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THE SUPREME COURT AS A POLITICAL INSTITUTION

By EARL LATHAM*

I

COMMENTARY on American constitutional law has long been the almost preclusive specialty of lawyers and teachers of politics who imitate lawyers in the classroom. In fact, the lawyer's approach has been so pervasive that it is sometimes difficult to discern the essential nature of that branch of the "law" under the rituals and trappings with which the custom of the market has invested the legal trade. Legal ceremonies and habits, in short, have covered the substantive nature of American constitutional law in a garb which marks the form but conceals the fact. It is the assumption of this paper that American constitutional law is primarily political theory dressed in lawyers language, and that the justices of the United States Supreme Court, when they act in constitutional law cases, deal with juristic theories of politics.

In one sense, all law that gets itself enforced through public secular institutions (policemen and judges) is public law, for enforcement by private institutions would be the rule of the vendetta, lynch law, or the law of the beer barons of the 1920's. In the manner of speaking of lawyers, however, public law is more commonly supposed to concern itself with the activities of public institutions, in their relations with each other and, collectively, as government, in their relations to the people. So considered, public law (including American constitutional law) is concerned with politics in its broadest sense, the subject matter of which is power in human relations—its origin, forms, accumulation, administration, obsolescence, and control within the frame of accepted norms of

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social ethics. Theories of public law are necessarily, therefore, theories of politics, and American constitutional law is a body of juristic theories of American politics.

Juristic theories of politics are to be distinguished from sociological theories of politics say, by the manner of their expression and the focus of their concern. Juristic theories of politics are propositions of political theory put into terms of rights and obligations. They are to be further distinguished from ethical propositions of the same order by the institutional context within which they function. The speech of lawyers makes a careful distinction between "legal" duties and "moral" duties, with the somewhat cynical implication that the latter are of little consequence because the policeman won't arrest you, and the judge won't fine you, if you violate them. One consequence of this preoccupation with the instruments and institutions of law administration is a tendency to define law in terms of such instruments and institutions. Law becomes that pattern of rules which the public authorities will enforce. If true, it should follow, perhaps, that whatever does not get itself enforced is not law, although the normative values of the law would disappear if this were so.

Despite the teapot tempest over legal realism in the last decade and a half (now reduced to a simmer) the source of this law cannot be merely the behavior of the judges, but must be the behavior of the people as well. The reduction of law to the ignobility of a judicial tic is a melancholy development out of the confusion of the times. Not the judges alone, but the entire community participates in the making of law—presidents, legislators, administrators of public agencies, organized groups and unorganized groups, churches, unions, lodges, business enterprises, professional societies and social clubs, farmers, laborers and captains of industry, preachers, teachers, prelates and politicians, bureaucrats, policemen, clerks, and lawyers.

The pattern of the public law at any given instant of time is the balance of the relations existing among these various and numerous elements of the society. Where conflict is absent (or slight) relations may be said to be stable, and agreement on common rules prevails. Where serious conflict exists, relations are in turmoil and the rules themselves are exposed to pressure for change. A German writer has remarked that developments in constitutional and administrative law may be looked for precisely when some special interest is seeking to arrogate to itself the signs and seals of

the public interest. The life of the law is indeed experience, and not logic, as Holmes once observed, but it is the experience of the society through which the dynamism of social change works as a ferment. Judges are but one of the voices through which this experience finds tongue and expression, yet because of the strategic position in the American political process won for the Supreme Court by John Marshall, the utterances of the justices of the Supreme Court have assumed a disproportionate weight in the shifting balance of these social forces.

Each generation necessarily defines the basic distribution of public powers for itself, and it is the function of the political apparatus of society to give expression to this decision, including the Court as a political institution. What we call the "Constitution of the United States" is the prevailing sense that men now have of the proper distribution of political powers, and of the nature of the forms and methods necessary to achieve the ends for which such powers were distributed. The vigor of this Constitution is not in the minds of men long dead but in the conceptions of the living.

The following pages discuss the role of the Supreme Court as a political institution, not as a trafficker in party votes and electoral stratagems, but as one of the principal holders of public power, responsible to no constituency, and strategically located to slow down or divert those great pivotal movements in American society when the weight of political power shifts from one point and plane to another. As one of the institutional holders of public power, the Court has inevitably been involved with juristic theories of politics in three major areas of doctrine: federalism; the priority of the estates; and the separation of powers. The object of this essay is to comment on the way in which the Court in these three areas of doctrine has wielded its power to slow down, guide, and divert the political adjustments of an evolving society in movement from one tentative balance to the next, and to consider the logic of this form of political control and influence within the context of a democratic system.

II

The use of the power of the Supreme Court as a political institution may be observed in the role it played in interpreting the Federal system in two critical periods: Marshall's time and the years directly after the Civil War. In the first, the Court defined a broad area of Federal competence and put constitutional fences

of verbal wire around it; in the second, the Court sought to restate the role of the States as entities of the Federal system and to set metes and bounds to Federal encroachment. In both instances, the Court intervened in a popular struggle, in one case succoring a party fatally defeated at the polls and in the other, frustrating the aims of the victor; and by the shrewd exposition and interpretation of its own doctrines perpetuated its views about the nature of the Federal union and, incidentally, extended its own dominion.

In the early 1800's, there were other views of the nature of the Federal union than the Federalist conception of Chief Justice Marshall equally consistent with the language of the Constitution and, in some cases, better supported by the electorate.[1] The debates of the Federal Convention were secret and not made known through Madison's notes until 1840 so that argument on the basis of what the Framers intended was speculative at best. Nor did Marshall often attempt to use such argument, since there was no particular force in it; those who ratified the Constitution presumed that their understanding of that for which they voted would be equally valid in fixing the meaning of the document. The Framers after all were merely the draftsmen of a document whose meaning could as well (better) be fixed by the common understanding of those who adopted it as by the undisclosed intentions of those who had written the words.

