (83 U.S.) 34 (1873).

¹²⁰ 134 U.S. 418 (1890); 169 U.S. 466 (1898).

¹²¹ 165 U.S. 578 (1897); 198 U.S. 45 (1905).

¹²² 208 U.S. 161 (1908); 236 U.S. 1 (1915).

¹²³ 157 U.S. 429 (1895); 158 U.S. 601 (1895).

¹²⁴ 156 U.S. 1 (1895).

¹²⁵ 158 U.S. 564 (1895).

¹²⁶ *E. G. Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (federal anti-trust enforcement); *Holden v. Hardy*, 169 U.S. 366 (1898); *Muller v. Oregon*, 208 U.S. 412 (1908); *Bunting v. Oregon*, 243 U.S. 426 (1917) (state regulation of the conditions of labor and women's labor).

¹²⁷ For an excellent survey of judicial reaction through 1895 and the responses to it, both favorable and hostile, see Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Ithaca, 1960).

¹²⁸ William M. Meigs, "The Relation of the Judiciary to the Constitution," 19 *Am. L. Rev.* 175-203 (1885), at p. 202.

¹²⁹ *Munn v. Illinois*, 94 U.S. 113 (1877).

¹³⁰ *Budd v. New York*, 143 U.S. 517 (1892) at 551 (Brewer J., dissenting, joined by Field and Brown, JJ.).

¹³¹ [Seymour D. Thompson,] "Constitutional Law . . .," 26 *Am. L. Rev.* 766 (1892).

¹³² Walter D. Coles, "Politics and the Supreme Court of the United States," 27 *Am. L. Rev.* 182-208 (1893) at p. 207.

¹³³ Boyd Winchester, "The Judiciary: Its Growing Power and Influence," 32 *Am. L. Rev.* 801-813 (1898) at p. 803.

¹³⁴ James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harv. L. Rev.* 129-156 (1893) at pp. 152, 144.

¹³⁵ Sylvester Pennoyer, "The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress," 29 *Am. L. Rev.* 550-558 (1895) at p. 558. See also, John W. Akin, "Aggressions of the Federal Courts," 32 *Am. L. Rev.* 669-700 (1898) at p. 700.

¹³⁶ Robert G. Street, "The Irreconcilable Conflict," 41 *Am. L. Rev.* 685-695 (1907) at p. 695.

¹³⁷ William Trickett, "The Great Usurpation," 40 *Am. L. Rev.* 356-376 (1906) at p. 376; Trickett, "Judicial Dispensation from Congressional Statutes," 41 *Am. L. Rev.* 687-694 (1918).

¹³⁸ Walter Clark, "Is the Supreme Court Constitutional?" *The Independent*, 63 (1907), pp. 723-726; Clark, "Back to the Constitution," 50 *Am. L. Rev.* 1-14 (1916); Clark, "Where Does the Governing Power Reside?" 52 *Am. L. Rev.* 687-694 (1918).

¹³⁹ Charles G. Haines, *The Conflict Over Judicial Powers in the United States to 1870* (New York, 1909); "Judicial Criticism of Legislation by Courts," 11 *Mich. L. Rev.* 26-49 (1912); *The American Doctrine of Judi-*

cial Supremacy, 1st ed. (New York, 1914).

¹⁴⁰ Edward S. Corwin, "The Supreme Court and Un-constitutional Acts of Congress," 4 *Mich. L. Rev.* 616-630 (1906); "The Establishment of Judicial Review," 9 *Mich. L. Rev.* 102-125, 283-316 (1910); "The Basic Doctrine of American Constitutional Law," 12 *Mich. L. Rev.* 247-276 (1914); "Marbury v. Madison and the Doctrine of Judicial Review," 12 *Mich. L. Rev.* 538-572 (1914); *The Doctrine of Judicial Review* (Princeton, 1914).

¹⁴¹ Morris R. Cohen, "The Process of Judicial Legislation," 48 *Am. L. Rev.* 161-198 (1914); Charles Warren, "The Progressiveness of the United States Supreme Court," 13 *Col. L. Rev.* 290-313 (1913); see also Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States."

¹⁴² James Allen Smith, *The Spirit of American Government* (New York, 1907).

¹⁴³ Gustavus Myers, *History of the Supreme Court of the United States* (Chicago, 1912).

¹⁴⁴ Roscoe Pound, "Mechanical Jurisprudence," 8 *Col. L. Rev.* 605-623 (1908); "Courts and Legislation," 7 *Am. Pol. Sci. Rev.* 361-383 (1913). For a succinct and perceptive survey of Pound's thought, see David Wigdor, *Roscoe Pound: Philosopher of Law* (Westport, Conn., 1974), esp. ch. 7.

¹⁴⁵ 223 U.S. 118 (1912).

¹⁴⁶ *Congressional Record*, 62 Cong. 1 sess., p. 3359 (31 July 1911).

¹⁴⁷ Richardson, *Messages and papers of the Presidents*, XVIII, pp. 8016-8024 at p. 8023.

¹⁴⁸ *Congressional Record*, 54 Cong. 1 sess., p. 5441 (20 May 1896); 55 Cong. 2 sess., p. 430 (7 Jan. 1898).

¹⁴⁹ 1908 Socialist Party Platform, in Johnson, *National Party Platforms*, I, p. 166.

¹⁵⁰ *Congressional Record*, 64 Cong. 2 sess., p. 1068 (9 Jan. 1917); 65 Cong. 2 sess., p. 7433 (6 June 1918).

¹⁵¹ Roosevelt, "Judges and Progress," *Outlook*, 6 Jan. 1912, pp. 40-48; "A Charter of Democracy," *ibid.*, 24 Feb. 1912, pp. 490-502; "The Right of the People to Rule," *ibid.*, 23 March 1912, pp. 618-626.

¹⁵² *Ives v. South Buffalo Railway Co.*, 201 N.Y. 271 (1911).

¹⁵³ Act of 28 Jan. 1915, h. 22, 38 Stat. 805.

¹⁵⁴ Judiciary Act of 1925, ch. 229, 43 Stat. 936. In the Judiciary Act of 1891, ch. 517, 26 Stat. 826, Congress had modified the structure of the federal court system by converting its intermediate courts to what were called the Circuit Courts of Appeal, which had final appellate authority over certain kinds of cases appealed from the United States District Courts. This relieved pressure that had been building up on the Supreme Court docket since the Civil War.

¹⁵⁵ 21 Wall. (88 U.S.) 163 (1875).

¹⁵⁶ Clayton Act (Act of 15 Oct. 1914), ch. 323 (6, 20, 38 Stat. 730).

¹⁵⁷ 247 U.S. 251 (1918); 259 U.S. 20 (1922).

¹⁵⁸ *Hitchman Coal and Coke Co. v. Mitchell*, 245 U.S. 229 (1917); *Duplex Printing Press v. Deering*, 254 U.S. 443 (1921); *American Steel Foundries v. Tri-City Central Trades Council* 257 U.S. 184 (1921).

¹⁵⁹ 257 U.S. 312 (1921).

¹⁶⁰ 261 U.S. 525 (1923).

¹⁶¹ 262 U.S. 522 (1923).

¹⁶² Cf. critique of these two proposals made by LaFollette in Cordenio A. Severance, "The Proposal to Make Congress Supreme," 8 *A.B.A.J.* 459-464 (1922).

¹⁶³ Quoted in "Shall We Curb the Supreme Court?," *Forum*, 71 (1924) pp. 842-845.

¹⁶⁴ *Congressional Record*, 66 Cong. 2 sess., p. 4567 (19 Mar. 1920).

¹⁶⁵ Platforms of the LaFollette and Progressive Parties (Conference for Progressive Political Action), Johnson, *National Party Platforms*, I, pp. 254, 256.

¹⁶⁶ 286 U.S. 262 (1932).

¹⁶⁷ *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934); *Nebbia v. New York*, 291 U.S. 502 (1934).

¹⁶⁸ 297 U.S. 1 at pp. 62-63.

¹⁶⁹ 209 U.S. at 452-453 (Sutherland, J. dissenting), citing Cooley on Constitutional Limitations, 8th ed., I, p., 124.

¹⁷⁰ *Schechter v. U.S.*, 295 U.S. 495 (1935).

¹⁷¹ 296 U.S. 404 (1935); 297 U.S. 1 (1936); 298 U.S. 238 (1936); *Morehead v. New-York ex rel. Tipaldo*, 298 U.S. 587 (1936).

¹⁷² Samuel I. Rosenman, comp., *The Public Papers and Addresses of Franklin D. Roosevelt* (New York, 1938-1950), V, p. 200.

¹⁷³ Quoted in Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (New York, 1956), p. 425.

¹⁷⁴ Corwin, *The Twilight of the Supreme Court: A History of Our Constitutional Theory* (New Haven, 1934) (quoted phrases at pp. 184, 182); *The Commerce Power Versus States Rights* (Princeton, 1936); *Court Over Constitution: A Study of Judicial Review as an Instrument of Popular Government* (Princeton, 1938).

¹⁷⁵ Surveys of these proposals may be found in William E. Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan," 1966 *Supreme Court Review*, pp. 347-400, and Arthur M. Schlesinger, Jr., *The Politics of Upheaval* (Boston, 1960), pp. 447-496.

¹⁷⁶ Harold L. Ickes, *The Secret Diary of Harold L. Ickes: The First Thousand Days, 1933-1936* (New York, 1953), I, pp. 529-530.

¹⁷⁷ Leuchtenburg, "Court-Packing Plan," p. 363.

¹⁷⁸ Quoted in Leuchtenburg, "'Court-Packing' Plan," p. 353.

¹⁷⁹ Rosenman, comp. *Public Papers of Franklin D. Roosevelt*, V, p. 639; VI, p. 2.

¹⁸⁰ 347 U.S. 483.

¹⁸¹ 349 U.S. 294 (1955).

¹⁸² The Southern Manifesto is reprinted to Com-mager, *Documents of American History*, II, pp. 617-619.

¹⁸³ James F. Byrnes, "The Supreme Court Must Be Curbed," *U.S. News and World Report*, 18 May 1956, pp. 50-58.

¹⁸⁴ 350 U.S. 497.

¹⁸⁵ 351 U.S. 536.

¹⁸⁶ 353 U.S. 657.

¹⁸⁷ 355 U.S. 66 (1957); 341 U.S. 494 (1951).

¹⁸⁸ 354 U.S. 178.

¹⁸⁹ 354 U.S. 234.

¹⁹⁰ The latter was H.R. 10775, 85 Cong. 2 sess.; see the discussion by its sponsor, Rep. William Colmer of Mississippi, in *Congressional Record*, 85 Cong. 2 sess., p. 2331 (18 Feb. 1958).

¹⁹¹ Quoted in Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969*, (New York, 1972), p. 392.

¹⁹² Pritchett, *Congress Versus the Supreme Court*, pp. 119-120.

The Supreme Court: A Co-Equal Branch of Government

by David O'Brien

The Supreme Court has proven during its nearly 200 years of existence to be neither "the least dangerous"¹ branch nor quiescent under "the chains of the Constitution."² The Supreme Court inevitably looms large in the national political process, as Tocqueville foresaw, both because "[w]ithout [the Court] the Constitution would be dead letter" and because "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."³ Judicial authority, in other words, is not simply the result of landmark decisions—decisions like *Marbury v. Madison*⁴ for example, or more recently *Youngstown Sheet & Tube Co. v. Sawyer*,⁵ *Brown v. Board of Education*,⁶ *Mapp v. Ohio*,⁷ *Baker v. Carr*,⁸ *Roe v. Wade*,⁹ *United States v. Nixon*,¹⁰ *Regents of the University of California v. Bakke*,¹¹ and *INS v. Chadha*.¹² No less significant have been socio-economic, legal and political changes finding more or less direct expression in the changing nature of litigation coming before the Court, the jurisdictional rules governing access to the Court, and the doctrines and interpretations advanced by the members of the Court.

Just as the contemporary presidency is vastly different from the presidency in the 19th century, so too the Supreme Court today is quite a different institution from what it was during the founding decade, the late 19th century, or even the early 20th century. "The great tides and currents which engulf the rest of men," in Justice Benjamin Cardozo's memorable words, "do not turn aside in their course, and pass judges by."¹³ The socio-economic and political trends that contrib-

uted to the increasing and changing nature of judicial business in lower federal and state courts, have likewise had an impact on the role and business of the Supreme Court. The modern Supreme Court is not, as it once was, primarily concerned with resolving disputes per se; but instead with providing uniformity, stability and predictability to the law—primarily through constitutional and statutory construction.

In historical perspective, as Felix Frankfurter and James Landis noted in 1927,¹⁴ the Court has gradually become a tribunal of constitutional and statutory law. During roughly the first decade of the Court's history, over 40 percent of its business consisted of admiralty and prize cases. Approximately 50 percent of the docketed cases raised questions of law—largely diversity actions and matters of common law—with the remaining ten percent matters such as equity, and including one probate case.¹⁵ The business of the Supreme Court was not immune from socio-economic changes stimulated by the Civil War, Reconstruction, and the industrial revolution. In the 1882 Term, for instance, while the number of admiralty suits dropped to less than four percent, almost 40 percent of the decisions handed down continued to deal with either disputes at common law or questions of jurisdiction, practice and procedure. Over 43 percent of the Court's business, however, resolved issues of statutory interpretation; less than four percent matters of constitutional law.¹⁶ The decline in admiralty and common law litigation, and the corresponding increase in statutory and constitutional adjudication during the late 19th century reflected

the impact of the industrial revolution and increasing congressional legislation and governmental regulation.¹⁷ In the 20th century, with the further burgeoning of the Court's docket, the trend continues toward a Court that principally decides issues of statutory and constitutional law. In the 1980 Term, for instance, 47% of the cases disposed by full or *per curiam* opinion involved matters of constitutional law, while 38% dealt

with statutory interpretation. The remaining 15% of the cases resolved matters of administrative law or taxation, patents and claims.¹⁸ Table 1, *The Character of Business Before the Supreme Court of the United States, Selected Terms, 1825-1980*, illustrates the changing nature of the Court's business and the evolution in its role from that essentially as a tribunal for dispute resolution to an institution of national importance,

THE CHARACTER OF BUSINESS BEFORE THE SUPREME COURT OF THE UNITED STATES, SELECTED TERMS, TABLE 1*

Subject Matter of Opinions for the Court**	October Terms											
	1825	1875	1925	1930	1935	1945	1955	1960	1965	1970	1975	1980
Admiralty	2	5	8	2	1	3	1	0	0	0	0	0
Anti-Trust	0	0	2	5	3	2	2	0	8	3	3	0
Bankruptcy	0	13	9	1	9	7	1	0	5	3	0	0
Bill of Rights (Civil Liberties; except rights of accused) . .	0	2	3	3	3	9	6	22	15	30	8	22
Commerce Clause												
1. Constitutionality and Construction of Federal Legislation, Regulation and Administrative Action	0	0	31	17	13	28	28	42	13	20	31	50
2. Constitutionality of State Regulation	0	2	2	4	11	4	1	5	8	5	27	7
Common Law	10	81	11	5	3	3	0	0	0	0	0	0
Misc. Statutory Interpretation	4	16	15	14	16	9	16	1	12	8	4	4
Due Process												
1. Economic Interests	0	0	20	8	8	3	1	0	0	0	0	2
2. Procedure and Rights of Accused contained in Bill of Rights	0	2	3	3	2	5	7	18	18	28	34	21
Impairment of Contract	0	1	4	0	6	1	0	0	1	0	0	0
Indians	0	0	7	3	0	2	1	0	0	1	4	0
International Law, War & Peace	2	5	6	0	2	12	3	0	0	0	1	0
Jurisdiction, Procedure and Practice	4	30	29	21	27	27	17	11	16	8	4	2
Land Legislation	0	11	3	0	3	0	0	0	0	1	0	0
Patents, Copyrights, and Trademarks	1	8	4	12	5	2	1	1	1	1	1	1
Slaves	3	0	0	0	0	0	0	0	0	0	0	0
Other Suits Against the Government and Officials . .	0	12	17	1	1	2	0	7	5	5	16	10
Suits by States	0	0	8	6	5	0	2	2	5	2	6	0
Taxation (federal and state) . .	0	5	27	59	40	19	7	8	5	3	4	7

*This table incorporates data from and updates the statistics that Felix Frankfurter and James Landis compiled in *The Business of the Supreme Court* (New York: McMillan & Co., 1927) (data for the 1825, 1875 and 1925 Terms) at p. 302, Table 1; Felix Frankfurter and James Landis, "The Business of the Supreme Court in the October Term 1930," 45 *Harvard Law Review* 271, at 295, Table 9 (1931) (for figures for the 1930 Term; and Eugene Gressman, "Much Ado About Certiorari," 52 *Georgetown Law Journal* 742, 756-757 (1964) (for the 1935, 1945 and 1955 Terms).

**The table here, like those offered by Frankfurter and Landis and Gressman, aims only at illustrating trends. The classification of cases in this and other tables, particularly where there are a limited number of categories of cases, necessarily invites differences of opinion as to the dominant issue in a case. So too the total number of opinions may vary with computations depending on the inclusion or exclusion of *per curiam* opinions.

with broad policy-making responsibilities in supervising the constitutional and statutory basis for expanding governmental power.

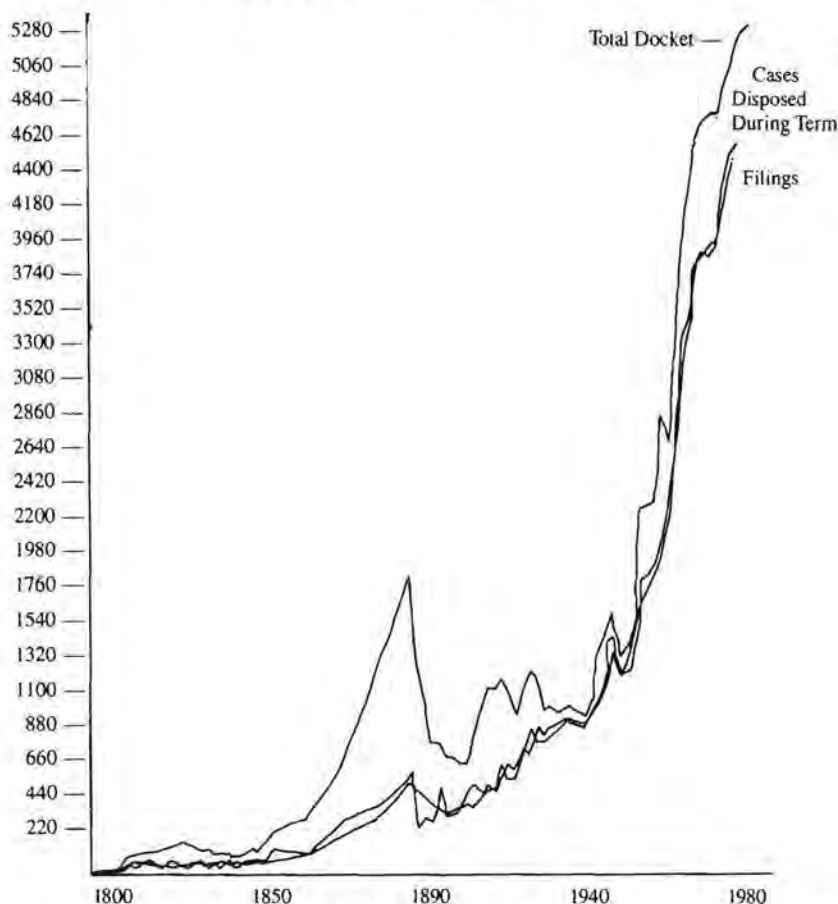
The evolution of the Supreme Court from the least dangerous to a co-equal branch in the national politics is directly related to the increasing and changing nature of the business brought to its docket. The growth in the Court's business is portrayed in historical perspective in *Diagram I, Supreme Court of the United States, October Terms, 1800-1981: Docket and Filings*.¹⁹

The gradual increase in the size of the docket during the first half of the 19th century was due notably to population growth, territorial expansion and the incremental development of federal regulation and attendant litigation.²⁰ Litigation arising from the triumph of national authority after the Civil War, subsequent programs during

the Reconstruction period, and disputes accompanying the industrial and commercial expansion in the late 19th century, swelled the dockets of the Supreme Court and those of lower federal courts as well. No less importantly, Congress greatly expanded the jurisdiction of all federal courts. In particular, jurisdiction was enlarged over civil rights²¹ and habeas corpus appeals,²² as well as federal questions coming from state courts and all suits over \$500 arising under the Constitution or federal legislation.²³ The workload of the federal judiciary thus grew dramatically. During the 1870s-1880s the Court confronted a growing backlog of cases, as shown in *Diagram 1*. Dockets of federal district courts likewise rose; from 29,013 in 1873, to 38,045 seven years later and to 44,194 by 1890.²⁴

Congress eventually responded, initially curb-

DIAGRAM I
DOCKET AND FILINGS (1800-1981)



Filings = Cases filed during a Term. Cases Disposed = Cases decided on merits or denied. Total Docket = Filings + Cases carried over from prior Term.

ing access to federal courts by raising the jurisdictional amount in diversity cases to \$2000.²⁵ In 1891 with the passage of the Evarts Act,²⁶ Congress provided immediate (if not long lasting) relief for the Court with the creation of Circuit Courts of Appeals. These new intermediate Courts were given final jurisdiction over appeals in most cases, with the exception of certain classes of civil cases and cases involving capital or otherwise infamous crime in which a right of direct appeal to the Supreme Court was preserved. Although declaring Court of Appeals decisions final, in some areas—diversity suits and suits over admiralty, criminal prosecutions, and revenue and patent laws—the act preserved access to the Supreme Court by providing, instead of mandatory rights of appeal, for petitions for writs of certiorari. The act thus gave the Court for the first time the important power of discretionary review.

In the early 20th century, the Court's docket again began to grow; in part because of further population increases, economic changes resulting in more bankruptcy cases and, later, World War I which raised the number of disputes over war contracts and suits against the government.²⁷ In large measure, however, the congested caseloads were due to expanding congressional legislation and regulation. Congress directly contributed to the inflation of the Court's docket by expanding the opportunities for the government and particular private groups to appeal directly to the Court. Direct and mandatory review was extended, for example, to government appeals from dismissals of criminal prosecutions²⁸ and to individuals and groups challenging decisions under antitrust and interstate commerce acts,²⁹ and the Federal Employers' Liability Act (FELA),³⁰ as well as injunctions issued by Three-Judge Courts³¹ and federal questions reached by state supreme courts.³²

The Supreme Court once again could not stay abreast of its docket. Congress responded initially in a piecemeal fashion, enlarging the Court's discretionary jurisdiction by eliminating mandatory rights of appeal in narrow but nonetheless important areas, such as under FELA.³³ Then, due in no small part to the campaign waged by Chief Justice Taft for further relief,³⁴ Congress passed the Judges' Bill in 1925.³⁵ The Judiciary Act of 1925, which basically establishes the jurisdiction of the modern Supreme Court, alleviated the caseload prob-

lem, for the moment, by largely replacing mandatory rights of appeal with petitions for writs of certiorari. The act thereby greatly extended the Court's power of discretionary review, enabling it to set its own agenda and to decide only cases of national importance. As the Court's business began to increase yet again in the post-World War II period (as shown in *Diagram 1*), Congress eliminated most of the remaining provisions for mandatory review, further expanding the Court's discretionary jurisdiction. *Table 2, Major Legislation Affecting the Jurisdiction and Business of the Supreme Court of the United States*, lists and summarizes the principal legislation altering the Court's jurisdiction and providing for its enlarged power of discretionary review.