In fixing the Federalist conception in the law of the land, Marshall laid down the pivotal doctrine that the Federal Government alone could define the competence of the Federal Government; moreover, in defining its competence it need not confine itself to the strict constructions of meager words. In such classic cases as *Cohens v. Virginia,*[2] *McCullough v. Maryland,*[3] and *Fletcher v. Peck,*[4] Chief Justice Marshall, the architect of the new Constitution, expounded these doctrines despite the frequent clangor of protest some of them aroused. His two opinions in the Maryland and Ohio bank cases[5] reflect a close study of Hamilton's *Opinion on the Constitutionality of the Bank of the United States,*[6] and

[1]For a good discussion of other theories of the nature of the Federal Union than those of the Federalists, see Charles G. Haines, The Role of the Supreme Court in American Government and Politics, 1789-1835, University of California Press, Berkeley and Los Angeles, 1944.

[2](1821) 6 Wheaton 264, 5 L. Ed. 257.

[3](1819) 4 Wheaton 316, 4 L. Ed. 579.

[4](1810) 6 Cranch 87, 3 L. Ed. 162.

[5]Osborn v. Bank of the United States, (1824) 9 Wheaton 738, 6 L. Ed. 204.

[6]B. F. Wright, Source Book of American Political Theory, MacMillan, New York, 1929, p. 294 ff.

historians of the period can abundantly document the hostility with which they were received in some State quarters. Others have pointed out that Marshall, the Federalist, reached different results from those that Spencer Roane, the Republican, probably would have reached, had the appointment of Ellsworth's successor fallen to Jefferson instead of Adams. Be that as it may, these cases (and others) lend color to the charge made by Jefferson against the Federalists that they had retreated into the judiciary whence they could work as sappers and miners to defeat the popular will. The tracts of such writers as John Taylor of Caroline—his *Constructions Construed and Constitutions Vindicated* is an example—were evidence of a very lively dissent from the Federalist view of the Constitution that Marshall was deriving from the "fundamental nature of things" and reading into the law of the land.

The problem of federalism and the Federalist view of the Constitution were also implicit (in some respects quite clear) in the several cases involving the contract clause. In the course of adjudicating these cases, Marshall was able to throw the protection of the Federal Government around certain forms of property and at the same time assert the paramountcy of Federal power over that of the States in selected areas.[7] In achieving these objectives, frequent resort had to be made to a somewhat strained interpretation of language and a selective ignorance of inconvenient facts. In many of the cases involving the division of power in the new American federalism, however, Chief Justice Marshall successfully left vast areas of free decision by future courts. In the case of *Gibbons v. Ogden*,[8] for example, the sort of restraint for the control of which the Federal Convention was called (note that it took almost thirty years before the Court got such a case), he left later courts a broad area within which State actions affecting interstate commerce could be judged tolerable, without yielding in the slightest the paramountcy of the Federal interest in the subject matter.

While Chief Justice Marshall thus sketched the epic design of the Federal system in Federalist style and color, he guaranteed his authorship by moving the Federal judiciary into a position in the Federal Government where it was possible for later judges—as it was for himself—to defeat the popular will in the name of the people. This was accomplished in *Marbury v. Madison*,[9] in an

[7]Charles A. Beard, Jefferson, Corporations, and the Constitution, Washington, D. C., 1936, pp. 16-17.

[8](1824) 9 Wheaton 1, 6 L. Ed. 23.

[9](1803) 1 Cranch 137, 2 L. Ed. 60.

argument applicable not only to Congressional statutes but by extension to State legislation as well. The source of the Constitution, so the argument runs, is the will of the people. The people ordain the fundamental law. But a statute also emanates from the people. In case of a challenge on the grounds of unconstitutionality, the Court must choose to support the statute or the Constitution. There lies, therefore, an appeal from the people (statute) to the people (Constitution). Although put into office by no electorate, the Supreme Court thus acquired a fictitious constituency which (through the judges) could out-vote living men and thwart their purpose as reflected in the statutes. In some instances, he flirted with nature and Divinity as the inspiration for the Constitution but he was too close to the event plausibly to ignore the fifty-five framers and the convention fights over ratification in Virginia and New York.

By asserting for the Court the ultimate authority to define the intent and interpret the will of the fictitious constituency, Chief Justice Marshall enabled the judges to poll the frequently inscrutable desires of men long departed and mark their ghostly ballots. Their function became one of searching the words of the mute to determine their views about matters on which they held no opinion, for the purpose of blocking the efforts of men alive to regulate their own affairs. To be sure, the prevailing doctrine of the day rejected the notion of unlimited power in any organ of government. The philosophy of the Constitution is too much influenced by Locke to accommodate despotism, whether of popular majorities or potentates. But the acceptance of ideas of limited government would not have been incompatible with the view that the demarcation of these limits must be made by succeeding generations for themselves, through their elected representatives or directly.

Fundamental questions about the nature of the Federal union were temporarily taken out of the hands of the judges by the war in 1861; national policy was for the time being no longer being shaped by the law of books but of battles. During the carnage, the judges in the main, bided their time. While the war was on the Supreme Court (although sometimes over the protest of minority judges) avoided embarrassing the Federal Government; it waited until after Appomattox for example before declaring military trials unconstitutional when held in a peaceful theater.[10] From time to time the Court had occasion to observe the spoils of Reconstruction

[10]Ex parte Milligan (1866), 4 Wallace 2, 18 L. Ed. 281.

but, throughout, managed to avoid direct judicial intervention, although here too the judges were far from unanimous in their course.[11] In sum the Court declined to interfere with the progress of the war or of Reconstruction, but later subjected the Fourteenth Amendment to a special (and probably unintended) interpretation that appropriated the guarantees of freedom designed for former slaves and donated them to men of property.