The business of the Supreme Court, like other federal and state courts, continues to grow: from a bare 565 cases on the docket in 1920 to over 1,300 in 1950, over 2,300 in 1960, 4,212 in 1970 and to 5,311 by the beginning of this decade.³⁶ Unlike other courts, however, the modern Supreme Court's docket is largely discretionary. Prior to 1925, 80% of the docket was on appeal and 20% on certiorari. By contrast, today approximately 95% of all filings are on certiorari. Much of the increase in the docket since the 1930s-1940s, however, has been due to the rise in *in forma pauperis* petitions (Ifp's)—a congressionally established practice giving every citizen the right to file without payment of fees upon an oath of indigency, which the Court's own rulings on the rights of indigents have basically constitutionalized.³⁷ The filing of Ifp's has increased steadily, from 22 in 1930, to over 1,000 in 1960, to almost half the Court's present docket—2,354 in the 1981 Term. *Diagram II, Supreme Court of the United States: Filings—Paid and Unpaid—1935-1982* illustrates this trend.³⁸ The second Justice John Marshall Harlan observed that "more than nine-tenths of the [Ifp] petitions [were] so insubstantial that they never should have been filed."³⁹ The largest growing category of Ifp's come from "jailhouse lawyers," indigent prisoners claiming some constitutional violation or deprivation,⁴⁰ which apparently do not require much of the justices' time for disposition.⁴¹ *Table 3, Disposition of Petitions for Certiorari and Appeals* further illustrates the trend toward increased filing of certiorari petitions and Ifp's, and the small number that are granted and given plenary consideration.⁴²

Congress thus enabled the Supreme Court to

set its own agenda to a considerable degree. Indeed, as Justice Harlan once remarked, the cornerstone of the modern Supreme Court is "the control it possesses over the amount and character of its business."⁴³ As Justice Byron White recently indicated, given its mounting caseload, the Court seriously only reviews 10 to 20 percent of its docket, and gives plenary consideration "to only 4 1/2 percent of all cases."⁴⁴ During the 1981 Term, for example, the Court disposed of 4,433 cases from its docket of 5,311 cases, carrying 878 cases over to the next Term. The cases dis-

posed of included six on original jurisdiction, 242 on appeal, and 4,089 petitions for writs of certiorari, as well as 96 other petitions for extraordinary remedies. The Court granted review and disposed of 468 cases, either by opinion or summarily (without oral argument or written opinion), and another 28 cases were withdrawn by consent of the parties. In other words, the Court gave plenary consideration to less than 10% of its docket; hearing oral argument in 184 and (after consolidation) disposing of 170 by signed opinion and another 10 by per curiam

TABLE 2
MAJOR LEGISLATION DIRECTLY AFFECTING THE
JURISDICTION OF AND BUSINESS OF THE
SUPREME COURT OF THE UNITED STATES*

<i>Act</i>	<i>Commentary</i>
Judiciary Act of 1789 (Ch. 20, 1 Stat. 73)	Provided basic appellate jurisdiction; a three tier judiciary system staffed by justices and district court judges
Act of March 2, 1793 (Ch. 22, 1 Stat. 333)	Provided rotation system so as to cut back on circuit riding of the justices
Act of February 13, 1801 (Ch. 4, Sec. 1, 2 Stat. 89)	Eliminated circuit riding; made "midnight" appointment to 6 circuits
Act of March 8, 1802 (Ch. 8, Sec. 1, 2 Stat. 132)	Repealed Act of 1801
Act of April 29, 1802 (Ch. 31, Sec. 1, 2 Stat. 156)	Eliminated judgeships; 6 circuits staffed justices and district judges re-established
Act of March 3, 1803 (Ch. 40, Sec. 2, Stat. 44)	Restricted circuit riding duties of the justices
Act of February 24, 1807 (Ch. 34, 2 Stat. 420)	Added 7th circuit justice
Act of March 3, 1837 (Ch. 34, 5 Stat. 177)	Divided country into 9 circuits and brought number of justices to 9 (the Court's jurisdiction was also expanded to include Michigan, Arkansas and Oregon in 1825, 1828 and 1848, due to the territorial expansion of the country)
Act of March 2, 1855 (Ch. 142, 10 Stat. 631)	California added as 10th circuit
Act of 1863 (12 Stat. 794)	Added 10th justice
Act of April 9, 1866 (Ch. 31, Sec. 10, 14 Stat. 27)	Expanded federal courts' jurisdiction over civil rights
Act of July 23, 1866 (Ch. 210, Sec. 2, 14 Stat. 209)	Reorganized country into 9 circuits and reduced the number of justices to 7
Act of February 5, 1867 (Ch. 28, Sec. 1, 14 Stat. 385)	Expanded Court's jurisdiction over habeas corpus and amended Sec. 25 of the Judiciary Act of 1789 with regard to review of state court decisions
Act of April 10, 1869 (Ch. 22, Sec. 2, 16 Stat. 44)	Created 9 circuits court judgeships; fixed number of justices at 9
Civil Rights Act of April 20, 1871 (Ch. 22, Sec. 1, 17 Stat. 13)	Expanded jurisdiction in civil rights without regard to amount of dispute
Act of March 3, 1875 (Ch. 137, 18 Stat. 470)	Expanded federal court jurisdiction to all suits over \$500 under Constitution or federal legislation; given appellate jurisdiction via writ of error or appeal; and granted full federal question jurisdiction from state courts

Act of March 3, 1887 (Ch. 373, 24 Stat. 552) as corrected by Act of February 6, 1889 (Ch. 886, 25 Stat. 433)	Curbed access to federal courts by raising jurisdictional amount to \$2000 in diversity cases; limited removal venue; provided writ of error to Court in all capital cases
Circuit Court Appeals Act of March 3, 1891 (Ch. 517, 26 Stat. 826)	Established 9 circuit courts and broadened Court review in criminal cases and provided for some discretionary review via writs of certiorari
Act of 1892 (27 Stat. 252)	Provided for <i>in forma pauperis</i> filings
Act of February 9, 1893 (Ch. 74, Sec. 1, 27 Stat. 434)	Established circuit for District of Columbia
Expediting Act of February 11, 1903 (Ch. 544, 32 Stat. 823)	Provided direct appeal under Antitrust and Interstate Com- merce Acts (revised in 1970)
Act of March 2, 1907 (Ch. 2564, 34 Stat. 1746)	Granted government right of direct appeal from dismissals of criminal prosecutions
Three Judge Court Act of 1910 (36 Stat. 577)	Altered federal injunctive power, due to abuses by single judges in enjoining state economic regulations
Act of March 3, 1911 (Ch. 231, Sec. 128)	Expanded direct review by Court in a number of areas, in- cluding federal questions reached by state supreme courts
Act of March 13, 1913 (Ch. 160, 37 Stat. 1013)	Extended requirement of 3 Judge Court for injunctions against state administrative tribunals, with direct appeal to Court
Act of December 23, 1914 (Ch. 2, 38 Stat. 790)	Court jurisdiction over state courts is discretionary when a state court upholds federal law or strikes down state law
Act of January 28, 1915 (Ch. 22, Sec. 4, 38 Stat. 803)	Eliminated right to review in bankruptcy and trademark cases and cases from Puerto Rico
Act of September 6, 1916 (Ch. 448, Sec. 4, 39 Stat. 726)	Eliminated FELA cases from obligatory review
Judiciary Act of February 13, 1925 (Ch. 229, Sec. 1, 43 Stat. 936)	Greatly extended the Court's discretionary jurisdiction
Act of January 31, 1928 (Ch. 229, Sec. 1, 43 Stat. 936)	Abolished writ of error and appeals become sole method of obligatory appellate review
Act of February 28, 1929 (Ch. 363, Sec. 116, 45 Stat. 1346)	Restablished 10th circuit
Act of May 22, 1939 (55 Stat. 752)	Expanded review of decisions by Court of Claims over both law and fact
Act of June 15, 1948 (62 Stat. 869-870)	Judicial Code revised, codified and enacted into law and es- tablished 11th circuit
(Hobbes) Act of 1950 (28 U.S.C. 234)	Eliminated 3 Judge Court requirement in certain areas
Voting rights Act of 1965 (79 Stat. 445)	Provided direct appeal over decisions of 3 Judge Courts in areas of voting rights
District of Columbia Court Reform Act and Criminal Procedure Act of 1970 (88 Stat. 437)	In reorganizing the judicial system in the District of Colum- bia, expanded Court's discretionary jurisdiction
Act of January 2, 1971 (84 Stat. 1890)	Repealed right of direct government appeal under Act of 1907
Act of December 21, 1974 (88 Stat. 1709)	Eliminated direct appeals in Antitrust and ICA cases
Act of January 2, 1975 (88 Stat. 1918)	Further cutback on direct appeals from and jurisdiction of 3 Judge Courts
Act of August 12, 1976 (90 Stat. 1119)	Eliminated most other jurisdiction of 3 Judge Courts and rights of direct appeals, with exception of areas of voting rights and reapportionment
Federal Courts Improvement Act of 1982 (28 U.S.C. Sec. 41)	Created by Court of appeals for the Federal Circuit by joining appellate division of the Court of Claims with the Court of Customs and Patent Appeals

*Excluded, necessarily, is the vast amount of legislation expanding the administrative state and providing parties with opportunities for challenging the formulation, implementation and enforcement of law and policy in federal courts.

opinion, and scheduling four cases for reargument. The bulk of the cases—over 3,900—were either denied as appeals or dismissed as a matter of discretion; the remaining cases were carried over to the next term.⁴⁵

The modern Supreme Court plays as a consequence an important role in national political process. Congress has so expanded the Court's discretionary jurisdiction that the justices now largely define their own agenda and respond to the inexorable necessity of deciding issues of national importance inherent in the cases and controversies brought before it by competing special interest groups which have come to characterize

our litigious society. "The function of the [modern] Supreme Court," as Chief Justice Taft envisioned when commenting on the passage of the Judiciary Act of 1925, has indeed become "not the remedy of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court."⁴⁶ The extent to which the Court sets its own agenda and decides principally issues of constitutional and statutory law, or other matters of national importance, is illustrated persuasively in *Table 4*.⁴⁷

TABLE 3
SUPREME COURT OF THE UNITED STATES:
DISPOSITION OF PETITIONS FOR CERTIORARI AND APPEALS

Term	Acted On	Granted	Argued	Petitions for Certiorari		Granted	Ifp Acted On	Ifp Granted
				Non- Argued	Paid Acted On			
1941	951	166	—	—	773	150	178	16
1951	1017	113	—	—	612	94	405	19
1961	1899	141	—	—	768	103	1131	38
1971	3153	184	124	53	1443	128	1720	56
1981	4066	225	135	90	2118	169	1948	56

Term	Mandatory Appeals		
	Appeals Acted On	Disposed Without Argument	Argued Orally
1971	253	209	44
1981	237	189	48

TABLE 4
A COMPARISON OF THE SUBJECT MATTER OF CASES
DISPOSED DURING THE OCTOBER TERM 1981

Subject Matter	Decided on Merits		Paid Cases Denied (%)	Ifp Cases Denied (%)	Dismissed- Rule 53 (%)	Number of Cases
	(%) [No. of Opinions]					
Taxation	14 (18.9) [8]		56 (73.6)	6 (7.8)	0	76
Patents & Claims	3 (10) [1]		25 (83.3)	2 (6.6)	0	30
Administrative	9 (16.6) [9]		35 (64.8)	9 (16.6)	1 (1.8)	54
Statutory	97 (15.1) [60]		457 (71.5)	80 (12.5)	5 (0.8)	639
Criminal Law	95 (4.1) [27]		586 (25.7)	1595 (69.9)	4 (0.17)	2280
Constitutional	210 (56) [52]		79 (21)	72 (19.2)	14 (3.7)	375
Civil Law	34 (3.5) [2]		726 (78.9)	158 (17.1)	1 (0.1)	919
Miscellaneous	6 (10) [4]		1 (1.5)	50 (83.3)	3 (5)	60
Total	468 (10.5) [163]		1965 (44.4)	1972 (44.4)	28 (0.6)	4433

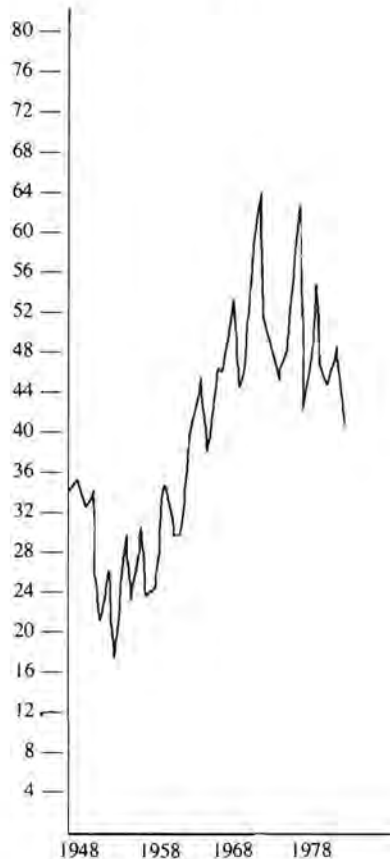
Diagram III, Percentage of Constitutional Issues in Supreme Court Adjudication and Disposition of Cases by Full Written Opinion: 1948-1982, underscores the trend in the post-World War II period toward more judicial intervention in constitutional claims.⁴⁸

The inflation of constitutional politics and the Supreme Court's intervention in an ever growing range of areas is not likely to decrease, but not for the reasons suggested by those who argue that the Court has become an "imperial judiciary." Retrenchment is unlikely precisely because the Court's expanded discretionary jurisdiction enables it — more than less — to set its own agenda and decide only issues of national importance, and due to the growing number and range of cases arising from the increasingly strategic use of litigation by both government and special-interest groups. Prior to the 1983 ruling in *INS v. Chadha*⁴⁹ which struck down a one-house veto provision for federal regulations, and challenged the validity of over 200 other statutes with similar provisions — the Court had invalidated over 110 congressional statutes and 1,050 state laws or

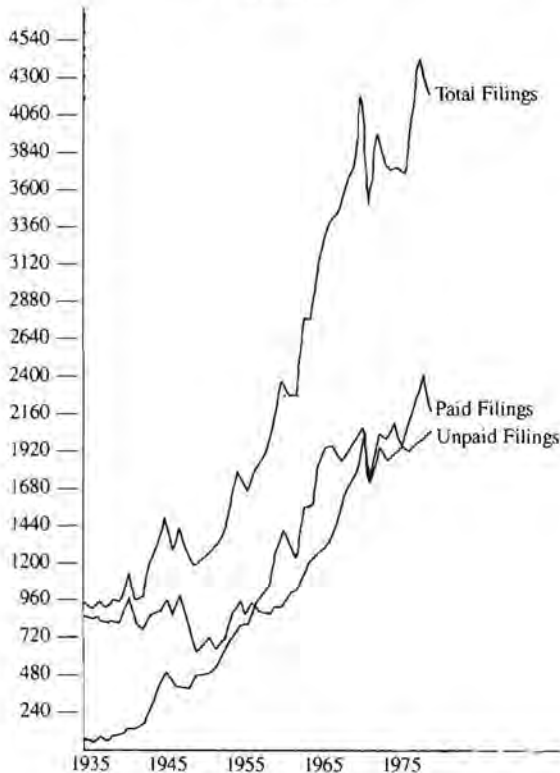
municipal ordinances. Significantly, in the last 30 years the Court — *regardless of its composition* — has increasingly asserted the power of judicial review in overturning prior decisions, congressional and state legislation, and municipal ordinances. This trend toward more judicial intervention or "activism"⁵⁰ is illustrated in *Table 5* and the cumulative increase in the number of decisions and acts overturned is represented in *Diagram IV*.

The growing number of prior decisions that the Court has overruled appears a not altogether insignificant trend. "The Court has felt far freer," Justice Lewis Powell explains, "to reverse constitutional decisions than it has to reverse the interpretation of statutes,"⁵¹ perhaps because of the felt need for stability in the law

**DIAGRAM III
PERCENTAGE OF
CONSTITUTIONAL ISSUES IN
SUPREME COURT ADJUDICATION
AND DISPOSITION OF CASES BY
FULL WRITTEN OPINION
(1948-1982)**



**DIAGRAM II
SUPREME COURT OF THE UNITED
STATES: FILINGS (PAID AND UNPAID),
1935-1982**



and respect for the principle of separation of powers. Another explanation is that institutional norms and practices of the Court's collegial decision-making process have changed. More specifically, as the Court's caseload has grown it has had greater discretion in deciding what to decide, and has taken primarily cases of national importance. Those selected for review are, almost by definition, "hard cases" — inevitably inviting controversy and reaffirming Justice Frankfurter's observation that constitutional law is not all at an exact science, but applied politics. The increase in the number and complexity of constitutional decisions has made it undoubtedly more difficult for the Court either to abide by *stare decisis* or reach agreement on all aspects of an opinion justifying any particular decision.

Consequently, in the last three to four decades there has been a trend not only for the Court to reconsider previous rulings, but toward more divisiveness within the Court. While the percentage of unanimous opinions remains rather constant (around 30%), the number of dissenting votes cast each term has tended to increase. Compare *Diagram V, Percentage of Unanimous Opinions and Memorandum Orders, 1948-1981*, with *Diagram VI, Comparison of Total Dissenting Votes in Cases Decided by Full or Per Curiam Opinion, 1948-1980*, on the following pages.⁵² Likewise, there has been a greater increase in the frequency, and hence cumulative number, of plurality decisions and cases decided by a bare majority of the justices. *Diagrams VII and VIII, respectively, Cumulative Number of Plurality*

TABLE 5
DECISIONS OF THE SUPREME COURT OVERRULED
AND ACTS OF CONGRESS HELD UNCONSTITUTIONAL (1800-1982);
AND STATE LAWS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL
(1800-1980)*

Year	Supreme Court Decision Overruled	Acts of Congress Overturned	State Laws Overturned	Ordinances Overturned
1791-1800 (Pre-Marshall)				
1801-1835 (Marshall Court)	3	1	18	
1836-1864 (Tancy Court)	6	1	21	
1865-1873 (Chase Court)	3	9	33	
1874-1888 (Waite Court)	11	8	7	
1889-1910 (Fuller Court)	4	14	73	15
1910-1921 (White Court)	6	11	107	18
1921-1930 (Taft Court)	5	15	131	12
1930-1940 (Hughes Court)	14	13	78	5
1941-1946 (Stone Court)	24	2	25	7
1947-1952 (Vinson Court)	11	1	38	7
1953-1969 (Warren Court)	46	19	150	16
1969- Burger Court)	46	28	182	14

*Based on list of cases in *The Constitution of the United States 1595-1797* (Library of Congress: Washington, D. C., 1972) and supplementary materials provided by the Library of Congress.

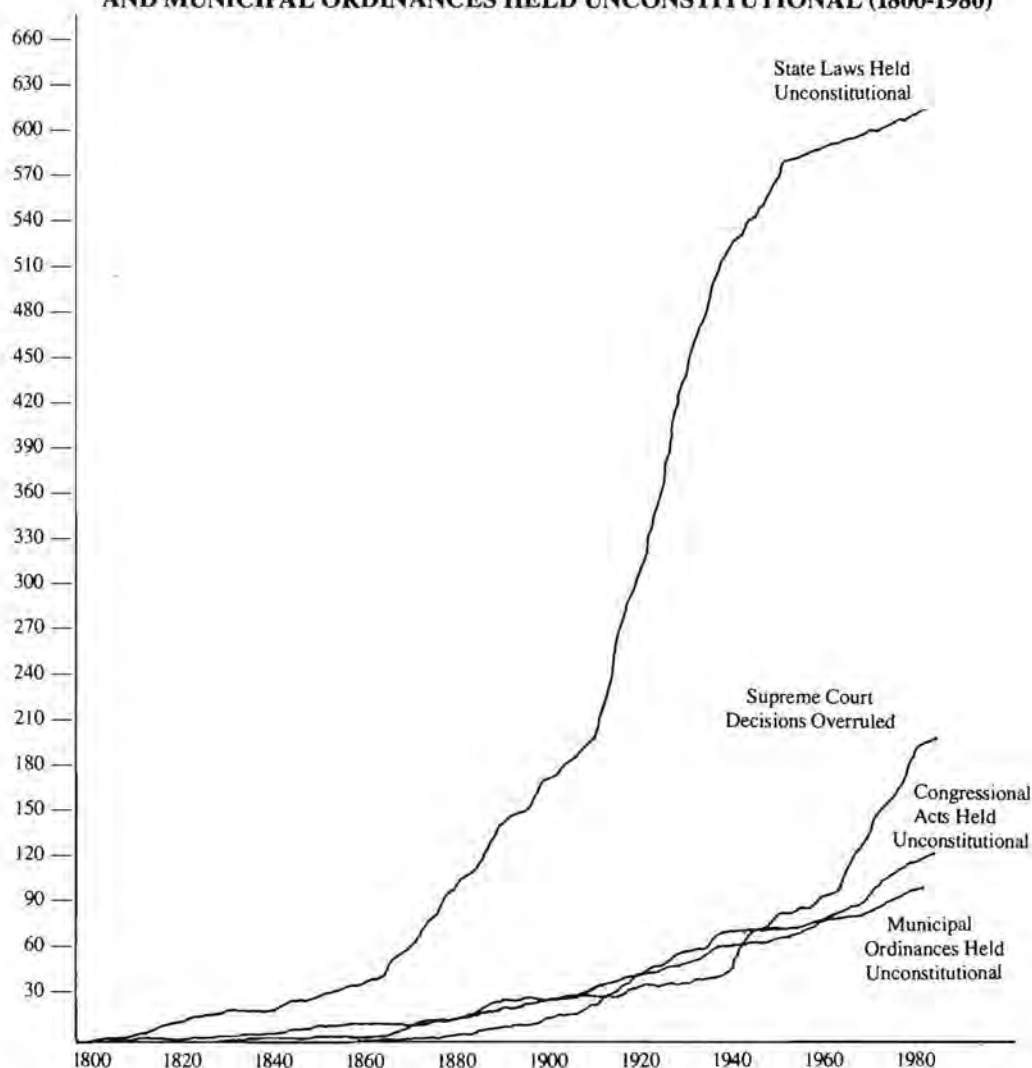
Decisions and Cumulative Number of Decisions Decided by A Bare Majority, illustrate these trends.

Not unrelated to these trends is that the justices — collectively and individually — also tend to provide more specialized justifications for their votes and decisions. Since 1939, and perhaps after the appointment of Justice Frankfurter,⁵³ the total number of opinions — including opinions announcing the Court's decision and concurring, separate and dissenting opinions — handed down each term has rather steadily increased. *Diagram IX, Opinion Writing: The Supreme Court of the United States, 1800-1981*, illustrates the rather dramatic rise in the number of

opinions issued by the Court.⁵⁴ *Diagram X, Opinion Writing: Supreme Court of the United States, 1937-1981*, breaks the total number of opinions issued each term into the number of opinions announcing the Court's decision and dissenting, separate — including those opinions concurring and/or dissenting in part with the judgment and/or majority opinion — and concurring opinions. Noticeably, the number of dissenting opinions has risen more sharply than the number of separate or concurring opinions.

There are a number of possible explanations for these trends, no one of which by itself is entirely persuasive. Such explanations include the following: the increasing complexity and

DIAGRAM IV
DECISIONS OF THE SUPREME COURT OVERRULED AND ACTS OF CONGRESS HELD UNCONSTITUTIONAL (1800-1982); AND STATE LAWS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL (1800-1980)

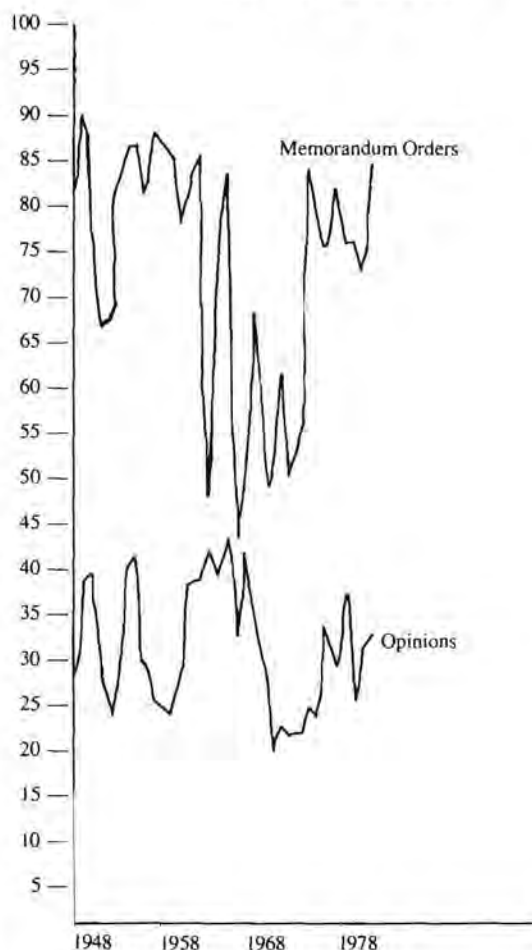


proportion of constitutional cases decided by the Court; changes in procedures for assigning, circulating and announcing opinions; a greater propensity for justices — like academics — “to state their views their own way;” and the relative influence of employing a greater number of law clerks on the deliberative process.⁵⁵ The only explanation advanced here is that these trends are not unrelated to the inflation of constitutional politics and the proliferation of specialized theories of judicial review. These trends seem to indicate, contrary to the suggestions of the critics of an “imperial judiciary,” that the Supreme Court has not conspired to exercise judicial review in an entrepreneurial fashion, or attempted to usurp the power of the other political branches. Rather, the evidence suggests that Congress has expanded the bases and opportuni-

ties for access to the judiciary, while at the same time enlarging the Supreme Court’s discretionary jurisdiction. As a consequence, the justices increasingly confront more vexatious issues of constitutional politics, and correspondingly tend to be less inclined to agree with each other on either the basis for or the outcome of their votes.

On reconsidering the claim of judicial expansionism and criticism of an “imperial judiciary,” it is difficult to find in the facts cited above an adequate foundation for the argument that the Supreme Court has sought to gain greater political power or influence at the expense of other governmental agents. Critics of the “imperial judiciary” often fail not only to distinguish different kinds of intervention by trial and appellate judges in the various state and federal courts. More importantly, they fail to pay sufficient attention to broader yet more fundamental socio-economic, legal and political changes. Specifically, those

**DIAGRAM V
PERCENTAGE OF UNANIMOUS
OPINIONS AND MEMORANDUM
ORDERS (1948-1981)**



**DIAGRAM VI
COMPARISON OF TOTAL
DISSENTING VOTES IN CASES
DECIDED BY FULL OR PER
CURIAM OPINION (1948-1980)**

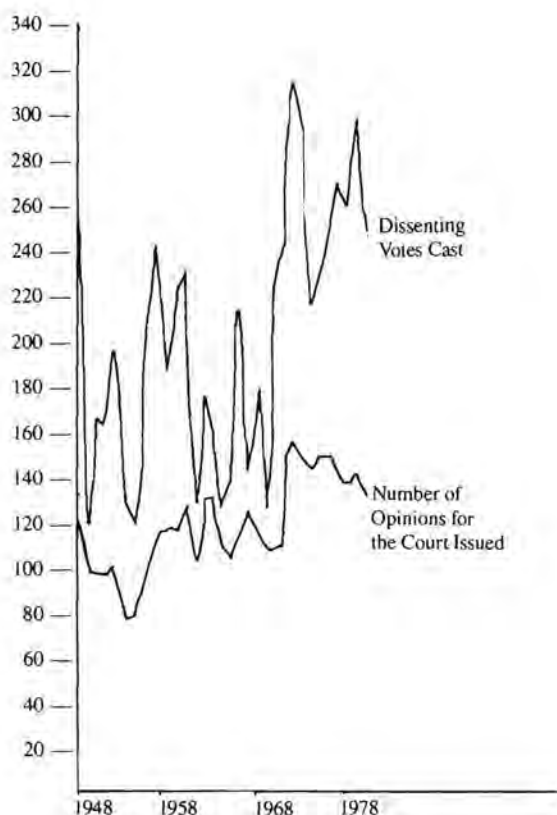


DIAGRAM VII
CUMULATIVE NUMBER OF PLURALITY
DECISIONS (1900-1981)*

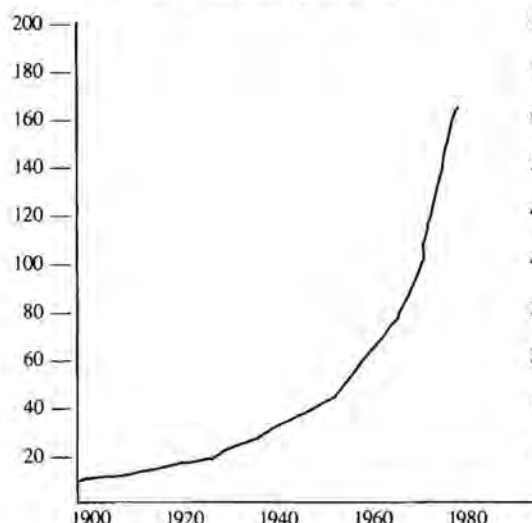
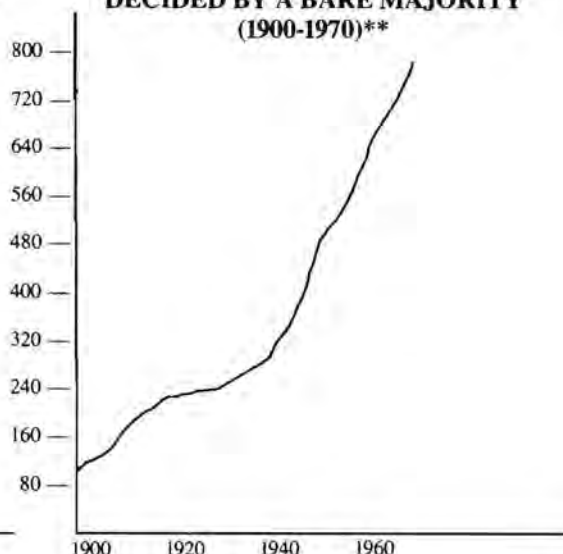


DIAGRAM VIII
CUMULATIVE NUMBER OF DECISIONS
DECIDED BY A BARE MAJORITY
(1900-1970)**



*A plurality opinion is an opinion for the Court's holding that gain at least five votes but does not command the support of a majority of the justices. Excluded are some cases where less than a majority agreed on an opinion for the Court, but where there nevertheless prevailed substantial agreement by a majority on a rationale for the decision; for example, as in *Dennis v. United States*, 341 U.S. 494 (1951). Also excluded are affirmances by an equally divided Court and four-three decisions due to the recuse of one or more justices or, as in the 19th century, due to the diminished number of justices on the Court. Figures for plurality decisions prior to the 1969 Term were taken from J. F. Davis and W. Reynolds, "Juridical Cripples: Plurality Opinions in the Supreme Court," 1974 *Duke Law Journal* 59. Numbers for the 1969-1979 Terms were taken from Note, "Plurality Decisions and Judicial Decisionmaking" 94 *Harvard Law Review* 1127, Appendix, at 1147 (1981). Plurality decisions in the 1980 and 1981 Terms were tabulated by the author.

**The number of bare majority opinions for the Court during the period of 1900-1945 is taken from *A List of Supreme Court Cases Decided by a Majority of One* (Mimeograph, July 9, 1935; April 26, 1937; Washington, D.C.: Library of Congress). Figures for the 1945-1971 Terms are taken from Note, "Five-Four Decisions of the United States Supreme Court: Resurrection of the Extraordinary Majority," 7 *Suffolk University Law Review* 807, Appendix 6 (1973). In the last three Terms the number of five-four decisions has ranged from 28 to 21 to 32 in the 1979, 1980 and 1981 Terms.

trends associated with increased litigation and the expansion of the administrative state, the rise of interest-group pluralism, the expansion of the constitutional politics and the proliferation of specialized theories of judicial review. In the final

analysis, the judiciary — and particularly the Supreme Court — has evolved, for better or worse, with the evolution of free government and American politics throughout the bicentenary.

Footnotes

¹ *The Federalist* No. 78, at 465 (A. Hamilton) (C. Rossiter ed., 1961).

² Thomas Jefferson, "Resolutions to the Alien and Sedition Acts," reprinted in 17 *The Writings of Thomas Jefferson* 389 (A. Lipscomb and R. Bergh, eds., 1905).

³ Alexis de Toqueville, *Democracy in America*, at 28 and 156 (New York: Vantage, 1945).

⁴ *Marbury v. Madison*, 1 Cranch 137 (1803).

⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁸ *Baker v. Carr*, 369 U.S. 186 (1962).

⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰ *United States v. Nixon*, 418 U.S. 683 (1974).

¹¹ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

¹² *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983).

¹³ Benjamin Cardozo, *The Nature of the Judicial Process* 168 (New Haven: Yale University, 1921).

¹⁴ Felix Frankfurter and James Landis, *The Business of the Supreme Court* 300 (Cambridge: Harvard University Press, 1927).

¹⁵ Based on data in J. Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, Appendix: The Business of the Supreme Court, 1789-1801, at 796-798 (New York: Macmillan, 1971).

¹⁶ Based on an analysis by the author.

¹⁷ See, e.g., Stephen Field, "The Centenary of the Supreme Court of the United States," 24 *American Law Review* 23 (1890).

¹⁸ Based on an analysis by the author.

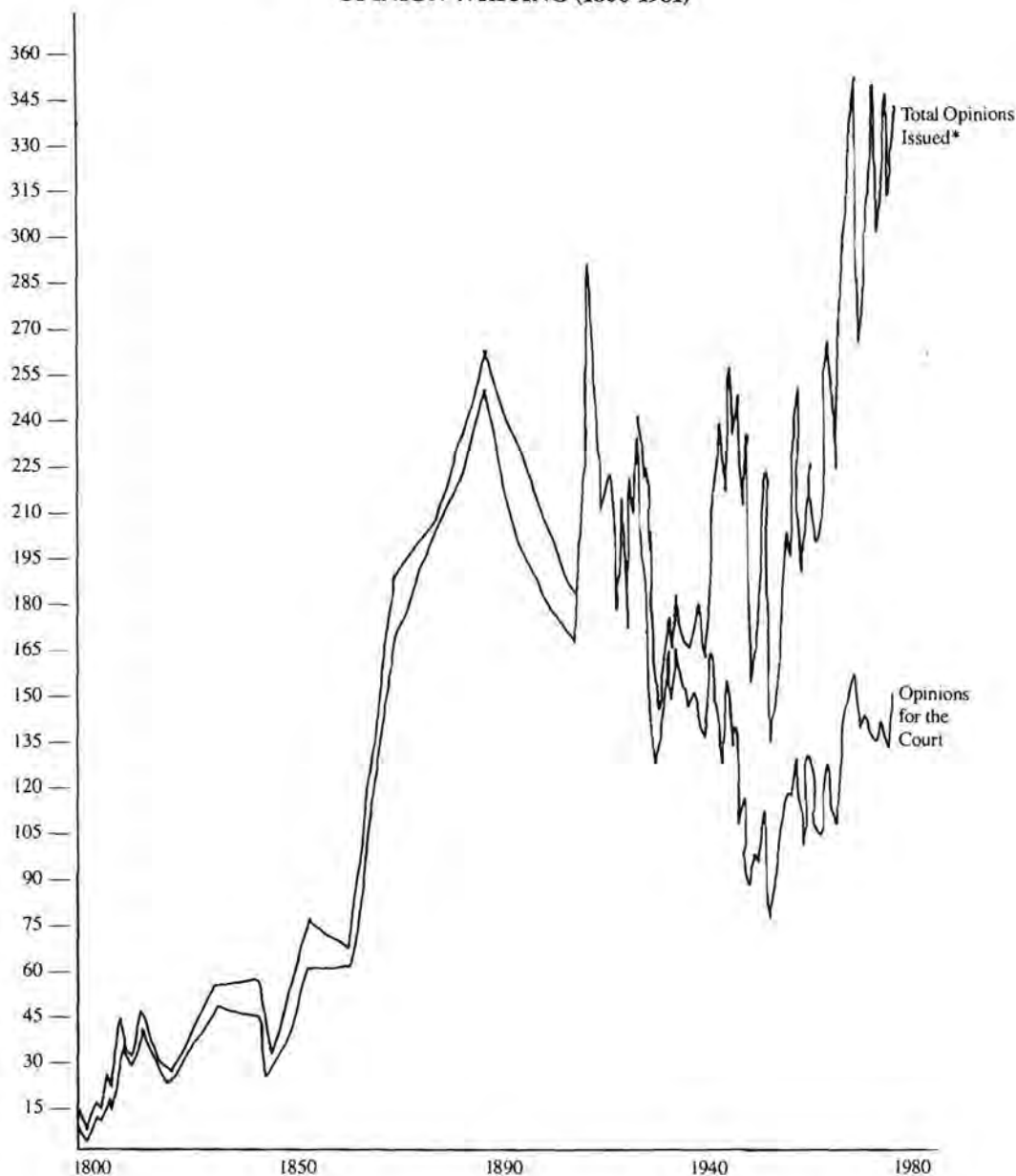
¹⁹ The data for this graph may be found in Table X, *Supreme Court of the United States: Term, Filings, Docket, Opinions, Cases Disposed of and Carried Over—1791-1981* (on file with the author). An explanation for the sources and manner in which the data for Table X and Diagram I was compiled follows:

Data on filings for the Terms 1791-1913 was

gathered by examining the *Docket Books of the Supreme Court of the United States* (available at the National Archives, Washington, D.C.). The figures for the October Terms 1913-1981 are taken from Annual Reports of the Office of the Clerk, Supreme Court of the United States.

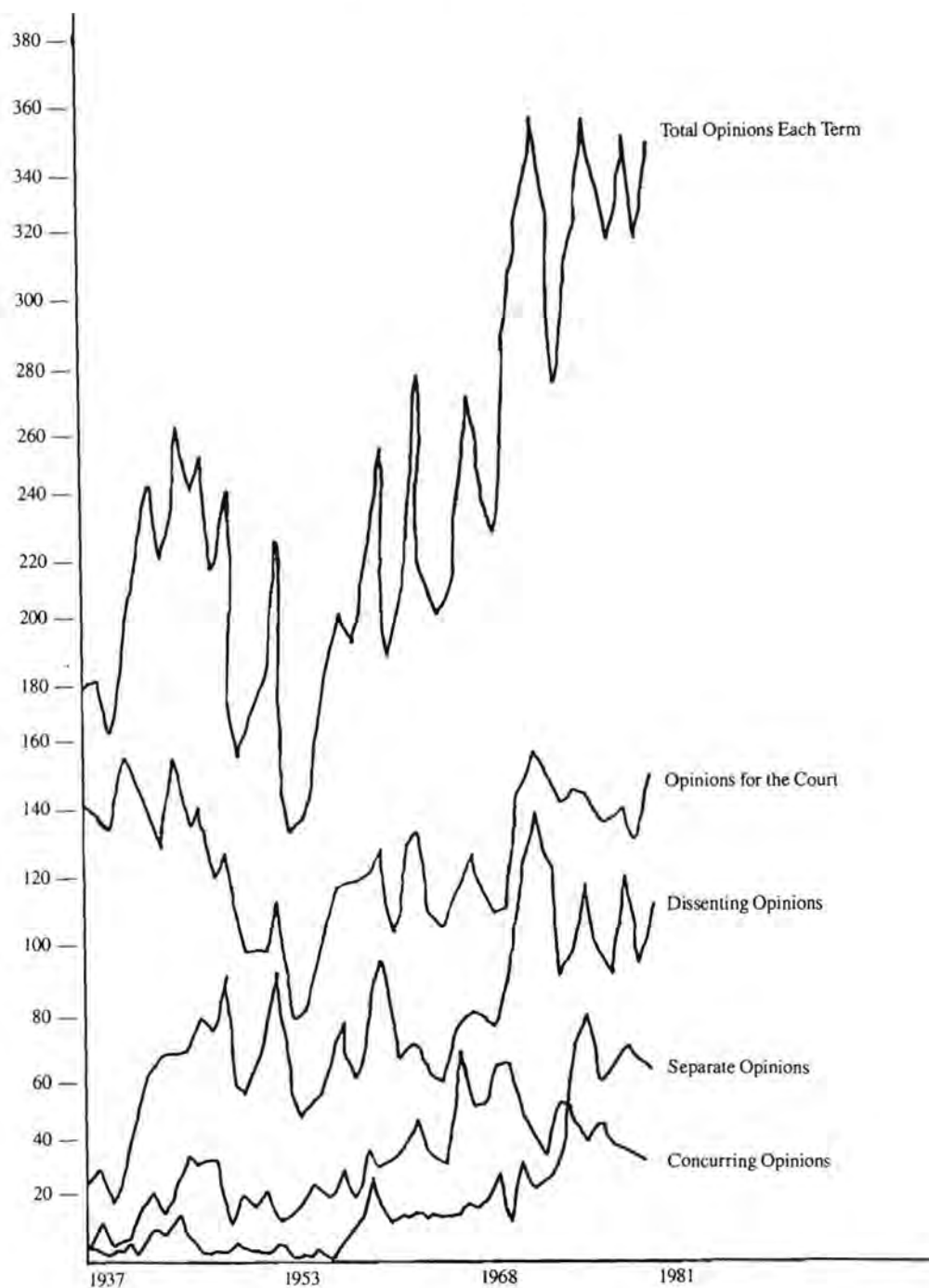
Data on the total number of cases on the Supreme Court's docket for the years 1791-1913 was gathered by the author from the *Docket Books of the Supreme Court of the United States*. The figures for October Terms 1913-1981 are taken from Annual Reports of the Office

DIAGRAM IX
OPINION WRITING (1800-1981)



*Total Opinions includes Opinions for the Court and dissenting, concurring and separate opinions.

DIAGRAM X
OPINION WRITING (1937-1981)



of the Clerk, Supreme Court of the United States.

Opinions refers to the number of opinions for the Court disposing of one or more cases on merits. Prior to 1801, the Supreme Court maintained the practice of issuing its opinions seriatim. (Here each case disposed in such a manner is counted as only one opinion.) This practice was largely abandoned when John Marshall became Chief Justice. The figures for the number of opinions for the Terms 1791-1800 are taken from J. Goebel, Jr., *History of the Supreme Court of the United States (1790-1800)*, Table XII, p. 811 (New York: Macmillan, 1971). The number for those Terms between 1800 and 1815 are taken from G. Haskins and H. A. Johnson, *Foundations of Power: John Marshall (1801-1815)*, Table 2, p. 653 (New York: Macmillan, 1981). The number for the 1810, 1820, 1830, 1840, 1850, 1860, 1870, 1890, 1900 and 1910 Terms are based on an analysis of decisions in *United States Reports* for those respective years (for which the author expresses his appreciation for the assistance of Mr. Andy Goldstein, a Ph.D. student in history at the University of Connecticut). Excluded from those figures are short per curiam or memorandum orders denying review or not reaching the merits of a case or otherwise disposing of a case. Data for the October Terms 1913-1981 is taken from the Statistical Sheet, Office of the Clerk, Supreme Court of the United States.

Total number of opinions refers to both signed and per curiam opinions for the Court and any dissenting, concurring or separate opinions in cases given plenary consideration. Excluded, for example, are dissenting opinions from the denial of a petition for certiorari. Data for 1801-1814 is taken from Haskins and Johnson, *Id.* Figures for the 1800, 1810, 1820, 1830, 1840, 1850, 1860, 1870, 1890, 1900 and 1910 Terms are based on an examination and tabulation by the author of opinions in *United States Reports* for those years. Figures for the October Terms 1913-1981 are taken from the Annual Statement of Number of Printed Opinions, Office of the Clerk, Supreme Court of the United States, with the exception of the 1924-1936 Terms where the number of total opinions was taken from the *Harvard Law Review's* Annual Survey of those Terms.

Cases disposed of during term include both those given plenary consideration and those summarily decided or otherwise disposed. Figures for cases disposed of and carried over for the years 1791-1810, 1820, 1822-1846, 1850, 1860, 1870, 1880 and 1890 are based on the author's tabulation of cases contained in the *Docket Books of the Supreme Court of the United States*. Figures for the Terms between 1890 and 1910 are taken from the *Annual Reports of the Attorney General of the United States* (Washington, D.C.: Government Printing Office, 1891, 1901, 1911). See, also, Justice John M. Harlan, Jr., 20 *Chicago Legal News* 396 (1887) (reporting figures for docket and disposition of cases, 1803, 1819, 1860, 1970, 1880, and 1886). Figures for October Terms 1913-1981 are taken from Statistical Sheet, Office of the Clerk, Supreme Court of the United States.

²⁰ Frankfurter and Landis, *supra* note 14, at 43-51.

²¹ See, e.g., Act of April 9, 1866, Ch. 31, Sec. 10, 14 Stat. 27; and Civil Rights Act of April 20, 1871, Ch. 22, Sec. 1, 17 Stat. 13.

²² Act of February 5, 1867, Ch. 28, Sec. 1, 14 Stat. 385.

²³ Act of March 3, 1875, Ch. 137, 18 Stat. 470.