Although reluctant to meet the issues of the war and Reconstruction frontally, the Court exhibited a strong resolve to restore the Federal union as nearly to its ante-bellum division as possible regardless of the intentions of the framers of the new amendments. Many of the cases after 1865 read lectures upon the need for national unity and although the paramountcy of the Federal Government was not denied, but indeed vigorously asserted, care was taken to re-assert the role of the States in the Federal system. But while consistent in the general statement of principle, the judges were not unanimous in the shades of emphasis they imported into their words. A good pair of cases to compare in this respect is *Ex parte Siebold*[12] and *Tarble's Case*.[13] The second was written by a Union Democrat and the first by one of the two 1869 appointees of President Grant, an ardent Republican. Both of these cases postulated the paramountcy of the Federal authority under the Constitution in the fields of its proper exercise. Both declared that the American Government was a federation and not a unitary system. They differed, however, in the theories of federalism they expressed, although both were federalistic.

Justice Field's conception was closer to that of Chief Justice Taney and indeed he cited the latter's opinion in *Ableman v. Booth*[14] to support the decision of Tarble's Case. Taney had diminished the carefully fortified Federal authority of Marshall in no essential respect and indeed had increased and expanded it.[15] What he did try to do in addition, however, was to define a proper sphere of State activity, and in doing so, felt that he was restoring the intentions of the Framers. His doctrine had no room for the nullification sentiments of the Kentucky and Virginia Resolutions, but he attempted to restate for his generation the basic principles

[11] See Mississippi v. Johnson, (1867) 4 Wallace 475, 18 L. Ed. 437; and George v. Stanton, (1867) 6 Wallace 50, 18 L. Ed. 721.

[12] (1880) 100 U. S. 371, 25 L. Ed. 717.

[13] (1871) 13 Wallace 397, 20 L. Ed. 597.

[14] (1859) 21 Howard 506, 16 L. Ed. 169.

[15] B. F. Wright. The Growth of American Constitutional Law, Boston, 1942, p. 55 ff.

of the fundamental law. Like Taney, Field regarded the Instrument of 1787 as a division of powers between two authorities of equal dignity, each empowered to insist that its reserved fields should not be encroached upon by the other. Under this doctrine the Ninth and Tenth Amendments become, in effect, limitations upon the authority of the Federal Government and help to define its sphere.

The conception of Justice Bradley on the other hand was that employed by Marshall. Under this conception, the Federal Government defines its own jurisdiction; the Ninth and Tenth Amendments leave to the State governments the residuum of authority that remains after the Federal sphere has been marked out. The Ninth and Tenth Amendments do not in themselves constitute limitations upon Federal authority, and do not reserve areas of activity or subjects of control into which the Federal Government can never go under any circumstances.

The *Slaughterhouse Cases*[16] were a sign that the post Civil War Court was not disposed to tolerate the argument that the war had wrought any fundamental change in the nature of the Federal union, however disposed individual judges might be to argue the refinements of its division. Despite the evident desires of the Congressional Reconstructionists to retain, by means of the Fourteenth Amendment, the authority to legislate the victory in perpetuity, the Court with appropriate applause for national unity, nevertheless construed the words of grant into vaporous futility in the *Civil Rights Cases*[17] of 1883. The Fourteenth Amendment was construed to have intended no alteration in the historic relationship between the Federal Government and the States (a doubtful conclusion), and the Court offered itself to the States as a repository of the trust that they might not commit to a hostile Congress.

In these dissertations about the nature of the Federal union, the judges were dealing with profound problems of the basic political organization of the Federal society. Chief Justice Marshall's task, as he conceived it, was to mark out the sphere for the Federal Government, to make the master design, the details of which could be filled in later. The post Civil War Court sought to maintain the position of the States as entities of the Federal Union, at a time when an overriding Congress and a victorious army seemed bent upon distorting what the Court considered to be an historic relationship, to be restored and perpetuated. President

[16](1873) 16 Wallace 36, 21 L. Ed. 394.
[17](1883) 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

Lincoln had argued that the Union preceded the States and indeed was responsible for having brought the latter into being, on the assumption that the people became one in 1776, a view that appealed to Jellinek in Germany which was also faced with the problem of producing central unity out of the diversity of fragmented political parts. The world extent of the problem of making political unities out of separatistic localities is evident in the struggles of Garibaldi, Mazzini, and Cavour to unify Italy, of Juarez to unify Mexico, and of the Canadians to set up a federation that would heed the lessons of the American experience. This was done in the British North America Act of 1867 by placing the reserved powers in the central authority instead of the localities. The American Civil War in short was one phase of a world movement in the Nineteenth Century towards republicanism and unification. The contribution of the Supreme Court was to refuse to agree that the war had made any basic change in the position of the States in the American Federal union. In so doing, it exercised political power of considerable influence in a critical moment of American history.

The re-asserted role of the States in the Federal Union scarcely interrupted the expansion of the Federal Government, however, especially when the industrial revolution after the Civil War brought large scale Federal regulation. Some one has remarked that the United States never goes to the right or the left, but always expands in the middle. Something of the sort operated in the field of Federal-State relations; for the growth of governmental activity after the Civil War was less a matter of encroachment by the Federal Government upon the competences of the States than an increase of both Federal and State activity. If the expansion of Federal activities appeared to dominate, it was because the Federal Government was almost for the first time faced with the necessity of dealing with a variety of problems requiring uniform national treatment, for the new business enterprise knew few State loyalties, and the solicitude of business lawyers for the historic rights of the States was all too frequently a maneuver to defeat the public interest. It was a rare case in which the States themselves, through their public attorneys could assert the need for protection from the Federal Government. In the usual case, it was a debaters point between lawyers for private clients to assert that the interest of the client was not peculiarly his own, but that of the State of his residence or incorporation.