²⁴ Frankfurter and Landis, *supra* note 14, at 60.

²⁵ Act of March 3, 1887, Ch. 373, 24 Stat. 552; as corrected by Act of February 6, 1889, Ch. 886, 25 Stat. 433.

²⁶ Circuit Court of Appeals Act of March 3, 1891, Ch. 517, 26 Stat. 826. See, generally, Frankfurter and Landis, *supra* note 18; and L. Nelson, "Federalism and the Judicial Process: A Survey of Judicial Administration in the United States Courts of Appeals," 18 *Gonzaga Law Review* 53 (1982/1983).

²⁷ See, e.g., Frankfurter and Landis, *supra* note 14, at 105-110.

²⁸ Act of March 3, 1911, Ch. 231, Secs. 128-129.

²⁹ See, e.g., Expediting Act of February 11, 1903, Ch. 554, 32 Stat. 823.

³⁰ Federal Employers' Liability Act of April 22, 1908, Ch. 149, 35 Stat. 65.

³¹ See, e.g., Act of June 18, 1910, Ch. 309, Sec. 17, 36 Stat. 539; and Act of March 4, 1913, Ch. 160, 37 Stat. 1013.

³² See, Act of March 3, 1911, Ch. 231, Secs. 128-129.

³³ See, Act of September 6, 1916, Ch. 448, Sec. 4, 38 Stat. 803.

³⁴ See, e.g., William H. Taft, "Three Needed Steps of Progress," 8 *American Bar Association Journal* 34 (1922); "Possible and Needed Reforms in Administration of Justice in Federal Courts," 8 *American Bar Association Journal* 601 (1922); Taft, "The Jurisdiction of the Supreme Court Under the Act of February 13, 1925," 35 *Yale Law Journal* 1 (1925); and Letter to Senator Copeland from Taft, printed in *Congressional Record* (S. 2920 (December 9, 1925)). See also, Testimony of Chief Justice Taft and Justices Van Devanter, McReynolds, and Sutherland on the Bill in U.S. Cong., H.R., Hearings before the Committee on the Judiciary, *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States*, H.R. 8206, at 6-30 (Washington, D.C.: Government Printing Office, 1925). In a letter to Mr. George Rose, Justice Van Devanter discusses the drafting of the bill by a committee of justices of the Supreme Court. Papers of Justice Van Devanter, Box 19, Letter of March 9, 1925 (Library of Congress, Manuscript Division).

³⁵ Act of February 13, 1925, Ch. 448, Sec. 4, 39 Stat. 726.

³⁶ See, *Diagram 1* and *supra* note 19, for explanation.

³⁷ See, 27 Stat. 252 (1982), 28 U.S.C. s 1915 (1948); and, generally, Robert Stern and Eugene Gressman, *Supreme Court Practice* 541-589 (BNA: Washington, D.C., 5th ed., 1978).

³⁸ Data for the 1935-1971 Terms is taken from *The Report of the Study Group on the Caseload of the Supreme Court (The Freund Report)*, 57 F.R.D. 573, 614 (1972). Data for the 1971-1982 Terms is compiled from the Supreme Court of the United States, Office of the Clerk, Statistical Sheets (Final). Note that cases on the Court's original docket are included in the total number of filings, but do not usually appear in the number for paid and unpaid filings. Note also that at various times between 1935 and 1971 the method of assigning cases to the miscellaneous docket changed and thus there may be some minor variations in the 1945 and beginning in 1947 all petitions for certiorari in forma pauperis were transferred to that docket, and appeals in forma pauperis was likewise docketed and transferred from it to the Appellate Docket once certiorari was granted or an appeal noted. Since 1971 the Clerk of the Supreme Court reports as a category all in forma

pauperis petitions.

³⁹ John M. Harlan, Jr., "Manning the Dikes," 13 *Record of the New York City Bar Association* 541, 547 (1958).

⁴⁰ See, e.g., William O. Douglas, "The Supreme Court and Its Case Load," 45 *Cornell Law Quarterly* 401, 407 (1960).

⁴¹ See, e.g., Douglas, *Id.*; Douglas, "Mr. Justice Douglas," *CBS Reports*, transcript at 12 (New York: CBS News, September 6, 1972); William Brennan, Jr., "The National Court of Appeals: Another Dissent," 40 *University of Chicago Law Review* 473 (1973). See, also, John Paul Stevens, "Some Thoughts on Judicial Restraint," 66 *Judicature* 177, 179 (1982).

⁴² Figures for the October 1941, 1951, 1961, and 1971 Terms are taken from *The Report of the Study Group on the Caseload of the Supreme Court (The Freund Report)*, 57 F.R.D. 573, 615 (1972). Data for the 1981 Term, and for argued and nonargued cases in the 1971 Term, is based on the author's analysis.

⁴³ John M. Harlan, Jr., "A Glimpse of the Supreme Court at Work," 11 *University of Chicago Law School* 1, 4 (1963).

⁴⁴ Byron White, "The Case for the National Court of Appeals," 23 *Federal Bar News* 134, 140 (1970).

⁴⁵ Based on author's analysis.

⁴⁶ Taft, *Yale Law Journal*, *supra* note 33, at 2.

⁴⁷ Based on author's analysis.

⁴⁸ This Diagram is based on data in the annual survey of the October Term of the Supreme Court of the United States in Volumes 63 to 97 of the *Harvard Law*

Review (1948-1982).

⁴⁹ *INS v. Chadha*, 103 S. Ct. 2764 (1983).

⁵⁰ By "activism," here, I simply mean the Court's invalidation of a law or act of a co-equal branch of government, state or municipality or otherwise official governmental action. For an interesting, though not unproblematic, discussion of "judicial activism" see: Bradley Cannon, "Defining the Dimensions of Judicial Activism," 66 *Judicature* 236 (1983).

⁵¹ Lewis Powell, "Constitutional Interpretation: An Interview with Justice Lewis Powell," *Kenyon College Alumni Bulletin* 14, 15 (Summer, 1979).

⁵² Data for the diagrams was taken from volumes of the *Harvard Law Review*. See, *supra* note 48.

⁵³ For a further discussion of this suggestion, see: Louis Lusky, "Fragmentation of the Supreme Court: An Inquiry Into Causes," 10 *Hofstra Law Review* 1137 (1982).

⁵⁴ This Diagram, as well as Diagram X, is based on Table X, discussed in *supra* note 19.

⁵⁵ Given the limited time and space here, naturally, it is impossible to cover adequately the jurisdictional, socio-economic and political changes discussed herein, or to venture some satisfactory assessment of their relative influence, compared to decisions rendered by the Supreme Court, on the changing role of the Court and judicial expansionism. In short, this discussion is tentative and hopefully provocative. The main points are further developed in a work-in-progress entitled, *The Marble Temple* (to be published by W. W. Norton).

JUDICIAL POTPOURRI

or,

"De Minimis,"



Toward 1987: Consequences of Independence

by William F. Swindler

In January 1784 the Congress of the Confederation finally received and ratified the Treaty of Paris, thus assuring international recognition of the independence of the United States which had been declared in 1776. The new states and the new nation thereupon were confronted with a variety of demands upon their political initiatives, as they converted from an ad hoc wartime organization to the different and much more complex details of peacetime government. The year 1784 thus marked a watershed in the constitutional development of the states and the Union which would reach a climax, in the latter case, in the Constitutional Convention of 1787, the ratification debates which took up most of the 1788, and the introduction of the new federal government in the spring and summer of 1789.

The constitutional beginnings of independence, indeed, could be traced to the states which drafted the first American constitutions in 1776. New Hampshire, in January of that year, had been the first; and it was indicative of the new conditions created by complete independence in the winter of 1784 that New Hampshire should thereupon set about drafting a new, more detailed constitution. South Carolina, which adopted the second American constitution in March of 1776, had replaced that document with a new one in 1778, and in 1779 the town meeting at Concord N.H. adopted a draft for a new constitution which was supplemented by another draft by a meeting at Exeter, N.H. in 1781. The fact was that Americans realized that they were experimenting and proceeding by trial and error (see table) as they learned from experience. This would make it easier to entertain proposals for a new national character in 1787.

Among the first states to have adopted two major instruments — Virginia — the famous Declaration of Rights had come first, on June 12, 1776, to be followed seventeen days later by a rudimentary constitution. George Mason, of

course, won his place in history as the author of the first document, but everyone seemed to have a try at the second. Thomas Jefferson, who would have put the writing of a Virginia constitution at the top of his list of priorities, was in Philadelphia working on an even more monumental work — the Declaration of Independence — and could only wait impatiently for news of the progress on the Fifth Virginia Convention in Williamsburg. With his old mentor, George Wythe, and his kindred spirit from Massachusetts, John Adams, Jefferson developed suggested forms for the charter for his beloved Commonwealth; Adams, at the invitation of Jefferson and Wythe, actually wrote a preliminary draft, which was then revised twice by Jefferson. The third and final draft was given to Wythe to take to Williamsburg.

All of this work was pretty much in vain; not only was Jefferson's plan of government too radical for his contemporaries, but the convention had already done most of its work by the time Wythe reached the capital city. While some of Jefferson's language was added onto the final draft — interestingly enough, the part which was virtually a paraphrase of the Declaration of Independence — the main body of the constitution was little more than a modified version of the frame of government under the colonial regime.

Virginia's experience was typical of several of the earliest state constitutions, so that the first year of total peace, 1784, was full of suggestions in all parts of the Confederation that the wartime state structures be overhauled. Massachusetts, which had delayed adopting a constitution until 1781, was more fortunate than its predecessors, and in amended form has continued its original charter to the present. Like Virginia — as a consequence of the continuing Adams-Jefferson communications — it provided for a separate declaration of liberties, although it made this a discrete part of the unified constitution.

The status quo proved good enough for two of



Architect of the Capitol

Colonel John Sevier, also known as "Nolachucky Jack" sought to establish a new state in what is now Western North Carolina.

the original colonies, and both Connecticut and Rhode Island continued under their colonial charters until well into the nineteenth century. Connecticut finally adopted a constitution in 1818, but Rhode Island did not until 1848-49. As for states beyond the original thirteen, the first efforts at spontaneous generation were usually involved and sometimes abortive. Between New Hampshire and New York lay a mountainous area known as the "Hampshire grants," settlements originally made by authorities in England with no knowledge of the geographic character of the region. The occupants of this "no man's land," practicing their own version of "squatter sovereignty," sought to become independent of both of the older states by drafting a constitution for a state of their own, which they called Vermont. This draft dated from 1777, but both New York and New Hampshire raised objections in the Continental Congress, and the Green Mountain men did not succeed in winning admission to the Union until 1792, under the Congress of the new Constitution.

Even more ephemeral was the proposed state of Transylvania, a general body of land in western Pennsylvania extending across the rivers into parts of present-day Kentucky. When the settlers

there sent a representative to the Continental Congress, the Pennsylvania delegation was so outraged at the presumptuousness of the Transylvanians that the delegate fled from Philadelphia under threat of prosecution. This did not deter another state-builder, Col. John Sevier of Western North Carolina — that famed "Nolachucky Jack" of the Battle of King's Mountain. Sevier organized the settlers in the region to draft a constitution and elect a government for a state of Franklin, which actually functioned for several years, although it had no better luck in having Congress accept its representative. Eventually the area was merged into the new state of Tennessee, and Sevier became governor of that state.

The first statehood effort encouraged by an older state came with Virginia, which legislatively empowered the people of the "District of Kentucky" to begin preparations for admission to the Union in 1785. Already Virginia had ceded its "western lands" — the region north of the Ohio River, including the "county" of Illinois which it had claimed after the conquests of George Rogers Clark — and was coming to the realization that any state extending from the Atlantic seaboard to the Mississippi was too vast to be manageable. (California and Texas were far in the future.) The Kentuckians fought vigorously among themselves over an acceptable constitution, and it was not until 1792 that Kentucky was admitted as the fifteenth state, after Vermont.

But additional states to emerge from the western regions were consistently foreseen by the new government of the United States, and in 1787, as the convention in Philadelphia was drafting an instrument which would replace the Confederation, the Congress of the Confederation was enacting a last major instrument of its own. This was the Ordinance for the Governance of the Territory Northwest of the River Ohio — the famous Northwest Ordinance — and it would provide the procedure for formally creating territories which in due course would have the population and constitutional resources to petition for statehood. This was complemented in the new Federal Congress by a statute for the territories "southwest" of the River Ohio, substantially similar to the 1787 Ordinance except that it did not contain the provision prohibiting slavery. Under authority of this statute, the new State of Tennessee was admitted in 1796.

Thus the American people, beginning in 1784, began to come to grips with the fundamental

question presented by independence: If it had been hard enough to win a war for independence, how would an untried system of self-government work when the unifying forces of revolution

ceased to exist? By trial and error, and by territorial experiment, these people provided an answer which was to be successful beyond all historic imagining.

American Constitutions—the First 25 Years

Just how novel the idea of a written constitution was, and how the early documents had to be altered or replaced as experience dictated, is indicated by the succession of instruments adopted by the original states (and three new ones, plus several unsuccessful proposals for statehood) in the first quarter-century of independence. The following chronology suggests the readiness of the American people to experiment with their charters of government until the majority was satisfied with the result.

January 5, 1776	New Hampshire adopts first constitution.
March 26, 1776	South Carolina adopts its first constitution.
June 12, 1776	Virginia adopts Declaration of Rights, prototype of the Federal Bill of Rights.
June 29, 1776	Virginia becomes third state to adopt constitution; it did not incorporate its Declaration of Rights into the constitution until 1850.
July 2, 1776	New Jersey adopts constitution.
July 4, 1776	Continental Congress approves Declaration of Independence; previous year, Congress had formally proposed to the states that they undertake to draft constitutions, and in late May had created a committee to draft a national charter of government.
August 14, 1776	Maryland adopts constitution.
September 21, 1776	Delaware adopts constitution, and formally becomes "independent" of Pennsylvania; under the colonial organization of government, Delaware's "three lower counties" of Pennsylvania had their own legislature but a common governor.
September 28, 1776	Pennsylvania adopts constitution.
December 18, 1776	North Carolina adopts constitution. On this same date, the former colony of Connecticut adopted a "constitutional ordinance" which modified the colonial charter of 1661; Connecticut then continued to operate under the modified charter until 1818, when it replaced it with a constitution.
December 18, 1776	Delaware adopts Declaration of Rights and Fundamental Laws; like several other states, Delaware treated a constitution and a bill of rights as separate though equally important fundamental documents.
February 5, 1777	Georgia adopts its first constitution.
April 20, 1777	New York adopts constitution.
July 8, 1777	Vermont drafts constitution in a bid for statehood; settlers in the "Hampshire grants" between New Hampshire and New York sought to be independent of both.
March 19, 1778	South Carolina adopts second constitution.
October, 1778	Virginia, following "conquest" of French settlements on Mississippi under its forces led by George Rogers Clark, creates "county" of Illinois.

The C E N T I N E L

Vol IX



The FEDERAL EDIFICE.

ELEVEN STARS, in quick succession rise—
ELEVEN COLUMNS strike our wond'ring eyes,
Soon o'er the whole, shall swell the beauteous DOME,
COLUMBIA's boast—and FREEDOM's hallow'd home.
Here shall the ARTS in glorious splendour shine!
And AGRICULTURE give her stores divine!
COMMERCE refin'd, dispense us more than gold,
And this new world, teach WISDOM to the old—
RELIGION here shall fix her blest abode,
Array'd in mildness, like its parent GOD!
JUSTICE and LAW, shall coddle PEACE maintain,
And the "SATURNIAN AGE," return again.

Accompanied by the words of an unknown muse, this period drawing illustrated the great difficulty encountered in the 1780s in fusing the thirteen colonies into thirteen states united under a strong central authority.

March 1, 1781

Articles of Confederation, first national constitution, go into effect following ratification by Maryland, the thirteenth state which had held out for cession of the "western lands" (Ohio Valley) to Continental Congress by Virginia.

October 25, 1781

Massachusetts adopts constitution, the eleventh state to do so; thereafter only Connecticut (until 1818) and Rhode Island (until 1849) continued under colonial charters.

June 7, 1784

New Hampshire adopts second constitution.

January 1785

"State" of Franklin adopts constitution; this represented a separatist movement in the western part of North Carolina which eventually became part of state of Tennessee.

October 1785

Virginia legislature authorizes its District of Kentucky to begin drafting constitution in anticipation of separate statehood.

July 13, 1787

Continental Congress adopts Ordinance of Northwest Territory, constitutional model for organizing "western land" cessions preparatory to future statehood.

September 17, 1787

"Constitution Day;" Federal convention in Philadelphia formally adopted text of Constitution of the United States and transmitted it to Continental Congress for submission to ratifying conventions of states.

December 7, 1787

Delaware ratifies new Federal Constitution and thus becomes first state "admitted" to the Union.

December 12, 1787

Pennsylvania becomes second state upon ratification.

December 18, 1787

New Jersey ratifies; third state.

January 2, 1788	Georgia ratifies; fourth state.
January 9, 1788	Connecticut ratifies; fifth state.
February 7, 1788	Massachusetts ratifies; sixth state.
April 18, 1788	Maryland ratifies; seventh state.
May 23, 1788	South Carolina ratifies; eighth state.
June 21, 1788	New Hampshire ratifies; ninth state. Under the ratification proviso of Article VII of the Constitution, nine states were sufficient to put the instrument into effect, but as a practical matter the major states of New York and Virginia had to ratify as well.
June 25, 1788	Virginia ratifies; tenth state.
July 26, 1788	New York ratifies; eleventh state. Pro and anti-ratification pamphleteering appeared in every state, but the series of "pro" articles by Alexander Hamilton, John Jay and James Madison, aimed at winning New York's ratification, became a classic of American constitutional theory under the title of the "Federalist Paper."
April 16, 1789	Federal government formally organizes with quorum of House of Representatives and Senate. Executive department followed legislative with inauguration of George Washington as President on April 29.
May 6, 1789	Georgia adopts second constitution.
September 24, 1789	Judiciary Act passed by First Congress, activating third branch of government under new Constitution.
November 21, 1789	North Carolina, having postponed early action, ratifies and is admitted as twelfth state.
May 26, 1790	Second territorial organic act, for "territory southwest of the river Ohio," supplements Northwest Ordinance but omits provision prohibiting slavery.
May 29, 1790	Rhode Island, which had earlier rejected a proposal of ratification, now ratifies Constitution and is admitted as thirteenth state.
June 3, 1790	South Carolina adopts third constitution.
September 2, 1790	Pennsylvania adopts second constitution
March 4, 1791	Vermont finally admitted to Union as fourteenth state.
December 15, 1791	Bill of Rights (first ten Amendments to Federal Constitution) proclaimed to have been ratified by necessary number of states. Twelve proposed amendments had been submitted, but the first two failed to win minimum number of ratifications; however, they theoretically remained on the table for an eventual majority vote of states, and for a number of years thereafter the amendments actually adopted were cited by their original order of submission—e.g., the present Fifth Amendment was cited as the seventh, etc. Official numbering of amendments did not begin until after the Civil War.
April 7, 1792	Kentucky adopts constitution; admitted in June as fifteenth state.
June 12, 1792	Delaware adopts second constitution.
February 6, 1796	Vermont adopts new constitution.
June 1, 1796	Tennessee adopts constitution and is admitted to Union as sixteenth state.
May 30, 1798	Georgia adopts third constitution.
August 17, 1799	Kentucky adopts second constitution.

The Pentagon Papers Case: A Personal Footnote

by Erwin N. Griswold*

I don't know that I have ever thought much about being present at my own funeral, but that was an extremely nice epitaph! I must confess that I don't feel ready for it yet, but I am most appreciative. I spent a generation working in legal education and working with many of you, and I always found it worthwhile and satisfying work.

When President Maxwell called me last spring and asked me to be the speaker today, it seemed like a long time away. It also seemed like an attractive opportunity to meet with my old friends among the law teachers. So here I am, with a mildly captive audience—a bigger audience, I may say, than I was accustomed to in my teaching days, even at the gargantuan Harvard Law School, and much bigger than the rather select audience to whom I have occasionally been lecturing these last five years. Incidentally, I noticed on the program that the price of this lunch was \$8.50, and I can only say that the speech isn't going to be worth it. Then I thought, well, that isn't too bad for the delegates here because the cost will be paid by the schools—and that made me very sad as an ex-dean!

The first Association meeting that I attended was in 1928, 44 years ago. It was held in what was then called the Stevens Hotel in Chicago. There may have been three or four hundred people that attended, certainly no more than that. As I recall it, Austin W. Scott was the President of the Association. I can recall the title of his address, which was "Confessions of a Law



Erwin Griswold

Teacher" but I cannot recall the sins he confessed to. Many of the great teachers of that time were there—Pound and Williston and Beale and Seavey and Wigmore and Corbin and Cook and Llewellyn and Ernst Freund and McCormick and Fraser and Cathcart, among others. The meeting proceeded at a fairly leisurely pace. I was not looking for a job and I was not aware that much hiring was being done. Indeed there weren't a great many openings for law teachers in those days. There were great teachers and scholars then, however, and we owe them much. In another forty years, someone present here today will be talking about the greats of 1972. They are perhaps less clear to us—very likely because there are more of them—but I have no doubt that they are here.

* The text of this article consists of excerpts from a speech delivered by Mr. Griswold at the Association of American Law Schools convention in New York on December 29, 1972 while the author was serving as Solicitor General of the United States. It later appeared in Volume 25, No. 3 of the *Journal of Legal Education* (1973), and is reprinted here with Mr. Griswold's permission.

But I am not here to reminisce. What I plan to do is to make a few rather disjointed observations about law teachers and about legal education, with whatever perspective my absence from academia for the past five and a half years has given me. I suppose my remarks may be a bit hortatory, because I am a hortatory sort of a fellow. And I suppose they may be somewhat controversial, because one of my clearest observations as a law teacher is that controversy is the source of a great deal of progress.

For a starter, let me say that it has always seemed to me that law teachers are rather privileged people, and that carries with it a very considerable obligation to contribute. There are many ways to contribute, of course, and one of them is by teaching. But, in my view, teaching alone is not enough.

One of my favorite pieces of reading matter is a rather expensively printed brochure put out by a small school in New Haven and called the Yale Law Report. I suppose it's always good to see how the other half lives. The current issue has a Faculty Profile on my friend and conqueror, Alex Bickel. I was particularly struck by the last paragraph of this article, and it is, in many ways, the theme of my remarks today. Here is the whole paragraph:

Among a faculty that is often consulted and sought out by policy makers, Bickel is still felt to be especially active in public affairs. He terms this involvement 'partly self-starting and partly very natural in our profession. In the world of legal scholarship such involvement is almost always implicit or, if you choose to make it so, then it's explicit.' Why Bickel has chosen to 'make it explicit' is not a question that occurs to people who know him. His qualified restlessness, his personal energy . . . seems to make such involvement natural. In addition, Bickel comes from an intellectual tradition . . . which values involvement and rejects the scholar as a 'self-segregated hermit.' Professor Leon Lipson suggests that what Bickel inherited is 'not necessarily — probably not at all — styles of reasoning and expression, but rather the ethical and intellectual obligation, the felt duty to put oneself in the flow.' And that he does.

I like that and commend it to you.

One of the ways for the law teacher to contribute, of course, is through scholarship, as Paul Freund and Charles Fairman and Walter Gellhorn and Louis Loss and Kenneth Davis, among many others, have done. In some ways that is the purest way of all, and I honor and venerate it.

Indeed, I have tried some of it myself. But there are many other ways to participate. On many occasions, law teachers have taken on public office, and have done it well. I think not only of those who have become judges, like Felix Frankfurter, and Calvert Magruder, and Charley Clark, and more recently, Charley Joiner — and of Wayne Morse, who became a distinguished Senator, and Father Drinan who is a Congressman — but also of many who have taken on positions in the executive branch of the government. Of course, I wince a bit, for I was the dean of whom Father Drinan said: "Old deans never die, they just lose their faculties." But I was proud when Archie Cox left Cambridge to become Solicitor General, Stanley Surrey left to become Assistant Secretary of the Treasury, Abe Chayes left to become Legal Advisor in the State Department, Charlie Haar left to become an Assistant Secretary of Housing and Urban Development, and Don Turner became Assistant Attorney General for the Antitrust Division. Many other names could be added to this list, including Jerre Williams and Roger Cramton, who have served as Chairmen of the Administrative Conference of the United States. And now my successor is to be Bob Bork of the Yale Law School. I am glad that we are keeping the Solicitor Generalship in the academic fold. If Bob Bork holds the office until 1977, that will mean that it has been filled by academics for fourteen out of sixteen years, since Archie Cox went to Washington in 1961.

I mention this because it seems to me important for law teachers and for legal education that a substantial proportion of them remain in close contact with the other branches of the profession, with practitioners, and with government. Movement back and forth by law teachers is practically unknown in England, and is very rare indeed in Canada and Australia. We are very fortunate to have such opportunities in this country, and I believe that this has a substantial and vital impact on the kind of legal education we can provide.

It is highly important, I think, for a considerable number of law teachers to have experience within government, so that they have a real understanding of how government works. Government is a great and complex organism. It is handled by people, each of whom has his own background and outlook as well as his own particular responsibility. Often there are persons

with equal or coordinate responsibilities and differing views as to how they should be exercised. As in the legislative process, there is inevitably a certain amount of compromise if things are to go forward. Some people regard this as surrendering principle, but it may be instead simply the means of getting the most that can be obtained at that particular time and place.

Sometimes academic people who have not had government experience seem to me to be particularly failing in the understanding of governmental processes. Of course, I am legitimately subject to criticism for many things, but many of the criticisms that come to me seem to be based upon a misconception of what I have done or of what my powers were in the circumstances. Sometimes, I think that some self-assumed liberals in the law teaching profession are among the most closed minded and intolerant people I know.

Let me say something, too, about the practicing branch of the profession. It was always my belief that the law schools should keep close to the practitioners and work with them in various ways in the interest of the legal profession. Some of my colleagues, I think, were rather disdainful of practitioners, and tended to think of them as narrow-minded money grubbers. Well, perhaps some of them are. I have even known some law teachers to whom those terms could be applied with more or less accuracy. But the practitioners are the heart of the profession. For the most part law teachers are engaged in training practitioners of one sort or another; and the practitioners, through bar associations, and bar examiners, can exercise great influence over the law schools and over legal education.

For this and other reasons, I determined early in my deanship that I would work closely with the American Bar Association. At that time, Livy Hall was Vice Dean of the Harvard Law School, and we agreed that he would work with the Massachusetts Bar Association; and in due course he became President of that Association. I have always found my work with the American Bar Association interesting and worthwhile; and I believe that there were a number of occasions when my being there was useful to legal education.

This leads me to an observation. Many law teachers, in my experience, look down their noses at the American Bar Association. They say that it has a Neanderthal outlook, that it is ultra-

conservative — and so on. I have always found this response to be disappointing. After all, the American Bar Association is the great national organization of our profession. It has now over 160,000 members. If it is unduly conservative, that is in part because a great many people, including a great many law professors, with a more constructive point of view, are not members. You can't help to lead the profession forward by staying outside. Moreover, if you will get in, and find ways to be useful, I think you will be surprised to find how welcome you will be, and how receptive the Association is to change. Of course, a body with so many members moves slowly and deliberately. It does not often make the great leap forward. But the Association has done many fine things. Perhaps the most notable recently is its support for the whole O.E.O. operation, in which the Association's position stands out in sharp contrast to that taken by the American Medical Association with respect to so-called "socialized medicine." We have in fact a great deal of "socialized law" if you want to call it that, and the American Bar Association has done much to bring that about.

I started out by making a reference to Alex Bickel. You see, I like activists among law professors, if not on courts. This gives me a chance to make a few observations about the encounter Alex and I had just a year and a half ago. Alex had a great advantage on me in the Pentagon Papers case, because he argued the case, as he acknowledged in that same article, without ever having read any of the Pentagon Papers.

I was in Florida making a speech to the Florida Bar when the first series of articles concerning the Pentagon Papers broke in the newspapers and I said to myself, "Well, isn't this interesting. Perhaps this case will get to the Supreme Court some day. But that will be a long time away and it will be a very different case when that happens, and I don't need to worry about it now." I thought to myself that some of my colleagues in the Department of Justice would be very busy, but the problems of the case seemed very remote to me. I did note that there would be a trial before Judge Gesell in Washington on Monday, and I thought I would get the Tuesday morning paper and see what I could find about it.

Well, Judge Gesell decided against the Government, and an immediate appeal was taken to the Court of Appeals, and I thought that was interesting because I had no responsibility for the

Court of Appeals. About 10:30 on Tuesday morning, the Attorney General, Mr. Mitchell, called me in and said, "This Pentagon case is going to be argued in the Court of Appeals this afternoon," and I said "Yes, I saw that in the newspaper." "I would like to have you argue it." I said, "Mr. Attorney General, I don't know anything about it. I have never seen the papers. I haven't studied the law. All I know is what I have seen in the newspapers." "Well, if you would rather not, I will see if I can get somebody else," to which I said, "Mr. Attorney General, if you want me to argue it, I will do so."

So between eleven and two I made notes for an argument. I called my wife and she brought me some black shoes in place of the brown ones that I was wearing and a less noisy tie, and she brought me a couple of sandwiches. I walked over to the Court of Appeals Building (thinking that the fresh air would be good for me) and almost couldn't get in because of the crowd of reporters and photographers on the outside. I got in and the first thing that happened was that a Deputy Clerk came up to me and said, "Who is going to move your admission?" I intimated that I had been admitted to practice in the Court of Appeals and I argued the case for something over an hour, of course, violating every instruction that had ever been given to any law student, even in those schools which did fairly well in instruction on appellate advocacy. I argued the case without ever having seen the record, without ever having seen a brief on either side, and without really having much of an idea of what it was all about. It was a good experience because I found that I could get away with it, not that I could win the case, but that I could complete the argument and not have to sit down in utter confusion. There were various interesting episodes during the argument, but I won't take time for them.

And so I came away on Tuesday afternoon and I read in the papers about a corresponding case going on up here in New York involving the New York Times. On Wednesday that case was decided and on Thursday the New York Times filed a petition for certiorari.

On Wednesday afternoon the Court of Appeals decided against us in the Washington Post case, so on Thursday we prepared an application for a stay in that case because we felt that the two papers should be treated alike. As the New York Times had been enjoined, the Washington Post oughtn't to get a beat on the New York Times. We

filed an application for a stay, and as a sort of an afterthought at the very bottom of this application for a stay — which didn't comply with any rules about filing copies of the opinion below and what not — we put in two lines: "And if the Court would like to treat this application as a petition for certiorari, that is all right with us." The next morning just before noon the Chief Justice called me on the telephone and said, "The Court has granted the petition for certiorari in the newspaper cases and the cases are set for argument at 11:00 o'clock tomorrow morning."

At this point, I had never seen the Pentagon papers. I did arrange to get them delivered to my office — all forty-seven volumes of them — and with them came a security guard. He turned to my secretary and said, "Who is she?" I said, "Well, she is my secretary." "Is she going to be working with these?" I said "Why, yes, I suppose she will have to; I undoubtedly will find things I want —" "Is she cleared?" And I said, "I don't know whether she is cleared or not. I haven't got time to check on this. She is my secretary and I am responsible." "Well, she can't work on it unless she is cleared." And I finally politely told him to depart, to report to anybody that he needed to report to — I wanted him to do his duty, but it was perfectly apparent that I was going to need the help of my secretary.

And then I got in three people from the Defense Department, the State Department and the National Security Agency. I had an hour with each one of them and I said, "Now you tell me what are the things in this which are really bad." Up to this point I had never opened any of the papers. There are seven million words in the forty-seven volumes and if one read them all at a pretty rapid rate of speed, it would take seven weeks — and I had a few hours. And from the three gentlemen, who were very helpful, I picked up forty-two items that they thought were matters of concern. Let me say this — a thing that surprises me and that nobody on the outside has thought of or suggested its significance — one of the reasons that the cases were started in the first place was that there was nobody in the Department of Justice who knew anything whatever about what was in them or who had ever even heard of the Pentagon papers before the New York Times started to print them. And so the real objective of starting the suit was simply to say "For God's sake, give us time to find out what this is all about." It was on that Friday afternoon

I had three hours to be told that there were forty-two items. I then went through the forty-two items, scanning — I couldn't read everything — and I picked out eleven of the forty-two and I waived everything else. Actually, I would have claimed rather less than the eleven myself, but I had to take into account the wishes of other people in the Department.

While this was going on, I had had my First Deputy, Daniel Friedman, a very able Columbia Law School graduate, write what we called the Open Brief, and I said, "Do it by yourself. Don't bother me unless you feel you have to." And between two in the afternoon and three the next morning Daniel Friedman wrote what I would regard as a brilliant twenty-five page brief.

Beginning about 6:00 o'clock, I dictated the Secret Brief to my secretary. I finished the dictation about 3:00 o'clock in the morning. I then went home thinking that maybe a few hours of sleep would be useful before the argument the next day. At 8:00 o'clock that morning, I then proofread what my secretary had typed and she corrected it. It was Saturday morning. Who ran the Xerox machine? The Solicitor General of the United States ran the Xerox machine! My secretary took charge of the assembling of the items and we got it put together. I then took twelve copies up to the Court and this security guard turned up again. He said, "What are you going to do with the ten copies you have?" And I said, "I am going to file them with the Clerk of the Supreme Court." "Is the Clerk cleared?" I said, "I don't know, but I am going to file them." Well, then we got that done, and I had a copy for Alex Bickel, counsel for the New York Times, and one for Mr. Glendon, counsel for the Washington Post. He said, "What are you going to do with those?" I said "I am going to give them to the

counsel on the other side." "Well," he said, "that is giving it to the enemy!" I said, "Well, put it that way if you want to, but my obligation is perfectly clear. I am going to have to give one to counsel on each side." Indeed, this was the only way that we had of getting across to the papers what we were really concerned about.

The argument was held and then there was Sunday. The arguments were printed in full text in the New York Times, and I read it with great interest to see what it was that I had said. It didn't read too badly. On Monday morning I got down to my office at about 9:00 o'clock and Mr. Glendon was sitting outside waiting to be let in. I said, "Well, nice to see you here this morning." He said, "I have never read your Secret Brief." "Well," I said, "what in the world do you mean? I personally handed you a copy in the Supreme Court on Saturday morning." He said, "Yes, but as soon as the argument was over that security guard came up and took it away from me!"

Well, we won the case since none of the eleven items to which I referred was in fact printed by the papers at that time with perhaps one or two exceptions. Some of them were printed later — after they came out in the Senator Gravel edition — but there was one item, probably the most important, that has never been printed anywhere. Just by way of a footnote I would like to observe that within the month the Supreme Court denied certiorari in the Marchetti case, which is the case involving a former employee of the C.I.A. who was about to have his memoirs published by a publishing house here in New York. A suit was brought to enjoin that publication, the Fourth Circuit held that an injunction should be granted, and the Supreme Court denied certiorari. So the issue of prior restraint, I guess, is one which we will continue to discuss over a good many years.



THE COURT IN
RECENT LITERATURE

"It is my wish as well as my Duty to attend the court": The Hardships of Supreme Court Service, 1790-1800

by Maeva Marcus, James R. Perry, James M. Buchanan, Christine R. Jordan, and Steven L. Tull

The most novel governmental institution created by the Constitution of the United States is the Supreme Court. Yet Article III of the Constitution provides only a brief sketch of this most important third branch of the federal government. It remained Congress's task to flesh out the judicial system, which it did in "An Act to establish the Judicial Courts of the United States," passed on September 24, 1789. Never having had a full-blown national judiciary in America before, those associated with its formation knew they were undertaking a great experiment. Experience would furnish the best guide for fine tuning the system. Thus the early years of the Supreme Court's history are crucial to understanding how this institution came to occupy the place it holds in American government today.

Both Congress and the president appreciated the importance of the judicial branch of government. Congress, for example, awarded the justices of the Supreme Court higher salaries than most other officials of the federal government. President George Washington chose the most eminent men for his first appointments to the Court. But service on the new nation's highest bench brought with it a particularly heavy burden of hardship as well as honor, a burden that may have been in some part responsible for slowing the development of the Supreme Court into an esteemed coequal branch of the federal government.

Most burdensome for the justices was the extensive travel necessary to fulfill their judicial duties. Each year they attended two terms of the Supreme Court—one in February and one in Au-

gust. Court was held in the nation's capital (New York in 1790, Philadelphia from 1791 to 1800); since no more than one of the justices ever happened to live in the capital, the others had to travel from their home states in order to attend. In addition, the justices were required by law to ride circuit around the country. In the Judiciary Act of 1789, Congress had created in every state a federal district court with a federal judge presiding; Congress then had grouped the district courts into three circuits and required two Supreme Court justices to attend circuit courts at two places in every



Travel made difficult by uncertain roads and bad weather was one of the most significant hardships endured by justices throughout the Court's first century.

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district twice each year. Thousands of miles of travel were thus necessary. Because of the many complaints from Supreme Court justices regarding the onerous duty placed upon them, Congress, in March, 1793, amended the Judiciary Act to require the presence of only one Supreme Court justice at each circuit court.

In letters to family and friends, the justices recorded the difficulties of traveling to sessions of the circuit courts and the Supreme Court. Through all sorts of weather, the justices journeyed great distances over poorly marked and badly made roads. They endured the hazards of crossing rivers and streams, sometimes at the height of spring flooding. They occasionally stayed with friends or with individuals to whom they had been recommended; but more frequently they lodged at taverns, ordinaries, or other public houses. Accommodations at these public houses were often crowded and dirty. The quality of food varied from very good to very bad. As might be imagined, these conditions took a toll on the health of the justices.

The rigors of this extensive travel directly affected the ability of the justices to attend sessions of the Supreme Court itself. Illness was the single most important factor preventing or limiting their presence on the bench, but the difficulty of getting to New York or Philadelphia also contributed to absenteeism. That the Court met in the blistering heat of August and the wintry cold of February augmented these problems. The letters and newspaper items that follow, taken from the period January, 1792, to August, 1800, provide contemporary accounts of the difficulties in attending meetings of the Supreme Court during the Court's first decade. These documents reveal the justices' awareness of their constitutional duty as well as their sometimes heroic efforts to fulfill that duty despite physical discomfort and danger. Several justices did not serve long terms because of the hardships involved, and two died in office. In the course of the initial ten years—during which time the Court was composed of only six justices—twelve different men held the position of Supreme Court justice.

Minor changes have been made in order to transfer the following documents into print. Only a few of the documents have been reproduced in full. Most begin and end with ellipses to indicate that extraneous text has been left out. Spelling, capitalization, and punctuation (including the ubiquitous baseline dash) have been retained as



Chief Justice John Jay

National Archives

they appear in the original. For technical reasons, marks of punctuation appearing beneath superior letters—a common eighteenth century practice—have been deleted. Editorial insertions appear in italic type within brackets. All the letters published here are recipient copies, and all were written and signed by the sender.

The letter from Chief Justice John Jay that begins this collection is a good illustration of the early justices' problem in solving the conflict between the great burden of their official duty and their personal affairs. Jay tries to balance his desire to perform his duties responsibly with the necessity to take care of his family. He is so concerned about absenting himself from the Court that he addresses his explanation to the president. Jay states that his coming absence is attributable to his pregnant wife's precarious state of health but also indicates that his decision to remain at home was influenced by the lack of significant business before the Court. It is interesting that both Chief Justice Jay and Associate Justice William Cushing (in the next letter in the collection) chose to write to President Washington, the head of the executive branch. These are the only such letters found from a justice of the Supreme Court explaining his absence to the president in the first decade.

Chief Justice John Jay to President
George Washington
January 27, 1792—New York, New York
(*George Washington Papers, Library of Congress*)

...As I shall be absent from the next sup:
Court, obvious Considerations urge me to
mention to You the Reasons of it: Early in
the next month I expect an addition to my
Family— Mrs Jay's delicate Health (she
having for more than three weeks past
been confined to her Chamber) renders
that Event so interesting, that altho she is
now much better, I cannot prevail on my-
self to be then at a Distance from her; es-
pecially as no Business of particular Im-
portance either to the public, or to
Individuals, makes it necessary— ...

Associate Justice William Cushing to President
George Washington
February 2, 1792—New York, New York
(*George Washington Papers, Library of Congress*)

...I take the liberty to inform you that be-
ing on my journey to attend the Supreme
Court, which is to sit next monday, I have
had the misfortune to be stopt here, since
Friday last, by a bad cold attended with
somewhat of a fever, so that the probabili-
ty, at present, seems against my being able
to reach Philadelphia by the time court is
to sit. Assoon as my health permits, how-
ever, I design to proceed there. The travel-

ling is difficult this Season: — I left Bos-
ton, the 13th Jan^y in a Phaeton, in which I
made out to reach Middleton as the Snow
of the 18th began, which fell so deep there
as to oblige me to take a Slay, & now
again wheels seem necessary. If Judge
Blair & Judge Johnson attend there will be
a Quorum, I suppose, as two other Judges
are upon the Spot. The Chief Justice, I per-
ceive, cannot be present this term. — ...

Chief Justice John Jay to Associate Justice
William Cushing
January 27, 1793—New York, New York
(*Robert Treat Paine Papers, Massachusetts Historical
Society*)

New York 27 Jan^y 1793—

Dear Sir

I am prepared and purpose to set out for
Ph^a Tomorrow if the weather should prove
fair. for altho I have regained more Health
than I had Reason to expect to have done
so soon; yet I find it delicate, and not suffi-
ciently confirmed to admit of my travelling
in bad weather. I mention this that in Case
the ensuing week should be stormy, my
absence from you may not appear singu-
lar— It is my wish as well as my Duty to
attend the court, and every Exertion that
for
prudence may permit, shall be made [^]
that purpose— I hope the Benevolence of
Congress will induce them to fix the
Terms at more convenient Seasons, espe-
cially as the public good does not require
that we should be subjected to the Cold of



Associate Justice William Cushing



Associate Justice James Iredell

Feb'y or the Heat of August— Mrs Jay joins me in requesting the favor of you to present our best Compl^{ts} to Mrs Cushing—

I am Dear Sir your affect^{le} & h'ble Serv^t
John Jay
The Hon'ble Judge Cushing—

Associate Justice James Iredell to Chief Justice John Jay
January 21, 1794—Williamston, North Carolina
(*John Jay Papers, Columbia University*)

... It is with the most sensible mortification that I have to inform you of the disappointment of my expectation of attending at the Supreme Court in February, at which time I was extremely anxious to attend on account of the variety of important business which probably will then come on, and of the novel and peculiar nature of a part of it. I accordingly set off so early as the 14th, but was unfortunately taken sick when I had rode about 40 miles, and obliged to return. My health has since got better, but not so much so as to enable me to proceed. ...

If the present System is to continue, I beg leave to submit to you and the other Gentlemen whether the first Monday in January will not be a better time for the Supreme Court to meet than the first Monday in February. It is a much more certain time of travelling from the Southward, and

no particular objection occurs to me in respect to it. ...

You will be so good as to inform the other Judges of the circumstance which has unfortunately prevented my having the pleasure to meet them, and I beg the favour of you at the same time to assure them of the high respect I constantly feel for them. ...

In the next documentary excerpt Jeremiah Smith, a congressman from New Hampshire and a frequent observer of the Supreme Court, writes to William Plumer, a leading federalist in his home state, about absenteeism on the bench. Smith seems particularly upset by the absence of John Jay who was in England negotiating a new treaty.

Jeremiah Smith to William Plumer
February 7, 1795—Philadelphia, Pennsylvania
(*Plumer Papers, New Hampshire State Library*)

... The Supreme Court commenced their session on monday.— Much of the dignity of the Court is lost by the absence of the Chief Justice— Judge Cushing has not attended every day— He is under the Care of a Physician for a Cancer on his Lip— He attends part of the Time & in those Causes where they cannot make a quorum without him.— ...

Associate Justice John Blair, one of George Washington's original appointments to the Supreme Court, gives evidence in the following letter of the great efforts made by justices to perform their official duties. Here Blair describes his experiences while attempting to meet his obligation to ride the southern circuit and his fear that he will not be able to attend the Supreme Court in August in Philadelphia. In fact, Blair sent his letter of resignation to President Washington on October 25, 1795.

Associate Justice John Blair to Associate Justice William Cushing
June 12, 1795—Williamsburg, Virginia
(*Robert Treat Paine Papers, Massachusetts Historical Society*)

... I ought to inform you, that a malady which I have had for some years, in a smaller degree, has since I had the plea-



Associate Justice John Blair

sure of seeing you increased so greatly as to disqualify me totally for business— It is a rattling, distracting noise in my head— I had much of it at Savannah; besides almost continual cholic. I would fain have declined the decision of several Admiralty

there, cases, if I had not been told that delay would be greatly injurious, on account of the prize-goods being stored at a very great daily expense— This circumstance prompted me to go thro that business, altho in a condition not fit for any; & I have some reason to fear that in doing so I have effected nothing but work for the Supreme

court, by undoing what I have done. It is, however, a consolation to me, that there is yet a court where my errors may be corrected— When I came to Columbia, I found much business of the same sort; but as in those cases bond & security had been given, & the goods not stored, altho I heard an argument on two of them, I thought it adviseable (my disorder still increasing) to decline making any decree & adjourn the court— The same cause induced me to decline holding the court at

but make the best of my way home, Raleigh, having first done every thing I could to prevent the fruitless attendance of others; & from every thing I have experienced since my being at home, I have little encouragement to think that I shall be able to attend court in August; I fear I never shall; & if I find no speedy amendment, so as to justify an expectation that I may be again qualified to execute the duties of my office, I shall certainly resign it—...

The next letter, from Justice James Iredell to his wife Hannah, furnishes a vivid description of the troubles faced by the early justices and the toll these hardships took on their well-being.