In the main, the authentication of the exercise of Federal power by the Supreme Court was based upon doctrines of the Federal competence sketched out by Marshall. In this manner did the Court find the words to certify the approval of the Founding Fathers for acts of accommodation to the social change which transformed a sea-board confederation into a world empire, a feat of augury which was accomplished without the addition of any new substantive powers to the Federal Government by formal amendment of the written Constitution. Consider them briefly. The first ten amendments were limitations upon the power of the Federal Government and so closely associated with the ratification of the Constitution as to be part of the original document. The Civil War amendments granted a mere power to enforce the rules which those amendments prescribed in their texts, for the Thirteenth and Fifteenth amendments were primarily acts of legislation, and only incidentally grants of power. As indicated, Congress once supposed that it had been granted affirmative new powers of a radical nature by the Fourteenth Amendment, but this view was dispelled by the Court. The Sixteenth Amendment granted no new power but provided for the exercise of an admitted power in a manner different from that which the Supreme Court had said was prescribed. The Eighteenth Amendment like the Fifteenth was constitutional legislation, but unlike the Fifteenth it was one that the Congress seriously tried to enforce. None of these amendments or the later ones granted any material powers to Congress and of course the Eighteenth was repealed. All of the other amendments involved either changes in the electoral machinery or in the jurisdiction of the Federal courts. The judicial glossary on the Constitution rather than its text has been the mainspring of Federal authority.

Although the Marshall doctrine of federalism prevailed, later courts never hesitated to summon other theories of the Federal union than that employed by him to achieve objects that could not be won without a change of doctrine. For the Court was cheerfully ambivalent in cases involving what is discussed in the next section as the priority of the estates. Under the spell of its self-appointed mission to define and expound the gospel of civil liberty, it occasionally switched from the Marshall formula to something less hospitable to Federal control. For example, it substituted its version of the Taney-Field conception for the traditional Marshall doctrine in such cases as the Sugar Monopoly Case of 1895,[18] the

[18]United States v. E. C. Knight Company, (1895) 156 U. S. 1, 15 S. Ct. 249, 39 L. Ed. 325.

Child Labor Cases of 1918[19] and 1919,[20] and the agriculture and coal regulations involved in *U. S. v. Butler*[21] and *Carter v. Carter Coal Company*.[22] In each of these instances the Court expressed the view that agricultural and manufacturing production were subjects of control for the States and not for the Federal Government, although the Constitution nowhere says that any specific subject matters are exempt from proper and lawful regulation by the Federal authority. In so finding, the Court gave effect to the view that the Ninth and Tenth Amendments constituted limitations upon the Federal Government by reason, presumably, of the protections they threw around subject matters which the Court said were under the custody of the States.

Now what do these observations on the way in which the Court has dealt with fundamental political questions of the distribution of power amount to? What of it if the Court has pronounced its views about the fundamental nature of the Federal Union; does it not have to in the adjudication of cases before it? The answer to the first of these points is that the Court by reason of its power to declare acts of legislation unconstitutional does more than express its views about the nature of the Federal Union, a right that judges possess in common with all citizens in a democratic society; because of its position, its views acquire a definitive character from which there is neither recourse nor appeal. The answer to the second is that the fundamental pattern of the Federal union could probably have been quite as well preserved without the Court's power to void State acts unconstitutional, as with it. This view contradicts the opinion once expressed by Mr. Justice Holmes that the Court could well afford to yield its power to review the constitutionality of acts of Congress, but that it would be unfortunate if it lost its power to declare State acts unconstitutional. It is not entirely clear why this should be so, and there are serious considerations which support a contrary conclusion.

It is doubtful that the Court has been uniquely responsible for maintaining the basic structure of the American Federal union. As it has frequently said itself, it has neither the power of the purse or the sword, and in the only real clashes of authority, as in President Jackson's dispute with the nullificationists of South

[19]Hammer v. Dagenhart, (1918) 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101.

[20]Bailey v. Drexel Furniture Company, (1922) 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817.

[21](1936) 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477.

[22](1936) 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160.

Carolina, or President Washington's enforcement of the revenue laws in the Whiskey Rebellion, and of course the Civil War, the maintenance of Federal authority in the face of State opposition has been the function of the President and Congress. But, it may be said, these are instances of defiance of the Federal authority; what of the encroachment by the Federal Government into the domain of the States? Has not the Court performed a service to the people in maintaining the integrity of the States as entities of the Federal Union? The answer to this, as to the previous question, is that the elected officials of the Federal Government and the States have probably been more effective in this respect than the Court.

The elected officials of the Federal Government come from the States. There is one whole house of Congress whose basis of organization is the State; a house with coordinate powers in general legislation, a superior position so far as tenure and prestige are concerned, and unique powers in the domain of foreign relations and executive appointment. Such a body may well be trusted to heed the desires of the States in matters of Federal relationship, as the experience of recent efforts to enact Federal legislation against lynching would indicate.

In a democratic society, the basic political questions are for the people to decide, acting directly or through representatives responsible to them. To vest the authority to decide these basic questions of the organization and distribution of political power in other officials than those who owe an immediate responsibility to the electorate, is to take out of popular control the making of the important political decisions. The consequences of these views in evaluating the Supreme Court as a political institution will be further discussed after considering the Court's treatment of social controls and the separation of powers.