Associate Justice James Iredell to Hannah Iredell
July 2, 1795—New York, New York
(Charles E. Johnson Collection, North Carolina State
Department of Archives and History)

... I arrived here the day before yesterday, after a very agreeable passage from Newport of about 51 hours. The latest letter I received from you was of the 7th of June, but Mr Lenox told me he forwarded one to Newport, which I expect will be returned here. I am perfectly well, but extremely mortified to find that the Senate have broke up without a Chief Justice being appointed, as I have too much reason to fear that owing to that circumstance it will be unavoidable for me to have some Circuit

duty to perform this fall— Four Judges out of five were upon duty the last time, and there is some business, which will make it indispensably necessary that two Judges shall be on the Eastern Circuit. Judge Blair (owing to the Chief Justice's absence) went upon the Southern Circuit this last spring when he was entitled to stay at home if possible, and Judge Wilson had also several Courts to attend tho' it was his turn to stay, and they had additional duty on the same account 12 months before— At least four Judges must be on the Circuit this fall, and I hear with great concern that Judge Blair was so sick in South Carolina that he was not able to do any business there. If I have to attend any I presume it will be the middle Circuit, which begins at Trenton on the 2^d October. Should I be so unfortunate as to find this unavoidable, I will at all events go home from the Supreme Court if I can stay but a fortnight— but how distressing is this situation? It almost distracts me. Were you & our dear Children any where in this part of the Country I should not regard it in the least— But as it is, it affects me beyond all expression. The state of our business is now such, that I am persuaded it will be very seldom that any Judge can stay at home a whole Circuit, so that I must either resign or we must have in view some residence near Philadelphia, I don't care how [retired?], or how cheap it is. The account of your long continued ill health has given me great pain, and I am very apprehensive you will suffer relapses during the Summer. My anxiety about you and the Children embitters every enjoyment of life. Tho' I receive the greatest possible distinction and kindness every where, and experience marks of approbation of my public conduct highly flattering, yet I constantly tremble at the danger you and our dear Children may be in without my knowing it in a climate I have so much reason to dread. May God Almighty, in his goodness, preserve you all! At this distance, & not capable of judging, I must depend altogether on your discretion to do what is for the best, whether to remain in Edenton during the summer or not— Draw upon me for what you money you want— I will endeavour to send you some Sherry and Port Wine from here. Mr Jay was sworn in as Governor yesterday. He was in danger of dying on his passage, and does not look well now. I am told, which has greatly astonished me, that he did not send his resignation of Chief Justice till two or three days ago, since the Senate broke up. Whatever were his reasons, I am persuaded it was utterly unjustifiable. The President may himself make a temporary appointment, but it is not much to be expected, I fear, as few Gentlemen would chuse to accept under such circumstances. I expect to go in a few days to Philadelphia. ...

Almost three years have passed between the writing of the previous excerpt and the next two excerpts. Oliver Ellsworth of Connecticut is now the chief justice. He replaced John Rutledge who had served one term as chief justice on a temporary commission but was not confirmed by the Senate for a permanent appointment. Rutledge had succeeded John Jay who, upon his return from England, had resigned in June, 1795, to become governor of New York. Samuel Chase is the associate justice who had replaced John Blair. Both William Paterson, appointed to the Court in 1793, and James Iredell, commissioned in February, 1790, write to their wives about their concern that, with important business before the Court, only a bare quorum of the judges has arrived in Philadelphia for the February 1798 term.

Associate Justice William Paterson to Euphemia Paterson
February 5, 1798—Philadelphia, Pennsylvania
(William Paterson Papers, The State University at Rutgers)

...The Chief Justice has not yet come on, and it uncertain, whether he will be here, as he has not been well for some time. Judge Wilson is in North Carolina, and in such a bad state of health as to render it unsafe for him to travel. The other judges are here, and to-day court was opened. I can form no opinion as to the length of time we shall sit; but, I hope, we shall rise in the course of three weeks at furthest.

James Iredell to Hannah Iredell
February 5 and 8, 1798—Philadelphia, Pennsylvania
(Charles E. Johnson Collection, North Carolina State Department of Archives and History)

[February 5:] Our Court is to begin to day, but we have barely a quorum consisting of the Judges Cushing, Paterson, Chase, and myself: the Chief Justice being unfortunately in very bad health, and we have now no reason to expect he can attend. ...

[February 8:] Our Court has been very busily employed since Monday, being in Court every day from ten till three. Unluckily, the Chief Justice is in such bad health, that he has not been able to come on, nor is now expected. ...

In the following excerpt Samuel Chase provides a graphic account of the illness that kept him from the February 1799 term of the Supreme Court and that would cause him to miss the circuit court in New York. James Iredell, on his way to Philadelphia to attend the Supreme Court, had visited Chase in Baltimore.

Associate Justice Samuel Chase to Associate Justice James Iredell
March 17, 1799—Baltimore, Maryland
(James Iredell Sr. and Jr. Papers, Duke University)

...For five weeks after you left Me I was [letters inked out] confined to my Bed-Chamber, and three to my Bed. for some Days I was very ill. I was so very weak, that I could not walk across my Room without assistance. it is 14 Days, this Day, since I came below Stairs, and I have been only able, this last Week, to go in a close Carriage into the City for Exercise. I have not the least Hope of being able to travel in time to attend the Circuit Court at New York, on the 1st day of next Month. a Relapse would be fatal. my Cough is still bad and the Spitting continues. my Lungs are so very weak, that I cannot bear the least any but very gentle Exercise. ...

The next letter relates to James Iredell's absence from the Supreme Court during the August 1799 term. Iredell's circuit the previous spring had been very arduous because of the trial in Pennsylvania of John Fries and the Northampton insurgents. The increasing emotional strain on Iredell



Associate Justice William Paterson



Associate Justice Samuel Chase

during the course of the trial shows in the letters he wrote to his wife Hannah in May, 1799 (Charles E. Johnson Collection, North Carolina State Department of Archives and History). Two months after Bushrod Washington wrote the following letter, James Iredell died on October 20, 1799.

Associate Justice Bushrod Washington to Associate Justice James Iredell
August 20, 1799 — Alexandria, District of Columbia
(Charles E. Johnson Collection, North Carolina State Department of Archives and History)

... Upon my arrival at Baltimore about the first of the month, I heard from Judge Chase, with great concern that you were too much indisposed to attend the supreme Court. The fatigue to which you had been exposed during the Circuit was well calculated to produce this consequence, and you would have acted imprudently I think to venture upon so long a Journey in your then state of health. It will afford me very sincere pleasure to hear of your recovery.

Judge Cushing was seized upon the road by an indisposition so severe as to prevent his proceeding. Fortunately, there was no business brought on which involved any question of importance or difficulty, & the term was consequently short. I went from and returned to Baltimore with our brother Chase, whose excellent flow of spirits & good sense rendered pleasant a Journey which would otherwise have been fatiguing & disagreeable. ...



Associate Justice Bushrod Washington

The next group of documents, composed of letters and newspaper articles, demonstrates the continuing difficulties faced by the early justices as the decade wore on. A letter from Associate Justice Samuel Chase to his wife illustrates in minute detail the hazards of travel that faced the justices as they attempted to get to Philadelphia in time for the opening of the Court. The remaining documents show how the absence of the justices from the Supreme Court affected the conduct of business.

Philadelphia Gazette February 3, 1800

The Hon. Judge CHASE very narrowly escaped being drowned, a few days ago, in crossing the Susquehanna. He was taken from the river almost lifeless.

Mr. Chase was on his way to this City.

Associate Justice Samuel Chase to Hannah Chase
February 4, 1800 — Havre de Grace, Maryland¹
(Dreer Collection, Historical Society of Pennsylvania)

... It has pleased God once more to save Me from the most imminent Danger of sudden Death. my Son also in his great Exertions to save Me fell in three times and was in very great Danger. a young Officer of the Name of Alexander was the chief Instrument. he tied a Leather Strap round

my leg, and my Son held Me the whole time, by my Coat near my Neck, I beleive about five Minutes. I once exerted myself so far as to get my Breast on the Ice, but it broke. I was perfectly collected, but quite exhausted, I relied only on the protection of my god, and he saved Me. I am was concerned to see my son in such Danger, but he would not save himself without saving Me. a Negroe Fellow (called Ben) was the only Person besides Mr Alexander, who gave any assistance. there were two french gentlemen, who were so frightened they ran ashore.— the other Negroes were also so alarmed that they did not assist, but running up all together but my Son called and stopped them, as all would have broke in and probably all perished. when I was haled² out I got on the Baggage Sledge, and was drawn ashore by two Negroes.— again all would have come to the Sledge but my Son prevented them. I was brought in Arms of all to the House. I immediately was rubbed dry and put into Bed between Blankets. I fell in before Sunrise.— At 10 oClock Sammy³ wrote Tommy,⁴ and Cap^t Barney sent to the post office; by Neglect of the ~~post~~ Deputy Post Master [he?] it was not sent. after 12 oClock Cap^t Ketty was so kind (with Mr Pleasants) to call to see Me. I was then in a little perspirabal,⁵ which came on with Difficulty. My Head was rubbed all over with Brandy. I took a little burnt,⁶ and drunk [Whey?] and Tea. I was afraid to sit up to write, and sent You a Message by Cap^t Ketty. in the Morning I set up to have my ~~the~~ Bed [made and?] yesterday Morning I got up and shaved, and I cannot discover that I have taken Cold, and I think I am as well as if the accident had not happened. for fear You should think I was hazardous I will give You the particulars.— We got here on Fryday about 4 oClock. Cap^t Barney said the Ice would not bear, and could not easily be cut. on Saturday afternoon some Persons crossed on the Ice. on Sunday before Day light one of the Negroes came into my Room. and desired me to get up, that the passengers were going over, that the Ice had been tried and would bear a Waggon and horses. when I came down I asked Cap^t Barney, who said the Ice had been tried, & there was no Danger.— two Negroes went before Me with the Baggage on a sleigh. I followed directly on the Track. Sammy went about ten feet on my right Hand, the other Passengers followed. Myself and Son carried a long Boat-Hook. about 150 Yards from the shore, (in about fifteen feet Water) one of my feet broke in, I stepped forward with the other foot, and both broke in. I sent the Boat-Hook, & across, which prevented my sinking. Sammy immediately ran up, and caught hold of my Cloaths, and fell in.— he got out and lay on the Side of the Hole, and held Me and broke in twice afterwards.— I was heavily cloathed. my Fur Coat was very

heavy when it got wet.— I must inform You of our Circumstance. I had just offered up a prayer to god to protect Me from the Danger, when I instantly fell in. You know I have often mentioned Instances of the special Intraposition⁷ of providence in my favor, among several, last December in Annapolis. I believe I was saved by his special favor. and I feel myself most grateful, and shall now have cause to remember and to give Thanks.—

Sammy wrote Tommy on yesterday, & I hope it got safe and made You easy.— In the afternoon Judge Washington got here, & immediately passed in the Mail Boat.— I will pass when I can go in the large Boat. the people are now breaking over, and the passengers are preparing to go over[.] I shall stay, at least until the Boat returns, and be satisfied I ~~will~~ will not go until there is no possible Risque. . . .

¹ Samuel Chase misdated this letter as January instead of February. When he wrote it, he was "At Captain Barneys," a tavern, formerly called Rodger's Tavern, at Havre de Grace, Maryland, on the west bank of the Susquehanna River.

² "To draw or pull." *OED*.

³ Samuel Chase, Jr. (1773-1841), son of Samuel Chase.

⁴ Thomas Chase (1774-1826), son of Samuel Chase.

⁵ Samuel Chase, who was thawing out from his fall in the icy river, means here that "in a little" time, as he warmed up, he was perspirable, or able to perspire.

⁶ I.e., burnt brandy.

⁷ I.e., interposition.

Philadelphia Gazette August 12, 1800

On Saturday last, the Supreme Court of the United States commenced its session in this city. The indisposition of Judge Chase prevented the Court from proceeding to business on the first day of the term. Several important causes will be heard and determined in the course of the present week. . . . Judge Cushing (owing to indisposition) has not attended. . . .

Associate Justice William Paterson to Associate Justice William Cushing August 19, 1800—New Brunswick, New Jersey
(*Robert Treat Paine Papers, Massachusetts Historical Society*)

... Judge Chase, being indisposed, did not arrive at Philad^a till saturday, the 9th of the month, when we made a court, and went through the business by friday afternoon of the following week.— . . .

The conclusion to be drawn from this collection of documents is that the Supreme Court justices were acutely aware of the importance of their official duties and made sincere efforts to meet their obligations. But the impediments Congress had placed in their way made it difficult for the early justices to carry out their duties in a way that added dignity and importance to the judicial branch. The justices' absence from Supreme Court and circuit court sessions, whether caused

by illness, the hazards of travel, or additional tasks imposed on them by the president and Congress, undermined their effectiveness and hampered the development of the Court. Thus at the end of the first decade of the Court's existence, the justices, though faithfully discharging their duty to interpret the Constitution, had not yet molded the Supreme Court into the governmental institution of tremendous consequence that it is today.

On Review: Recent Books About the Supreme Court, the Justices, and the Constitution

by D. Grier Stephenson, Jr.

The United States Supreme Court and its decisions have long been the target of the analytical and probing eyes of scholars, journalists, and other publicists. Indeed, the work of the Court has attracted attention since its first session in 1790, a fact which should surprise few in a political system which both aspires to be democratic and allows judges such a large hand in interpreting public policy. "Where the courts deal, as ours do, with great public questions," confided Justice Stone, "the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."²

Other Justices have sometimes encouraged such scrutiny. "It is a mistake to suppose," Justice David Brewer declared in 1898, "that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all and its judgments subject to the freest criticism."³ Charles Evans Hughes claimed that widespread knowledge of how the Court operated would reaffirm popular respect for the judiciary.⁴ And Professor Felix Frankfurter echoed Brewer's call before his own appointment to the Court. "[T]he work of the Supreme Court," Frankfurter maintained, "is the history of relatively few personalities. . . . To understand what manner of men they were is crucial to an understanding of the Court."⁵ Later he asserted, "The intimacies of the conference room—the workshop of the living Constitution—are illuminations denied the historian. . . . Divisions on the Court and clarity of view and candor of expression to which they give rise, are especially productive of insight. Moreover, much life may be found to stir beneath even the decorous surface of unanimous opinions."⁶

Interest in the Court shows no signs of abating, not in the least because its justices remain in the forefront of the controversies which perplex and divide the nation. Several recent volumes high-

light the work of the modern Court, its Justices, and the relationship between the Supreme Court and the constitution.⁷

The Modern Court

Publication of Bernard Schwartz's *Super Chief: Earl Warren and His Supreme Court* in June 1983 occurred almost fourteen years to the day after Warren witnessed the swearing in of his successor, Warren Earl Burger, on June 23, 1969, as Chief Justice of the United States. Students of the Court today are therefore nearly as removed in time from Warren's departure as Chief, as Warren himself was in 1969 from his first day on the bench in October 1953. While the Warren Court has ever since been of interest to politicians, practitioners, and scholars alike, Professor Schwartz's volume is the first full-scale chronicle not only of the decisions of the Warren Court but of the Chief Justice's hand in them. The result is a massive display of the Supreme Court at work during the years 1953-1969, rather than a biography in the usual sense.⁸

When Warren became Chief Justice, no small part of his new challenge lay in the variety of strong-willed personalities who populated the bench. Justices such as Felix Frankfurter, Robert Jackson, Hugo Black, and William Douglas comprised, some assert, not only one of the most talented quartets of brainpower ever to grace the Court at the same time but one of the most feuding and animosity-ridden groups in the Court's history. The "brethren" Warren now had to try to lead, writes Schwartz, "were perhaps the most unbrotherly in the Court's annals."⁹

The second part of Warren's challenge appeared as a maze of complex issues which increasingly crowded the docket. When Warren took both the constitutional and judicial oaths as Chief Justice on October 5, his thirty-four years of previous public service paled in comparison to what "his" Court would do during the next sixteen. According to Schwartz, Warren led the Court in a



Curator's Office, Supreme Court



Curator's Office, Supreme Court



Curator's Office, Supreme Court



Curator's Office, Supreme Court

Associate Justices Felix Frankfurter (top, left), Hugo Black (top, right), Robert Jackson (bottom, left), and William O. Douglas (bottom, right). Was this "talented quartet of brainpower" racked by internecine feuds?

way the nation had not seen since the days of John Marshall, if then. At his retirement in 1969, the name of Earl Warren and the designation "Warren Court" had become synonymous with judicial activism. Certainly it was difficult to recall any other period of similar length when the Justices had engaged themselves on so many fronts in so many causes. Likewise, one would be hard-pressed to

discover another time in American history or in the history of any other nation when a court became the prime mover of such extensive social change, or when so pervasive a revolution was ever achieved by largely peaceful means. "Coming to grips with the hard, often unpleasant facts of contemporary American life," Alpheus Mason has written, "the Warren Court translated our

long-time commitment to racial equality into a certain measure of social and constitutional reality." The reapportionment decisions "brought us closer to the ideal professed in 1776, [that] just governments rest on the consent of the governed. New rules of criminal procedure were formulated, giving a ring of truth to Equality under the Law."¹⁰ The prevailing mood seemed to belong, in Justice Harlan's view, to those who saw the Court "primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source. . . ."¹¹

Super Chief is distinguished by a thoroughgoing reliance on Justices' personal papers and Court memoranda to an extent not seen since appearance of Alpheus Thomas Mason's monumental *Harlan Fiske Stone*¹² nearly three decades ago. Not only are the Harold Burton Papers at the Library of Congress and the Felix Frankfurter Papers at Harvard and the Library of Congress mined extensively, but numerous citations refer the reader to the John M. Harlan Papers at Princeton and the Tom C. Clark Papers at Texas.¹³ Moreover, Schwartz has squeezed more than anyone yet from the surviving Hugo L. Black Papers, also at the Library of Congress. Finally, there is at least one acknowledged, but unidentified, source for the detailed descriptions Schwartz includes on the second half of Warren's tenure as Chief Justice. From these and other resources, Schwartz constructs a perspective of Warren and his Court's decisions and presents substantial amounts of new information on, and insight into, how the justices arrived at those decisions.

Two episodes merit brief attention here: the 1954 school segregation and the 1962 reapportionment cases.¹⁴ With the former, Schwartz's research leads him to the conclusion that Justice Frankfurter deserves principal credit for delaying a decision on the constitutionality of racial segregation in public schools from 1952 to the 1953 term. A June 1953 decision in *Brown* would probably have been six to three or perhaps five to four in favor of the Negro plaintiffs. In view of the hostility and defiance a unanimous bench faced for a decade after 1955 in implementing *Brown*, one can only imagine the consequences awaiting a *Brown* Court split nearly down the middle. Furthermore, the bench which faced *Brown* a second time in the fall of 1953 was led by newly appointed Chief Justice Warren who, Schwartz contends, was much more resolute in moving to end racial segregation than his predecessor Chief Justice

Vinson had proven to be.

With legislative reapportionment, Warren himself later agreed that decisions such as *Baker v. Carr* and *Reynolds v. Sims*¹⁵ had been his Court's greatest handiwork. Students of the Court know that *Baker* stands for the proposition that the Supreme Court (as well as other federal courts) has jurisdiction over the apportionment of state legislatures. Yet, *Baker* did not lay down particular standards the district courts were supposed to apply in suits challenging apportionment. Instead, the standard appeared in the 1964 cases of *Wesberry v. Sanders*¹⁶ and *Reynolds v. Sims* when a majority imposed the one-man/one-vote rule on congressional districts and on both houses of state legislatures.

According to Schwartz, *Baker* came close to being a different decision. Most of the *Baker* majority were prepared to say that the Equal Protection Clause required states to maintain "approximately fair weight" in apportioning *one* house of a state legislature. (This was not the equality standard the Court later imposed in 1964.) But in order to preserve a majority of the Court behind a single opinion, the question of standards was left out. Instead, Justice Brennan's opinion for the majority reached only the jurisdictional issue, leaving the required standard for another day and case. By 1964, a majority of the Court was ready to adopt an equality standard not just for one legislative chamber but for both. Had *Baker* originally laid down a standard for constitutionally correct appointment, it seems improbable that the same justices would have changed their minds two years later to adopt the nearly inflexible rule of numerical equality.

Race, apportionment, and many other questions which engaged the Warren Court comprise much of the business of the Burger Court. A survey of major developments at the Court since 1969 appears in editor Vincent Blasi's *The Burger Court*.¹⁷ If Schwartz's *Super Chief* is a work by a single author exploring a variety of legal and constitutional questions through the perspective of the Chief Justice, Blasi's is a collection of eleven articles authored by twelve scholars largely focusing instead on a series of legal topics. These range from Thomas Emerson's "Freedom of the Press under the Burger Court" to Ruth Bader Ginsburg's "The Burger Court's Grappling with Sex Discrimination" and R.S. Markovits's "The Burger Court, Antitrust, and Economic Analysis." Of general interest are



The Burger Court in 1975. Seated (left to right) in the front row are: Associate Justices Byron White, and William J. Brennan, Jr., Chief Justice Warren Burger, and Associate Justices Potter Stewart and Thurgood Marshall. Standing (left to right) are: Associate Justices William H. Rehnquist, Harry A. Blackmun, Lewis F. Powell, Jr., and John Paul Stevens.

two: Martin Shapiro's "Fathers and Sons: The Court, the Commentators, and the Search for Values," and Vincent Blasi's "The Rootless Activism of the Burger Court."

In Shapiro's view, the bulk of the commentary on the Warren Court during the 1950's and 1960's came from a generation of scholars whose formative experience had been the New Deal. Seeing the Warren Court as constitutionalizing the major policies of the New Deal, Shapiro notes the irony in the intellectual battles raged "so fiercely about whether the Court could or should act, while agreeing so fundamentally on the substantive goodness of what the Court was doing or would do if not restrained by its own modesty."¹⁸ These disputations now seem like distant thunder in the literature because generations have changed. For current Court commentators, the major event is not President Roosevelt's fight with the Court, but *Brown v. Board of Education*. The magic year is not 1937 but 1954. For them, there is a happy acceptance of judicial activism, worrying over *how* the Court should act, not *whether* the Court should act.

Yet, just as the previous generation anguished over initiatives of the Warren Court, many from

the current generation of commentators seem displeased with the work of the Burger Court. The displeasure results, however, not because the commentators are activists and the Court is not, but because the Court's activism is not in service of the "right" values. The Warren Court's activism promoted the New Deal values of equality, and herein lies that Court's attractiveness to many commentators today. The Burger Court, Shapiro contends, has not pursued equality values with the same enthusiasm but is inclined toward "autonomy."¹⁹

Of course the Warren Court was not entirely consistent in promoting equality, any more than the Burger Court has unerringly preferred autonomy, writes Shapiro,

In all candor, . . . it must be admitted that the Court, like everyone else, seems to have an enemies list. It is far less interested in defending some people's autonomy than others. The bad guys include pornographers, war protesters, welfare recipients, practitioners of nontraditional religions and life-styles, and the business community. The last in the rogues' gallery may seem to be in odd company. But this is one area in which the Warren Court's constitutionalization of the New Deal's political victory has been sustained and reemphasized by the Burger Court.