III

Throughout its life, but with especial force and influence since the Civil War, the Court has dealt with cases that involve what may be called the "priority of the estates," those in short, in which economic groups and interests carry their struggles with each other into the courts, over issues defined by social controls in the form of legislation. The Court was quite hospitable to the men of property and substance and at various stages intervened in their behalf. This intervention in the social struggle was most persistent from

the 1880's on when a burgeoning capitalism transformed the economic life of the country, adding enormously to the wealth of the nation and breeding complex new problems. But although judicial intervention took new forms after the Civil War, its genealogy begins at least as early as the retreat of the Federalist Party into the Federal judiciary in 1801.

What the State courts had been unable to do for the men of property up to 1787, those men did for themselves in the Constitutional Convention of that year. No need for a *Trevett v. Weedon*[23] when the Constitution itself prohibited the kind of legislation involved in that case. The service which a conservative court could perform for conservative interests was seen before 1800 (notably by Hamilton) but it remained for John Adams and John Marshall to demonstrate how conservative principles could be raised to the dignity of constitutional precept. Chief Justice Marshall's reading of the contract clause was a masterpiece of judicial improvisation. His assumption in *Fletcher v. Peck*[24] that the contract clause of the Constitution was intended to apply to contracts in which a State was party was without foundation and his conclusion that a contract was made in the Yazoo scandal was at variance with the view of the private law about such matters. Fraudulent contracts are rescindable at the election of either party and the innocent third persons involved not only had "notice" but in fact rigged up the case of *Fletcher v. Peck* to get precisely the judgment they received.

By embedding the corporation in the matrix of the contract clause of the Constitution in the Dartmouth College Case,[25] the Supreme Court under Marshall created the conditions of growth most favorable for the budding embryo, to such an extent that it became the dominant form of business organization. Taney modified the inflexibility of the protection thus afforded in only slight degree in certain instances, and in no wise endangered the firmness with which vested corporate rights were anchored in constitutional doctrine. Commentators who see in the Charles River Bridge Case[26] a modification of Marshall by Taney do so without regard for the actual extension of the contract clause by Taney beyond the point

[23]Rhode Island, 1786, printed in J. B. Thayer, Cases on Constitutional Law, Cambridge, 1895, vol. I, pp. 55-83, with other early state cases.

[24]Fletcher v. Peck, (1810) 6 Cranch 87, 3 L. Ed. 162.

[25]Dartmouth College v. Woodward, (1819) 4 Wheaton 518, 4 L. Ed. 629.

[26]Charles River Bridge v. Warren Bridge, (1837) 11 Peters 420, 9 L. Ed. 773.

to which Marshall had taken it. In the Ohio Bank Cases, for example and *Dodge v. Woolsey*,[27] Chief Justice Taney continued to use the contract clause as an armor plate of vested corporate privilege against the efforts of State legislatures by statute and constitutional amendment to divest these privileges. Indeed the evidence is that Taney and Marshall exhibit the same ratios in the proportion of statutes upheld and upset under the contract clause.[28]

The Civil War released powerful forces in society. A new oligarchy was created. The businessman despised before the war by such pre-capitalist spirits as Emerson, Melville and Thoreau, after the war came to dominate the whole life of the country. A new set of mores was created by the new masters. A new economics was evolved to rationalize the chance combination of factors in the last quarter of the nineteenth century which gave to American industrialism its impetus, character, and vitality.[29] A new jurisprudence was in the making to consolidate the advantages gained. The revival of doctrines of natural law in the work of the Supreme Court in this period was essentially the sanctification of the new oligarchy according to the ancient rituals of the American political community. In the face of grangerism, greenbackism, populism, labor organization and corporation-curbing state legislation, the courts founded the defense of property upon bases more endurable, more fundamental than even the fundamental law itself. The right of property was derived from Nature and Nature's God, expressed in the philosophy of John Locke, and ratified by the American people in the Declaration of Independence. Reliance on mere man-made constitutions for the justification of social controls was risky because the greater authority which defined the rights of property was above mere men.

The rights of men, then, tended to become the rights of men of property, and this right of men of property took new forms. It became the right to acquire, rather than the right to hold; for a new doctrine was abroad—the doctrine of civil liberty, which in the Supreme Court, became a right of property. Although, as Parrington has pointed out, the new state of affairs was to have its confused liberal critics like E. L. Godkin and its confused radical critics like Brooks Adams, there was a general feeling, shared by the Supreme Court, that the United States as a nation was on the

[27](1856) 18 Howard 331, 15 L. Ed. 401.

[28]B. F. Wright, Growth of American Constitutional Law, *op. cit.*, pp. 63-64.

[29]See Vernon L. Parrington, Main Currents in American Thought, New York, 1930, vol. III, p. 102 ff.

threshold of great things. Writers as far apart in their methodology as John William Draper and Orestes A. Brownson could meet in the common conclusion that America was destined for an important place in history now that the question of unionism was out of the way. The social order having been ordained by the arbitrament of force, the destiny of America was to seek the ways how best to release the individual to achieve his highest potential. Social order and civil liberty were the twin prescriptions for the success of the new and revolutionary economics.

Draper's *Thoughts on the Future Civil Policy of America*[30] appeared in 1865 and Brownson's *American Republic*[31] in the following year. Each asserted that the United States had a mission to perform, an historical function to serve. This was liberty, a quality of freedom unknown to the world in its history. For Brownson, it was a greater work than either art or law, the God-given teleologies of Greece and Rome. It was liberty with law and law with liberty, "a dialectic union of . . . the natural rights of man and those of society."[32] The liberty cherished by Draper was liberty of intellect. Freedom of personal actions he felt was already secured. A nation that owed its material prosperity to the belief that man could comprehend nature and subjugate her to his use owed a duty to the world to stand forth as a defender of thought. For both, civil liberty had a quality of creativeness in it; to use Santayana's phrase it was vital, not vacant.