Moreover, search and seizure decisions over the past 15 years have hardly enshrined autonomy values, and in affirmative action cases the Burger Court has gone out of its way to promote equality rather than autonomy. "In short," says Shapiro, "the young white male who is low on the career ladder has joined the pornographer and the businessman on the enemies list."²¹

Still, the Burger Court's equality record results in tension between Court and commentators. Just as the 1937 Court fight meant that the "New Deal generation of commentators could not love the truly New Deal Court," the new generation of commentators "cannot love the Burger Court." Why? The "Burger Court is responsive to, and a victim of, the breakdown of the New Deal consensus which the Warren Court pursued."²²

The new generation of commentators is retrospectively happy with the Warren Court for the same reasons it is retrospectively happy with the pre-Vietnam democracy of Lyndon Johnson, and it is unhappy with the Burger Court for the same reasons it is unhappy with the post-Vietnam democracy of Jimmy Carter and Ronald Reagan. In a world in which political goals are not clear and policy consensus is diminished, the Supreme Court is as unlikely as the rest of government to acquire a cheering section.

Like Shapiro, Vincent Blasi portrays an activist bench in his "The Rootless Activism of the Burger Court." Indeed, the current Court is every bit as activist on almost every count as its predecessor, especially in terms of doctrinal innovation. "Perhaps the Warren Court's pace was faster or its range broader," asserts Blasi. But "if so, the difference can hardly be considered dramatic or fundamental. If its legacy of innovative constitutional doctrines is what made the Warren Court the paradigm of an activist court, no new paradigm is needed to comprehend the central tendency of its successor."²³ That assessment is especially significant in view of the efforts by three Presidents since Warren's retirement to select less activist justices. Unlike Shapiro, however, Blasi believes the debate between activists and restraintists will not only continue but continue to be important. Three decades of judicial activism of varying intensity have not left its opponents at bay.

In a second difference with Shapiro, Blasi finds little evidence of any consistent support for particular values, whether leaning toward "equality" or "autonomy." Instead, Blasi gleans from dozens of decisions ample evidence of a "powerful aver-

sion to making fundamental value choices."²⁴ If a majority of the Warren Justices reflected a "moral vision and an agenda" in many of their decisions, the activism practiced by a majority of the present Court is "centrist," "pragmatic," and even "rootless."²⁵ This style is apparently encouraged by the growth of bureaucratic government and the increasing political impact of single-issue groups, combined with what Blasi considers "strength in the center and weakness on the wings" among the justices. The result is activism "inspired not by a commitment to fundamental constitutional principles or noble political ideals, but rather by the belief that modest injections of logic and compassion by disinterested, sensible judges can serve as a counterforce to some of the excesses and irrationalities of contemporary governmental decision-making."²⁶

Pragmatic judicial review is useful in the short run, but risky over time, thinks Blasi, because it "may lose its essential oracular quality, in its claim to embody transcendent principles." Furthermore, "constitutional interpretation makes its most significant contribution to the governing process by legitimating or discrediting basic ideas that lie at the center of political dispute." Blasi believes this contribution is missing. "In that one respect, but only in that respect, the Burger Court has kept a low profile."²⁷

The Justices

Most public officials share with the rest of humankind a common fate; after death, passing years and fading memories soon consign almost everyone to oblivion. Even some justices of the Supreme Court have not escaped this end. Yet a few surely seem destined by their decisions, deeds, and doctrines to be ranked among the remembered; to remain near the gateway of scholarly and popular interest for a very long time.

Rather than reflect on the work of the Court as a whole, some authors prefer to focus attention on the personalities who have given the bench its character. At least since publication of Albert J. Beveridge's *The Life of John Marshall*,²⁸ the judicial biography has come into its own, as a unique type of literature. A judicial biography should attempt at least two objectives: the portrayal of the life of the subject, especially in terms of personal and intellectual growth, interests, and accomplishments; and, the depiction of the Court at work. The two are related, of course, and the goal of each is increased understanding of the institu-

tion by way of the individual. Akin to the judicial biography are circumscribed studies which attempt to highlight one or more aspects of a justice's career.

In *The Brandeis/Frankfurter Connection*,²⁹ Bruce Murphy eschews the approach of the full-scale judicial biography in order to examine the relationship between two extraordinary men who left their mark not only on the Court and constitutional jurisprudence but on the quality of American life. The volume is testimony to the truth that the separated powers mandated by the Constitution make judicial independence possible and that its shared powers make occasional breaches of that independence probable.

Studies by other scholars have shown that law and custom have combined to staff the Supreme Court with individuals who have occasionally relished political activity and who have found abstinence from it a sometimes unattainable goal. Varieties of such political activity are many. Since the time of John Jay's Court, standards of propriety have been least tolerant of partisan ballot-box-related pursuits by justices on either their own or another's behalf. Least objectionable and often even admired have been efforts to improve the efficiency of the courts. In between are things justices can do extra-judicially, directly or indirectly, and more or less privately, to help guide the

course of public policy in areas which may or may not come before them for review.

By almost any measure, Brandeis and Frankfurter would rank among the half-dozen or so most politically active justices. Murphy's examination of their endeavors is the product of extensive and careful research into numerous manuscript collections and oral histories, a few of which have only recently been open to the public. Much of course was already known about the political interests of these two justices. For example, Alpheus Mason's biography of Brandeis four decades ago devoted considerable space to Brandeis's off-Court life.³⁰ Having a narrower scope, Murphy provides more detail, including Brandeis's practice of supplementing Professor Frankfurter's income. Murphy's addition to what is known about Frankfurter is more notable, lending support to the view that, for a decade or more, little of importance happened in Washington that escaped Frankfurter's notice. Moreover, Murphy's book is additional evidence for the developing opinion that Frankfurter's impact as a political operator outside the Court was as far-reaching and perhaps more enduring than his bequests to constitutional jurisprudence.

As a justice, Brandeis went to greater lengths than did Frankfurter to keep his off-Court enterprises out of the spotlight. Brandeis's concern for



Curator's Office, Supreme Court



Curator's Office, Supreme Court

Abstinence from political activity was an unattainable goal for Justices Louis Brandeis (left) and Felix Frankfurter (right), according to author Bruce Murphy.

secrecy is not hard to fathom. The major charge in 1916 against his nomination was "lack of judicial temperament." If by this his critics meant that on the Court he would be unable to abandon his former interests in promoting the commonwealth, they were correct. If all of Brandeis's political activity, including the financial arrangement with his close friend Felix Frankfurter, had become common knowledge during his tenure on the Court, or even shortly thereafter, the charge would have proved accurate.³¹

The Brandeis/Frankfurter Connection has already renewed the debate on judicial proprieties and the risks their infringement entails. As justices, Brandeis and Frankfurter each took chances. Even the latter's close contacts with President Roosevelt in planning for war with Hitler—a subject seemingly far removed then from the Court's docket—surged to the foreground in his majority opinion in the *Gobitis* flag-salute case.³² Recent events suggest that both the likelihood and consequences of exposure are greater today for one who ventures beyond Court-related matters.

Some of the raw material Murphy employed had appeared in Harold Hirsch's *The Enigma of Felix Frankfurter*³³ which attempts to explain judicial behavior in terms of psychological theory. Traditionally, scholars have written about Justice Frankfurter's years on the Court as manifesting faith in a constitutional philosophy of judicial restraint. But the contrast between the pre-Court Frankfurter as a political "liberal" and the on-Court Frankfurter as a judicial "conservative" has seemed both abrupt and uncomfortable. While not diminishing the role of values in the life of a public official, Hirsch believes that application of psychological theory helps to account for this apparent inconsistency, among other things, and leads ultimately to a more complete understanding of Frankfurter's career. Specifically, Hirsch finds many similarities between Frankfurter's behavior (as teacher, political activist, presidential advisor, and justice) and "Horney's general neurotic personality type and the . . . style of the narcissistic personality. . . . [A]lthough any single piece of evidence I have presented could perhaps be accounted for in a different manner, the cumulative weight of the evidence makes such alternative explanations doubtful and lends support to my hypothesis."³⁴

Hirsch correctly observes that a justice's work consists of more than votes and opinions. It consists as well of one's personal style on the bench,

including relations with colleagues, mentors, and disciples. Frankfurter's emphasis on judicial self-restraint, especially the extent to which he was prepared to stretch the concept, resulted in part from his attitude (anger) toward fellow liberals (such as Black, Douglas, and Murphy) who eventually opposed him. Frankfurter, as the constitutional scholar on the bench, wanted to lead, but they rejected his leadership. The challenges his colleagues posed resulted in his ignoring "countervailing claims within his own belief system" and "his own commitment to the existence of a hierarchy of values in the Constitution. . . ." Hirsch goes so far as to assert that Frankfurter would have been willing to adopt some variation of the "preferred freedoms" concept had it not "been first presented by a man he did not respect and in a case that touched him on a number of different levels. . . ." ³⁵ Having taken this stand, "he could only defend it further in *Barnette*, given the added impetus of his anger at the liberals for deserting him and his sense of himself as the true interpreter of Holmes." At the same time, for values that were "psychologically important to him" such as separation of church and state and academic freedom, Frankfurter could temporarily abandon judicial self-restraint, "thereby opening himself to the charges of logical contradiction and hypocrisy."³⁶

In supplementing traditional analyses of Frankfurter's constitutional jurisprudence, Hirsch's approach—hinged as it is on the validity of particular psychological theories—makes plain the full complexities of Frankfurter's astonishing and achievement-filled life. As Hirsch concludes, "if it makes him any less magnificent, it does so . . . only by making him more human."³⁷

One of Justice Frankfurter's chief antagonists on the bench was of course Hugo Black. In fact, every one of Frankfurter's terms on the Supreme Court was shared with Justice Black. The constitutional thought of one usually stands clearest when placed alongside the thought of the other. If one misses much of the modern Court by overlooking Frankfurter's role, the same can be said if Black somehow goes unnoticed. James J. Magee makes the latter prospect highly unlikely in his monograph on Black's First Amendment absolutism.³⁸

Like Frankfurter, Justice Black's long judicial career contains its own set of puzzling questions. Justice Black, asserts the author, has joined the

thin ranks of members of the Court "who have sought diligently and conscientiously to develop a constitutional jurisprudence which would serve to limit as well as to justify the exercise of judicial power."³⁹ As an opponent of "judicial discretion," Black could ruthlessly enforce the strictures of the First Amendment against majority sentiment that infringed on individual rights. As a staunch defender of free speech (extending its protection even to pornographers and libelers), Black could withhold the First Amendment's shield from those who protested racial discrimination or unjust arrest with their feet, after earlier extending it to labor picketers.

Magee shows that Black's First Amendment jurisprudence evolved rather than appeared full blown, and was shaped in part by his mighty efforts to maintain internal consistency in his opinions and voting record. Consistency was a means to avoid that discretion (the hobgoblin of judicial power) which so troubled Black about the Court of the 1920's and 1930's that had applied vague contours of the Constitution to make or unmake national economic policy. Consistency combined with absolutism in the 1950's to guard the First Amendment from "balancers" (led chiefly by Frankfurter) who would not only weaken constitutional commands in deference to Congress and state legislatures but would leave the meaning of the First Amendment in the hands of those who found its restriction most convenient. His war on First Amendment balancing overlooked what Magee sees as considerable balancing by Black himself during the 1940's.

But new decades bring unforeseen constitutional problems. If Black's First Amendment jurisprudence served him well in the 1950's as the Court encountered subversive activities cases, the civil rights protests of the 1960s presented a difficulty. If the First Amendment's words of "Congress shall make no law . . ." applied to speech and press, what about assembly? How could there be an absolute right to assembly without society's ending up in a state of anarchy? Black escaped this dilemma, at least to his own satisfaction, by distinguishing between "speech" and "conduct." Symbolic protest involving marches, meetings, sit-ins, and the like were not automatically accorded constitutional protection. To have said that they were—and still to have avoided social chaos—would have required Black to renounce absolutism, a recourse he would not accept. Rather, Black decided that



Associate Justice Hugo L. Black

Curator's Office, Supreme Court

people had an absolute right of assembly in places "where people have a right to be for such purposes."⁴⁰ So the anti-discretion jurist found himself boxed into a canyon of discretion. Or, in Magee's words, "his dilemma vanished as the constitutional right of assembly evaporated: The people have an absolute right of assembly whenever the government so allows. Placed in the middle of an insoluble dilemma, Justice Black found himself promoting a contradiction in terms."⁴¹

Of course, one who believes that some constitutional rights are absolute must, sooner or later, encounter difficulties similar to those that beset Justice Black. Magee concludes by observing that the policy consequences, had Black's view become the dominant one, would not be healthful in "a society which respects and desires to protect many freedoms and values."⁴² Still, he does not overlook the positive qualities of Black's First Amendment jurisprudence, even as he lays bare the limits of Black's accomplishments.⁴³

No justice of the Court conscientiously and persistently endeavored, as much as Justice Black did, to establish consistent standards of objectivity for adjudicating constitutional issues. Throughout his influential, long, and dedicated service on the Supreme Court, believing firmly, as he did, in the rule of law, he tried to find those standards primarily in the language of the Con-

stitution. His diligence, perseverance, and his purpose were laudable: He wanted to limit the capacity of life-appointed judges to establish social policy as the product of their own ideas and values — their politics; he wanted to prevent courts from balancing away precious constitutional guarantees. But Justice Black was in search of an objectivity which does not exist, at least not in the field of constitutional interpretation and adjudication.

James Simon's *Independent Journey* portrays the life of a third person prominent in the era of the modern Court: William O. Douglas. President Franklin Roosevelt's fourth appointee to the Court (after Black, Reed, and Frankfurter), Douglas sat until 1975, surpassing on the way in 1973 Stephen J. Field's longevity record of service as a Justice. More than any other American jurist, Douglas is remembered as a folk hero, a characterization Douglas did little to discourage during his busy life.

Independent Journey is a full-scale biography of Justice Douglas. With profit, Simon painstakingly and productively sifted the Frankfurter and Burton Papers at the Library of Congress, as well as smaller collections, such as the Fred Rodell Papers at Yale, containing Douglas correspondence. Unfortunately, the 30,000 items in the Douglas Papers at the Library of Congress remained completely restricted during the time Simon conducted his research. For this handicap, he compensated somewhat by gleaning much from interviews with colleagues, clerks, and family, including an extraordinary meeting with Douglas himself that must be read to be believed.⁴⁵ There is no indication that he saw the second volume of the Douglas autobiography⁴⁶ in manuscript form, although Simon naturally made extensive use of the first, which appeared in 1974.⁴⁷

Simon is graphic in revealing Douglas as a law teacher at Yale and as a fierce advocate and administrator at the Securities and Exchange Commission. Even had Douglas engaged in no public service after 1939, one suspects that his mark on the American polity would have been lasting. Once on the Court, Simon considers Douglas's most lasting contribution to have been his emphasis on the judiciary's duty to define, extend, and protect civil liberties and civil rights. This is especially the case with the constitutional right of privacy, which Simon sees principally as Douglas's handiwork. Indeed, he makes a convincing connection between Doug-



Associate Justice William O. Douglas

las's 1957 North Lectures at Franklin and Marshall⁴⁸ and his votes and opinions on privacy during the next seventeen years. He is straightforward about Douglas's recurring ambitions for elective office. He explores Douglas's role in the Court's review of the Rosenberg spy case, and recounts the 1970 impeachment drive against him in the House of Representatives. He is compassionate and no less skilled in writing about a troubled man in his dealings with spouses, children, and colleagues. If the overall effect is praise of Douglas (hardly unusual in a biography), the praise is by no means unqualified. *Independent Journey* contains ample evidence that the constitutional prerogatives of independence the Court enjoys in turn make unique demands on its members.

At his death in early 1980, Simon reports that the justices, both those who agreed with his constitutional stands and those who did not, felt his departure. "We miss him," said one who was close neither personally nor professionally to Douglas. Why, asks Simon? "Those who at-

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tended Douglas' memorial service at the National Presbyterian Church that cold January day . . . could provide the answer. Douglas' vanity, pettiness, irascibility, even his bouts of meanness, would pass from memory. But his greatness would endure. William O. Douglas became a heroic symbol of the human spirit, offering an unwavering belief that the power and dignity of the individual could make the nation and the world a better place."⁴⁹

It was during the years of the Warren Court, of course, that the differences among Douglas, Black, and Frankfurter appeared both fixed and sharpest, as did their sharing of a commitment to the Constitution and the judicial roles they felt that document inspired. Yet, an appreciation of their work remains incomplete without insight into the Chief Justice with whom each sat the longest.⁵⁰ While Bernard Schwartz's *Super Chief* amply documents the deeds of the Warren Court, it is in G. Edward White's *Earl Warren: A Public Life*⁵¹ that one finds a more finished portrait of Warren the man.

White is troubled by the "pat explanation" of Warren's public life. According to this view, Warren was a conservative "law-and-order California politician," who underwent some kind of political metamorphosis once President Eisenhower picked him for the Chief Justiceship, leaving the bench in 1969 "as a thoroughgoing liberal judge." Presumably, having no competency as a legal technician himself, Warren came under the influence of Justices such as Hugo Black and William Douglas. There are "three assumptions" in this construct of events which White sets out to challenge: that Warren was conservative, that he experienced a marked change in political attitudes and values after 1953, and that he was inexperienced as a legal technician and held views derived only from others. For White, the first two assumptions are false because a close study of Warren's California years, especially his long tenure as governor, reveal "a deep commitment to a general set of principles that were consistent in themselves." White, who was his clerk during the 1971 term after retirement, finds such commitment in spite of "surface contradictions in his thought" and "false trails" laid by Warren himself that have led others into misunderstanding. Instead his life is "of a piece. . . ." ⁵²

The third assumption is also false largely because of the inaccuracy of the first two. White

characterizes Warren as a "Progressive" in the early twentieth-century style. As such, it was natural for him to cast disputes, political or legal, in ethical terms, seeking out injustices and discovering remedies. That style marked his years as Governor and as Chief Justice. "He was not more put off as a judge by characterizations of his decisions as excessively activist than he had been deterred by criticism of his gubernatorial programs as excessively socialistic."⁵⁴ But what about the retort that, while activist and energetic executives are acceptable because that is what executives are supposed to do, activist and energetic justices are not because they improperly extend the role of the Supreme Court?

White asserts that American judges traditionally have not been passive. He notes the early nineteenth century "where statutory lawmaking by legislatures was relatively uncommon and where major political disputes . . . were settled in the courts."⁵⁵ Furthermore, Warren's Progressivism led him to reject the common twentieth-century notions that legislatures were both "democratic" and "representative" of the will of the people. Deference by judges to elected officials might perpetuate injustices and bad policy, as the nation's record on racial equality demonstrated. It was the 1954 *Brown* segregation case that firmed up Warren's view of himself as an activist judge. By the late 1950's, writes White, "he had settled into the role of vindicator, protector, and conscience. He had resumed the familiar stance of Progressive champion of the public interest." Warren's jurisprudence reflected a modern-day "natural law" theory: ethical principles flowed from constitutional commands. And these ethical principles were an unsystematic blend of Progressive social thought, lessons learned in public life, and his personal moral code with emphases on what was fair, honorable, and sensible. "Each case," says White, "contained its own 'essence' and its own resolution according to natural law. He saw his task as discerning that resolution and persuading others to support it."⁵⁶ Freed of the necessity of being politically accountable to an electorate (as he had been as governor), Warren could now act on ethical principles without concern for the consequences.

Of course this was not the theory of judicial review advocated by opponents of the pre-1937 Supreme Court. It was certainly not Felix Frankfurter's theory of judicial review. Rather, it was

"benevolent elitism" practiced by judges opposing what Warren saw as the "corrosive elitism" practiced by legislators.⁵⁷ The former would aid the powerless who had been rebuffed by the latter.⁵⁸

Admirable as Warren's view of the Chief Justiceship might be, White concludes that his record remains vulnerable because his reasoning did not always "establish the acceptability of the premises." The main problem with basing judicial decisions on ethical principles is that one must defend the ethical positions on which the decision rests. Is the position "good" or "bad"? The successful jurist thus becomes the "judge whose ethics seem 'right' most of the time."⁵⁹ It is on this reaction that Warren's reputation as a jurist stands, for "when one divorces Warren's opinions from their ethical premises, they evaporate. No overreaching doctrinal unity binds them; they are individual examples of beliefs leading to the judgement." In short, no one can separate "Earl Warren's opinions from Earl Warren and treat them as anonymous contributions to constitutional literature."⁶⁰

Nonetheless, for White this defect does not deny Warren's greatness.⁶¹

If he was not a sophisticated or wholly consistent thinker, he was . . . a great man, not only for what he embodied but also for what he accomplished. In a public world of corruptible and self-serving actors, he set a standard of incorruptibility and humanity; in a society fraught with injustices, he sought to use the power of his offices to promote decency and justice. The end of his public career may be the end of a phase of American life.

The Constitution And Judicial Review

The Supreme Court and its justices are the foci of so much attention in large measure because of the doctrine of judicial review. Having the authority to sit in judgment on the constitutionality of actions of other parts of the political system has given special meaning to President Washington's hope that the judiciary would be "the keystone of our political fabric."⁶² Yet, the scope of judicial review remains both controversial and in flux, as recent studies attest.

For Jesse Choper, "how the Court should interpret various provisions of the Constitution" falls outside the subject of his book, *Judicial Review and the National Political Process*. "Rather," he writes, "in searching for the

Court's proper function, I wish to explore . . . the *jurisdictional* or *procedural* role of the Supreme Court and judicial review." In particular, Choper explores justiciability — that is, "whether the Court should adjudicate certain constitutional questions at all." That question in turn is answered by his thesis:⁶⁴

[A]lthough judicial review is incompatible with a fundamental precept of American democracy — majority rule — the Court must exercise this power in order to protect the individual rights, which are not adequately represented in the political processes. When judicial review is unnecessary for the effective preservation of our constitutional scheme, however, the Court should decline to exercise its authority. By so abstaining, the Justices both reduce the discord between judicial review and majoritarian democracy and enhance their ability to render enforceable constitutional decisions when their participation is critically needed.

The novelty in Choper's thesis lies in his assertion that protection of individual rights should be, with only two exceptions, the *only* occasion for the exercise of judicial review. This is what he terms the Individual Rights Proposal. In turn, it summons the Federalism Proposal and the Separation Proposal. In the former, the federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-a-vis the states; rather, "the constitutional issue of whether federal action is beyond the authority of the central government and thus violates 'states rights' should be treated as nonjusticiable, final resolution being relegated to the political branches — *i.e.*, Congress and the President."⁶⁵ Likewise, neither should the Court adjudicate clashes concerning the respective powers of the President and Congress. Instead, "their final resolution [should] . . . be remitted to the interplay of the national political process."⁶⁶ Choper, in other words, would remove the justices from their roles as custodian and teachers of many constitutional values.