The Supreme Court adopted this new gospel of civil liberty and adapted it to the materials before it; it made this attractive political theory the law of the land. Nothing in the black letter of the written Constitution compelled the Court to write the jural apologetics that sanctified the new oligarchy; it was entirely a construction of the judges. Liberty of contract and the right to pursue a lawful calling, as Holmes later observed, were raised to the solemnity of dogma, although they had started as innocuous generalities. The adjustment of the law of the land to the needs of the new industrialism took the Court less than two decades; the repudiation of the doctrines of apology took several.

The Court abandoned the contract clause as the prime guarantee of vested corporate rights and transferred the protection of these rights to the Fourteenth Amendment. In a series of notable cases.

[30]John William Draper, Thoughts on the Future Civil Policy of America, Harpers, New York, 1865.

[31]Orestes Augustus Brownson, The American Republic, Its Constitution, Tendencies and Destiny, New York, 1866.

[32]*Ibid.* p. 5.

the Court found that there was a overriding power in the States, the police power, with reference to which all contracts must necessarily be considered to have been made, and to which they must be assumed to be subordinate in proper cases. The early statements of the scope of the police power, a judge made doctrine, were unusually strong because they were made in cases involving the rights of forms of business enterprise which at the common law were deemed to be peculiarly subject to regulation. Among these businesses were gambling, lotteries, and the manufacture and sale of liquor, and in the cases in which the Court found that contracts involving such enterprises were subject to the police power, strong rhetoric was used to describe the nature of this power of self-protection in the States.[33] The language by itself was deceptive, however; instead of constituting a general grant of power in the States to protect the public health, safety, welfare and morals, the doctrine of the police power was in essence a limiting doctrine, and up to the time of *Nebbia v. New York*[34] in 1934, at least, many ordinary regulations were required to meet the specifications of extraordinary justification before the Court would approve them.

The Court transformed the Fourteenth Amendment by making the due process clause a substantive limitation on State activity. Like the invention of the doctrine of the police power, this was without specific warrant in the black letter of the written Constitution. It was not accomplished by one single act of judicial wit and will for there had been hints of a substantive conception of due process before *Yick Wo v. Hopkins*[35] and *Barbier v. Connolly*,[36] although in the first extensive case involving the Fourteenth Amendment the majority had declined to limit the States in this fashion, and even the minority was not agreed as to which of the clauses of that Amendment should carry the interpretation.[37] The States, although the repositories of all governmental power not delegated to the Federal Government were not thereby the possessors of all governmental power, but were also found to be limited by other restrictions than the flat prohibitions of the Constitution like the ex post facto, bills of credit, and contract clauses. The States were thus limited because all government was limited. This theory of politics has had notable champions, including John Locke,

[33]See Wynehamer v. People (1856), 13 N. Y. 378, and Boston Beer Company v. Massachusetts, (1878) 97 U. S. 25.
[34](1934) 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940.
[35](1886) 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.
[36](1885) 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.
[37]Slaughter House Cases, (1873) 16 Wallace 36, 21 L. Ed. 394.

but it has also had notable dissenters, like Rousseau, who found the ethical basis of politics in the right of the majority to govern. Although the Court's design for freedom—the pursuit of lawful callings—was overlaid with the imputed approval of Nature and the Divinity by the judges, few of them were as candid as Justice Brewer when he said that the paternal theory of government was, to him, odious.[38] The new protection of vested corporate rights was complete when the Court found, in what seems almost like a fit of absentmindedness, that corporations were persons within the meaning of the Fourteenth Amendment.[39] The consequence of this finding was to place the corporation behind a protective barricade much more effective than the contract clause. It is not astonishing that the decline in number of cases under the contract clause coincides with the adoption of the substantive interpretation of the due process clause of the Fourteenth Amendment.[40]

Having decided to regard the due process clauses of the Fourteenth and Fifth Amendments as substantive limitations on governmental activity, the Court then refused to say what these limitations were except in the course of specific cases before it. The refusal to commit itself and the insisted exposition of the due process clause by the process of inclusion and exclusion gave the Court a power to loose and bind that was virtually pontifical. Even where it was willing to permit certain forms of regulation, it was frequently chary of justifying them as ordinary exercises of the police power. Instead, doctrines of extraordinary justification were devised for such situations. In the regulation of the rates of public utilities, for example, a rate would not be reasonable if those who fixed it failed to heed the element of reproduction cost new less depreciation, although the Court never did say how much weight should be given to this factor among others. In those enterprises that were not customarily regarded at common law as public utilities the Court would not tolerate rate fixing as an ordinary exercise of the police power, but invented the doctrine of affectation with a public interest, a pure fiction, for the purpose of limiting price fixing among these enterprises to as few as possible. This doctrine never had any theoretical coherence or predictive value, and indeed

[38]Dissent in Budd v. New York, (1892) 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247, 6 S.

[39]Santa Clara County v. Southern Pacific R. Co., (1886) 118 U. S. 374, 6 S. Ct. 1132, 30 L. Ed. 118.

[40]B. F. Wright, The Contract Clause of the Constitution, Cambridge, 1938, p. 95.

the Court was never able to express it clearly.[41] Only occasionally as in the bank insurance[42] and rent control cases[43] (both by Holmes) was its artificiality quietly smothered by a simple statement of legislative powers. All forms of price-fixing were virtually anathema to the judges, including wages regulation which, until 1937, ran serious risks in every trip to the Supreme Court.[44]

Under the spell of the dogmas, slogans, and mythology of the business community, the Court took very seriously its self-appointed role as the guardian of free enterprise. It revived and perpetuated the concepts of a society long past and applied its norms to conditions that had disappeared or changed. In what Pound has characterized as the "belated individualist crusade" of the judges,[45] they tended to assume that all individuals were of the same size. Over-intent upon the technical rules for the relief of individual defendants from the simpler forms of official duress, the Court consciously or otherwise contributed to the development of an economic system characterized by more complicated and not less effective forms of duress affecting masses of people.