While not discussing the substance of the individual rights the Court should protect, Choper advocates retiring part of the docket because of the Court's exhaustible institutional capital. In short, "the Supreme Court's use of the power of judicial review has made it a continuing subject of national controversy, often rendering its position highly insecure and several times pushing it close to the brink of defeat."⁶⁷ The justices

would more wisely preserve their institutional capital for the things that really matter.

The things that really matter are of course individual rights. And the content of those rights is the concern of John Ely's *Democracy and Distrust*.⁶⁸ In it, he attempts to apply both direction and limits to judicial review on those occasions when the Justices have to interpret the "open-ended" provisions of the Constitution.⁶⁹ Unlike Choper, however, Ely does not advocate constraints mainly out of a concern for the preservation of the Court's finite political resources. In fact, Ely gives little credence to the admonition of those who believe that the Court is politically vulnerable to any worrisome degree. Rather Ely, is searching for a suitable doctrine of judicial review that is both ideologically and intellectually satisfying.⁷⁰

If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that the courts simply should stay away from them.

In other words, Ely wants to legitimize judicial review. If, according to Justice Holmes and Brandeis, the best case for leaving final reviewing authority to the Court "was that constitutional restrictions enabled minorities to get an untroubled night's sleep,"⁷¹ Ely's effort seems designed in part to assure the same evening's rest to constitutional scholars.

Ely finds discourse on constitutional interpretation dominated by two general approaches. The first is "interpretism," which directs judges to "confine themselves to enforcing the norms that are stated or clearly implicit in the written Constitution." The second is "noninterpretism" and calls for judges to "go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." For Ely, each turns out to be unsatisfactory, and the bulk of his book is devoted to an explication of their weaknesses and to the development of a third, and preferred, option. As things work out, "noninterpretism" receives the larger share of criticism, and Ely's preference is a modified form of its rival.⁷²

For Ely, "noninterpretism" will not do. It is neither intellectually satisfying nor does it assure a particular policy outcome. "An untrammelled majority is indeed a dangerous thing, but it will

require a heroic inference to get from that realization to the conclusion that enforcement by unelected officials of an 'unwritten constitution' is an appropriate response in a democratic republic."⁷³

"Interpretism" suffers from defects as well, but is nonetheless salvageable, Ely believes. Those whom he considers "interpretists" tend to be "clause-bound" when confronting the more open-ended passages in the Constitution. They look for explicit meaning in the words themselves or attempt to divine a specific "intent" when perhaps a specific one was not intended.

Ely's solution is to look not *in* the Constitution for meaning but rather to draw *from* the Constitution because open-ended provisions actually instruct judges to look beyond the provisions themselves. This position in turn leads him to argue for "a participation-oriented, representation-reinforcing approach to judicial review." The justices should police popular government by "clearing the channels of political change" on the one hand, and by protecting "minorities from denials of equal concern and respect on the other."⁷⁴

This prescription rests on acceptance of three arguments. First, by and large the Constitution gives principal attention to the process and structure of government, rather than to "the identification and preservation of specific substantive values."⁷⁵ That is, the Constitution concerns itself generally with means rather than ends. Second, Ely's plan is "entirely supportive [of] the underlying premises of the American system of representative democracy."⁷⁶ Ely would have the judges enforce the process that the Constitution ordains. Third, his approach "involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials."⁷⁷

Ely's agenda is long, offering little rest for weary judges. As one might expect, free speech is to receive stringent protection under Ely's proposal. But there is much more. The justices should be breathing life into the guaranty clause, reopening the whole delegation question, making incursions into legislative motivation, and extending the list of suspect classifications in Equal Protection cases.

Sharing the concerns of Choper and Ely but also parting company from them is Michael Perry. His *The Constitution, the Courts, and*

*Human Rights*⁷⁸ is an inquiry into the legitimacy of judge-made constitutional policy "that goes beyond the value judgments established by the framers of the written Constitution. . . ." ⁷⁹ This is important, Perry believes, because little modern constitutional doctrine involving human rights can be justified as flowing from the intent of the framers. This is not to say that such decisions are in conflict with that intent, only that the intent cannot be cited as authority for the doctrines those decisions espouse. In the terminology of the debate, those decisions are "noninterpretive" rather than "interpretive." Since there is no textual or historical basis for that doctrine (that is, no "interpretive" basis), there must be a functional justification for contemporary judges to engage in "noninterpretive" review.⁸⁰ Otherwise, this judge-made policy is illegitimate.

Like Choper, Perry rejects "noninterpretive" review of issues involving federalism and separation of powers. Unlike Choper, Perry accepts "interpretive" review in these areas, since legitimacy, resting on the Constitution itself, is assured. Like Ely, Perry is most concerned with human rights, but he finds Ely's justification for participation-oriented and representation-enforcing review unpersuasive. Instead, Perry asserts that the function of "noninterpretive review in human rights cases . . . is the elaboration and enforcement by the Court of values . . . not constitutionalized by the framers; it is the function of deciding what rights, beyond those specified by the framers, individuals should and shall have against government."⁸¹

But what will be the source of values to be constitutionalized by the judges? Values, he notes, have been an important part of the American historical experience. Indeed, in a general way Americans have a *religious* understanding of themselves, although he is quick to add that he does not use that word "*in any sectarian, theistic, or otherwise metaphysical sense.*" Rather, he appears to refer to being bound by a "higher law." This understanding in turn "has generally involved a commitment . . . to the notion of moral evolution."⁸² So, understanding the American experience and this openness to moral evolution helps to explain the existence of "noninterpretive" review and to "clarify its character."⁸³ "My essential claim," writes Perry, "is that noninterpretive review in human rights cases enables us to take seriously . . . the possibility that there

are right answers to political-moral problems."⁸⁴ Without that possibility, noninterpretive review has no legitimacy.

It is no stumbling block for Perry that no one can be sure of having found the perfect moral philosophy. What counts is that there be a moral dialogue "between Court and polity"⁸⁵ in the context of deciding cases, even though one knows that the Court will not always take the correct position.⁸⁷

[W]hat the notion of moral evolution can help explain and justify is a policymaking institution . . . whose members, not every one of which has the same criteria of moral rightness, deal with moral problems, not passively, by bowing to established moral conventions, but actively, creatively, by subjecting those conventions to critical reevaluation.

In addition to the principles of human rights the Supreme Court has emphasized in recent decades, Perry wants to see more attention given to the plight of those he calls "marginal persons." These include the poor, "especially nonwhite poor,"⁸⁸ prisoners, and the mentally disabled. And Perry would not stop with political and civil rights but suggests that more be done by judges on behalf of socioeconomic rights for these marginal persons. Indeed, he says, the quality of American life in the coming years may depend heavily on the content of "noninterpretive" review. "The function of human rights is to protect the individual from the leviathan of the state. As government increases in size and power, government's capacity to harm . . . increases too, and so the matter of human rights becomes even more important."⁸⁹ For Perry, there should be no morally timid judges. Moral inquisitiveness is the watchword.

Perry, Choper, and Ely look forward, each seeking to chart the course of judicial review for the coming decades. Richard Cortner is no less interested in constitutional interpretation, but calls attention to fact rather than prospect. *The Supreme Court and the Second Bill of Rights*⁹⁰ records a process of constitutional evolution. In terms of magnitude of impact and degree of change, the process might more accurately be styled a "revolution" were Cortner not telling a story that was a century in the making.

The constitutional change Cortner describes is the gradual application to state governments of the provisions of the Bill of Rights following ratification of the Fourteenth Amendment in 1868. Had this substantial change in the American policy

been proposed as part of the amendment procedure the Constitution prescribes in Article V, there would most probably have been intense and widespread public debate. Instead, after 1868, this alteration was accomplished without a single change in the language of the Constitution, ultimately laying to rest Justice Field's anxiety that the Fourteenth Amendment might prove to be "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."⁹¹

Even so, the extent and dramatic nature of the change underway attracted little public notice. The agents were judges, mainly justices of the Supreme Court, acting incrementally through the medium of interpretation in the context of deciding individual cases. The result was the addition to the United States Constitution of a series of new limitations on the powers of state governments and their subdivisions: a second Bill of Rights.⁹²

Cortner sees four stages in the eventual nationalization of the Bill of Rights. The first, stretching from the *Slaughterhouse Cases* in 1873

to *Twining v. New Jersey* in 1908 produced the least change and indeed held out little hope for change. The second, beginning in 1925 with *Gitlow v. New York* and concluding with *Everson v. Board of Education*⁹⁵ in 1947 brought the provisions of the First Amendment to bear on the states. Overlapping the second, the third stage stretched from the 1930's until 1961, and witnessed an increasing interest by the Court in the details of state criminal procedure. This was the heyday of the so-called "fair trial rule." The fourth was an extension of the third: application of the "selective incorporation rule" between 1961 until 1969, making most *specific* procedural safeguards of Amendments IV, V, VI, and VIII enforceable against state systems of criminal justice.⁹⁶ Symbolically, the last case in the cycle of nationalization was *Benton v. Maryland*,⁹⁷ decided on June 23, 1969, the last day of Earl Warren's tenure as Chief Justice.

A real strength of Cortner's account is the degree of detail he provides on the cases in which the process of nationalization took place. The reader



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Socialists, like those shown in this picture of a march on Union Square in March 1912, were among the groups whose legal troubles helped bring on the nationalization of the legal protections under the Fourteenth Amendment.

finds the legal troubles of "murderers, thieves, bookies, Communists, Jehovah's witnesses, university professors, narcotics addicts, and others. . . ." ⁹⁸ Also depicted is the variety of participation by interest groups, ranging from the American Newspaper Publishers' Association to the American Jewish Congress. Yet, throughout this chronicle of constitutional change, Cortner finds a "disappointment": "this crucial constitutional development was not . . . satisfactorily justified by the Court in terms of constitutional theory." This relative absence of justification can be explained of course in terms of the span of years over which the change occurred and the large number of individuals who participated in it. Still, "to the extent that rational justification and explanation by the Court is important to the legitimization of constitutional change, it can fairly be said that the Court neglected one of its important functions in regard to the nationalization of the Bill of Rights." ⁹⁹

The books surveyed here point to continued

interest in judicial review and in those individuals, institutions, and processes Americans entrust with the maintenance of constitutional government. In one way or another, each volume is concerned with the quandary posed by minority rule of judges in a democratic order. Perhaps all could ascribe to part of a deceptively modest preface penned long ago by Justice Story: ¹⁰⁰

Such as it is, it may not be wholly useless, as a means of stimulating abler minds to a more thorough review of the whole subject; and of impressing upon Americans a reverential attachment to the Constitution, as in the highest sense the palladium of American Liberty.

Literature on the Court is sufficient indication that Americans have a timeless fascination with the judiciary. Books such as these are ample demonstration that the Constitution, with the justices' help, remains at once an instrument for national survival, a vehicle for national growth, and an evolving depository of national values.

Footnotes

¹ Listed alphabetically below are the books surveyed in this article.

(a) BLASI, Vincent, ed. *The Burger Court: The Counter-Revolution That Wasn't* (New Haven, Connecticut: Yale University Press, 1983). Pp. xiv, 326.

(b) CHOPER, Jesse. *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago, Illinois: University of Chicago Press, 1980). Pp. xviii, 494.

(c) CORTNER, Richard C. *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties* (Madison, Wisconsin: University of Wisconsin Press, 1981). Pp. xi, 360.

(d) ELY, John Hart. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Massachusetts: Harvard University Press, 1980). Pp. viii, 268.

(e) HIRSCH, H. N. *The Enigma of Felix Frankfurter* (New York, New York: Basic Books, 1981). Pp. xi, 253.

(f) MAGEE, James J. *Mr. Justice Black: Absolutist on the Court* (Charlottesville, Virginia: University Press of Virginia, 1980). Pp. xv, 214.

(g) MURPHY, Bruce Allen. *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices* (New York, New York: Oxford University Press, 1982). Pp. xiii, 473.

(h) PERRY, Michael J. *The Constitution, the Courts, and Human Rights* (New Haven, Connecticut: Yale University Press, 1982). Pp. xi, 241.

(i) SCHWARTZ, Bernard. *Super Chief: Earl Warren and His Supreme Court - A Judicial Biography* (New York, New York: New York University Press, 1983). Pp. xiii, 853.

(j) SIMON, James E. *Independent Journey: The*

Life of William O. Douglas (New York: New York: Harper & Row, 1980). Pp. viii, 503.

(k) WHITE, G. Edward. *Earl Warren: A Public Life* (New York, New York: Oxford University Press, 1982). Pp. x, 429.

² Letter from Stone to Thomas Reed Powell (Nov. 15, 1935), quoted in A. Mason, *Harlan Fiske Stone* 398 (1956).

³ Brewer, Lincoln Day Address of 1898, quoted in Frankfurter, "The Supreme Court and the Public," 83 *Forum* 329, 334 (1930).

⁴ "[A]n examination of the work of the Supreme Court discloses a most gratifying freedom from control by political parties. . . . Judges as men of mature years and wide experience undoubtedly have their convictions, . . . but they have not been the instruments of political manipulations or the tools of power. One cannot study their lives and decisions without confidence in their sincerity and independence. The Supreme Court has the inevitable failings of any human institution, but it has vindicated the confidence, which underlies the success of democratic effort, that you can find in imperfect human beings, for the essential administration of justice, a rectitude of purpose, a clarity of vision and a capacity for independence, impartiality and balanced judgment which will render impotent the solicitation of friends, the appeals of erstwhile political associates, and the threats of enemies." C. Hughes, *The Supreme Court of the United States* 45-46 (1928).

⁵ Frankfurter, "Mr. Justice Brandeis and the Constitution," 45 *Harvard Law Review* 33, 33 (1931).

⁶ Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* 9 (1937). After Franklin Roosevelt named him to the Court, Frankfurter continued to voice the same theme, but decried publication of "tittle-tattle" from inside the Court and the

breaking of the secrecy of the conference room, at least until time had made such secrecy unnecessary. See Frankfurter, "Mr. Justice Roberts," 104 *University of Pennsylvania Law Review* 311 (1955); see also Letter from Frankfurter to Charles Fairman (Dec. 27, 1948), reprinted in Fairman, "The Writing of Judicial Biography," 24 *Indiana Law Journal* 363, 367-369 (1949).

⁷ See the bibliographical information on each volume in note 1.

⁸ The reader, for instance, will find few references to Warren's formative years or to his extensive political career before going on the bench.

⁹ Schwartz, *supra* n. 1, at 7.

¹⁰ Mason, "The Burger Court in Historical Perspective," 89 *Political Science Quarterly* 27, 34 (1974).

¹¹ *Baker v. Carr*, 369 U.S. 186, 339 (1962) (Harlan, J., dissenting).

¹² *Supra* n. 2.

¹³ There are no citations to the Robert H. Jackson Papers at the University of Chicago. Furthermore, the massive collection of Warren's Court papers at the Library of Congress will not be opened for inspection until 1985.

¹⁴ *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁵ 377 U.S. 533 (1964).

¹⁶ 376 U.S. 1 (1964).

¹⁷ Blasi, *supra* n. 1.

¹⁸ Blasi, *supra* n. 1, at 219.

¹⁹ Shapiro defines "autonomy" as a "reserve against outside interference." Autonomy in turn, is not the same thing as freedom, which is a "capacity to act." Blasi, *supra* n. 1, at 231.

²⁰ *Id.*, 233.

²¹ *Id.*, 235.

²² *Id.*, 237.

²³ *Id.*, 205.

²⁴ *Id.*, 217.

²⁵ *Id.*, 211, 217.

²⁶ *Id.*, 210, 211.

²⁷ *Id.*, 216.

²⁸ 4 vols., 1916-1919.

²⁹ *Supra* n. 1.

³⁰ Alpheus Thomas Mason, *Brandeis: A Free Man's Life* (1946). In view of their long years of personal and professional association, it is ironic that Brandeis rejected Frankfurter's advice that he not cooperate with Mason's endeavor. Frankfurter wanted another scholar to be the Brandeis biographer. As it was, Frankfurter kept from Mason's view Brandeis's Court papers, documents to which Murphy has had access.

³¹ The Brandeis-Frankfurter relationship, including the financial arrangement, appears routine and not at all secretive in Leonard Banker's *Brandeis and Frankfurter: A Dual Biography* (1984), which arrived too late to be accorded full treatment in this article. See especially pages 242-244. Readers interested in recently published materials on the two Justices should consult Baker's new book, as well as Michael E. Parish, *Felix Frankfurter and His Times: The Reform Years* (1982), and Lewis J. Paper, *Brandeis* (1983).

Frankfurter's record as a politically active Justice stands in sharp contrast to his pronouncements on the secluded nature of the judicial function. As he wrote Justice Frank Murphy in January of 1943, "When a priest enters a monastery, he must leave—or ought to leave—all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery. And this isn't idle, high flown talk. We are all

poor human creatures and it's difficult enough to be wholly intellectually and morally dis-interested when one has no other motive except that of being a judge according to one's full conscience." Quoted in Joseph Lash, ed., *The Diaries of Felix Frankfurter* 155 (1975).

³² *Minersville School District v. Gabis*, 310 U.S. 586 (1940).

³³ *Supra* n. 1.

³⁴ *Id.*, 210.

³⁵ *Id.*, 210-211. Hirsch obviously has reference to the first flag salute case, *Minersville School District v. Gabis*, 310 U.S. 586 (1940).

³⁶ *Id.*, 211.

³⁷ *Id.*, 212.

³⁸ Magee, *supra* n. 1.

³⁹ *Id.*, xi-xii.

⁴⁰ *Cox v. Louisiana*, 379 U.S. 536, 578 (1965) (Black, J., concurring in part, dissenting in part.)

⁴¹ Magee, *supra* n. 1, at 178-179.

⁴² *Id.*, 191.

⁴³ *Id.*, 194.

⁴⁴ Simon, *supra* n. 1.

⁴⁵ *Independent Journey* opens with an account of this meeting. *Id.*, at 4-14.

⁴⁶ *The Court Years 1939-1975: The Autobiography of William O. Douglas* (1980).

⁴⁷ *Go East, Young Man* (1974).

⁴⁸ These were published as *The Right of the People* (1958).

⁴⁹ Simon, *supra* n. 1, at 454.

⁵⁰ About 40% of Frankfurter's time on the Court was spent while Warren was Chief Justice. For Black, the figure is 47% and for Douglas 44%.

⁵¹ White, *supra* n. 1.

⁵² Just as Simon's *Independent Journey* should be consulted when reading Douglas's two-volume autobiography, cited above, White's *Earl Warren* is a useful companion to Warren's *Memoirs* (1977) and his *A Republic, If You Can Keep It* (1972), in arriving at an understanding of the man.

⁵³ White, *supra* n. 1, at 4-5.

⁵⁴ *Id.*, 350-351.

⁵⁵ *Id.*, 351.

⁵⁶ *Id.*, 355.

⁵⁷ *Id.*, 358.

⁵⁸ White does not make the connection, but Warren apparently took to heart the suggestions contained in the famous footnote number four from Justice Stone's opinion for the Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁵⁹ White, *supra* n. 1, at 365.

⁶⁰ *Id.*, 367.

⁶¹ *Id.*, 369.

⁶² Quoted in I. C. Warren, *The Supreme Court in United States History* 36 (rev. ed. 1926).

⁶³ Choper, *supra* n. 1, at 1 (emphasis in original).

⁶⁴ *Id.*, 2.

⁶⁵ *Id.*, 175.

⁶⁶ *Id.*, 263. Presumably, the Court could still get itself entangled in inter-branch disputes and clashes with the states by way of statutory interpretation.

⁶⁷ *Id.*, 129.

⁶⁸ Ely, *supra* n. 1.

⁶⁹ "Open-ended" passages (such as "due process of law") are the ones which encourage the most litigation precisely because they are not self-interpreting. Few people are going to go to the expense to argue whether the President's stated term of four years really means four years.

⁷⁰ *Id.*, 41.

⁷¹ A. Bickel, *The Supreme Court and the Idea of Progress* 37 (1970).

⁷² Ely, *supra* n. 1, at 1. In the context of materials already covered in this article, it is fair to say that Justice Black's constitutional jurisprudence would be a kind of "interpretism," while Justice Frankfurter (as Black's doctrinal antagonist) would align with "noninterpretism."

⁷³ Ely, *supra* n. 1, at 8.

⁷⁴ *Id.*, 86-87.

⁷⁵ *Id.*, 92.

⁷⁶ *Id.*, 88.

⁷⁷ *Id.*

⁷⁸ Perry, *supra* n. 1.

⁷⁹ *Id.*, ix.

⁸⁰ *Id.*, 91.

⁸¹ *Id.*, 93.

⁸² *Id.*, 97; emphasis in the original.

⁸³ *Id.*, 99.

⁸⁴ *Id.*

⁸⁵ *Id.*, 102.

⁸⁶ *Id.*, 113.

⁸⁷ *Id.*, 111.

⁸⁸ *Id.*, 147.

⁸⁹ *Id.*, 164.

⁹⁰ Cortner, *supra* n. 1.

⁹¹ *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 96 (1873) (Field, J., dissenting).

⁹² The change is clearest when the present meaning of the Fourteenth Amendment is considered alongside the Constitution as it came from the hands of the Framers in 1787. The original document, even after the addition of the Bill of Rights in 1791, concerned mainly the new national government. Little was said about the states, and the list of limitations on state

power was short.

⁹³ 83 U.S. (16 Wall.) 36 (1873); 211 U.S. 78 (1908).

⁹⁴ 268 U.S. 652 (1925).

⁹⁵ 330 U.S. 1 (1947).

⁹⁶ Cortner, *supra* n. 1, at 279. At the same time, the Supreme Court was enlarging the liberties protected by the Bill of Rights. For example, the First Amendment's protection of free speech was worth more in 1969 than it had been in 1929. So, the nature of constitutional change going on during this period was really two dimensional: definition and reach. By the time the process of "incorporation" or nationalization had run its course in 1969, no one could any longer agree with Sir Henry Maine's 19th century characterization of the Bill of Rights as "a certain number of amendments on comparatively unimportant points." Maine, *Popular Government* 243 (1886).

Nationalization of the Bill of Rights has also had a significant impact on the nature of the Supreme Court's docket. Cortner reports that "in the field of freedom of expression, . . . of the 175 cases decided by the Court with opinions between 1931 and 1970, 70 percent involved challenges to state policies under the Fourteenth Amendment; similarly, 85 percent of the right-to-counsel cases decided by the Court between 1963 and 1970 arose under the Fourteenth Amendment." Cortner, *supra* n. 1, at 345, n. 49.

⁹⁷ 395 U.S. 784 (1969). *Benton* "incorporated" the double jeopardy clause of the Fifth Amendment into the Fourteenth.

⁹⁸ Cortner, *supra* n. 1, x.

⁹⁹ *Id.*

¹⁰⁰ J. Story, *Commentaries on the Constitution of the United States* vii (1833).

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