The new capitalism brought in its train various waves of reform which in one fashion or another bred cases for consideration by the Court. Grangerism found the Court feeling its way towards its new political theory and Waite, although reluctant, found sufficient authority for the regulation of grain elevators and railroads by the States in the Granger Cases of 1877.[46] By the 1890's, however, the Court was better prepared and more alarmed; better prepared with new doctrines of limitation and more alarmed by popular discontent. The year 1895 was a climax when the Court, by nullification of the Federal income tax statute,[47] the support of the injunction in the Pullman strike[48] and the protection of the sugar monopoly from the Sherman Anti-Trust Act of 1890,[49] sought, like heroic Perseus, to slay the Gorgon of populism. This

[41]Wolff Packing Company v. Kansas Industrial Court, (1923) 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, was a notable but futile attempt by Chief Justice Taft to provide the desired rationale.

[42]Noble State Bank v. Haskell, (1911) 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112.

[43]Block v. Hirsch, (1921) 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865.

[44]See West Coast Hotel v. Parrish, (1937) 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703.

[45]Roscoe Pound, Spirit of the Common Law, Boston, 1925, p. 49.

[46]Munn v. Illinois, (1877) 94 U. S. 113, 24 L. Ed. 77, and Peik v. C. & N. W. R. Co., (1877) 94 U. S. 164, 24 L. Ed. 97.

[47]Pollock v. Farmers Loan and Trust Company, (1895) 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759.

[48]In re Debs, (1895) 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092.

[49]*Supra*, footnote 18.

gratuitous attempt to defer social retribution and controls was accomplished by tortuous distortions of language and legislative intent and the repudiation (in the income tax case) of the precedents of a century. The climax of conservative reaction in the Court was sustained at high pitch for a period of about ten years. From 1895 to 1905, it declared that the Interstate Commerce Commission was without power to fix rates (even though it had been exercised for a decade);[50] wrote freedom of contract into the due process clause of the Fourteenth Amendment;[51] forced rate-making bodies to adopt a fantastically difficult method of computation in order to guarantee a fair return on the fair value of the property invested;[52] and nullified State labor legislation under circumstances which merited the rebuke of Justice Holmes that Herbert Spencer was more influential in the Court than the Constitution.[53]

The Square Deal and the New Freedom fared somewhat better than the populism that preceded them. New judges and the evident persistence of progressivism to survive at the polls brought about a change of tactics. The frontal assault represented by the Income Tax Cases of 1895 was abandoned and the political reforms represented by the initiative and referendum and the direct election of senators were supported unequivocally, although unnecessary confusion was created in the Newberry Case about the effect of the Seventeenth Amendment on the direct primary.[54] Efforts to persuade the Court to nullify legislation adopted directly by the voters without the mediation of a legislature were unavailing.[55]

Although frontal resistance was, for a time, given up, the more subtle and devious maneuvers of statutory construction persisted. The Clayton Act, for example, sought to relieve the position of labor unions under the Court's interpretation of the Sherman Act, and received rough treatment at the hands of the judges. Not only were the labor provisions construed as though no change had been

[50]Texas & Pacific R. Co. v. Interstate Commerce Commission, (1896) 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, Cinn. N. O. & Tex. Pac. R. Co. v. Interstate Commerce Commission, (1896) 162 U. S. 184, 16 S. Ct. 700, 40 L. Ed. 935, Interstate Commerce Commission v. Cinn. N. O. & T. P. R. Co. (1897) 167 U. S. 479, 17 S. Ct. 896, 42 L. Ed. 243, Interstate Commerce Commission v. Ala. Midland R. Co., (1897) 168 U. S. 144, 18 S. Ct. 45, 42 L. Ed. 414.

[51]Allgeyer v. Louisiana, (1897) 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832.

[52]Smith v. Ames, (1898) 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819.

[53]Lochner v. New York, (1905) 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937.

[54]Newberry v. U. S., (1921) 256 U. S. 232, 41 S. Ct. 469, 65 L. Ed. 913.

[55]Pacific States Tel. & Tel. Company v. Oregon, (1912) 223 U. S. 118, 32 S. Ct. 224, 56 L. Ed. 377.

intended or made, but the use of the injunction in labor disputes was broadened, not narrowed.[56] The Federal Trade Commission which was brought into being by the Clayton Act for the purpose of defining unfair trade practices was limited by interpretation of the Court to the prevention of those practices which were unfair at common law and those which might tend to create monopoly.[57] With its jurisdiction cramped and the Court looking over its shoulder, the Federal Trade Commission fulfilled its intended role as policeman in interstate commerce only with difficulty.

The jural apologetics for free enterprise were not compelled by any necessary interpretation of the words of the Constitution, but were written by judges who absorbed the new secular religion in the period following the Civil War and perpetuated it as the law of the land. The Court thereby trafficked in theories of politics that a substantial portion of the country did not entertain, and used them to defeat the popular will by earnest and frequent recourse to the fictional constituency of John Marshall. Although the Supreme Court is sometimes looked upon as a guarantor of civil liberties, this reputation is only recently won, for until after the middle 1930's, the Court's exegesis on freedom of speech afforded relatively little room for the exercise of this right by radical critics of the existing order. H. W. Edgerton's review of the cases involving the guarantee of personal freedom from arbitrary restraint and invasion by public authorities clearly indicates the modest compass of the protection afforded by the Court.[58] The extension of freedom of speech to the States by way of the Fourteenth Amendment was, incidentally, another act of judicial invention, at first in the Gitlow Case,[59] by assumption, and then in the Whitney Case,[60] by what seems to have been the application of the doctrine of *stare decisis* to the Gitlow Case, an approach to the development of basic political doctrine reminiscent of the way in which corporations came to be regarded as persons under the Fourteenth Amendment. That the right of freedom of speech was not a very broad one, at least at the start, is evident in the Court's early fondness for the limiting con-

[56]Duplex Printing Press Company v. Deering, (1921) 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349.

[57]Federal Trade Commission v. Gratz, (1920) 253 U. S. 421, 40 S. Ct. 572, 64 L. Ed. 993.

[58]Henry W. Edgerton, The Incidence of Judicial Control over Congress, 1937, 22 Cornell Law Quarterly 299.

[59]Gitlow v. New York, (1925) 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138.

[60]Whitney v. California, (1927) 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095.

cept of "dangerous tendency" as the mete and bound of its legitimate exercise. Granted that a society must protect itself from destruction, and cannot acquiesce in its own suicide, it must be admitted that the Court, in the Gitlow and Whitney Cases, was striking from the temple of the body politic, not a Colt .45, but a cap pistol.

IV

Roscoe Pound has pointed out that each of the three branches of the Federal Government has, in successive stages of United States history exercised domination in the Federal political system. Before the Civil War, it was the legislature; after the Civil War it was the judiciary; and more recently, it has been the executive. The frugal words of the Constitution tell us little about the separation of powers other than to arrange the first three articles around the Congress, President, and Supreme Court respectively. Custom and the Supreme Court have written the glossary. The fact is, that the subject has never been one of too much concern to the Supreme Court except where the judiciary was involved, and its powers, real or fancied, were threatened. It was not until 1935, for example, that a congressional statute was invalidated because it delegated too much power to the executive.[61] Where the powers of the judiciary have been involved, however, as in the growth of bureaucracy, the Court has enforced its theories of politics with a taskmaster's hand.

In two areas, the Supreme Court has tended to mark out fields of great scope for the executive—war and foreign affairs. It supported Lincoln, Wilson, and Roosevelt in the exercise of wartime powers that were truly emergency in character and would not have been tolerated in other than times of war, although the Court was at some pains to assert that war did not justify the exercise of powers not already vested.[62] In the field of foreign affairs the tendency has been to find control of our international relations to be an inherent attribute of the office of chief of state, an approach to the problem in contrast to the orthodox doctrine that the Federal Government is one of delegated powers.[63]

Like the issues of federalism and the priority of the estates,

[61]Panama Refining Company v. Ryan, (1935) 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446.

[62]See James G. Randall, Constitutional Problems under Lincoln, New York, 1936.

[63]U. S. v. Curtiss-Wright Export Corporation, (1936) 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255.

the chief problems of checks and balances to face the Court in the fifty years after the Civil War were rooted in the struggles over the new industrialism. The same forces which led to the enactment of various public regulations to delimit the capacity of enterprisers and to care for the casualties of the economic struggle led to the creation of commissions and the development of an administrative law. The justifications for this technique of regulation are too familiar to be repeated but it may be pointed out that the creation of administrative tribunals was necessitated by the very ignorance of sociology and economic fact that enabled the judges to write such opinions as that of Justice Peckham in *Lochner v. New York*.[64] The judges chose to view expanding bureaucracy as a challenge to the judiciary; administrative tribunals were an invasion of the ancient prerogatives of the courts. The principle of the separation of powers was deemed to be in peril.

In certain classes of executive action, the Court was satisfied to tolerate the exercise of a considerable amount of unreviewed authority. As early as 1855, for example, it held that due process was not necessarily judicial process and recognized the need in some cases for a certain amount of executive self-help.[65] Even later, the Court could view with equanimity the imposition of fines by administrative officers where the statute was clear in setting out the facts upon which the imposition of penalties should depend.[66] Where the simulacra of adjudication were involved, however, the Court was jealous of its powers and scrutinized its presumed executive rival with deep suspicion. The Court could hold that an administrative officer's findings of facts were binding upon the courts in cases involving Post Office fraud orders and the deportation of aliens, but not so in cases involving the so-called quasi-judicial tribunals like the Federal Trade Commission. Justice McReynolds felt bound to point out with some asperity in the case of *Federal Trade Commission v. Gratz*[67] that the Federal Trade Commission was merely the "primary fact-finding body."

The whole plexus of argument and refinement of distinction involved in the Court's discussions of questions of law and questions of fact, jurisdictional facts, evidentiary facts, and constitutional facts, was an effort to protect the historic monopoly of the judges

[64]Supra, footnote 53.

[65]Murray's Lessee v. Hoboken Land and Improvement Company, (1856) 18 Howard 272, 15 L. Ed. 372.

[66]Oceanic Steam Navigation Company v. Stranahan, (1909) 214 U. S. 320, 29 S. Ct. 671, 53 L. Ed. 1013.

[67](1920) 253 U. S. 421, 40 S. Ct. 572, 64 L. Ed. 993.

to "try" cases. Post Office, Department of the Interior, Customs, and Immigration officials were permitted to determine and fix the rights of individuals before them without provoking the concern of the Courts so long as they did not pretend that they were acting in place of the courts, but in the commission form of regulation, the Court steadfastly set its face against the wielding of the juridical symbols by any but the members of the ancient craft. In case after case, especially in the rate-making process, it substituted its conception of the facts for that of the men appointed for their expertness in the facts. Under the guise of finding admixtures of law and fact it brought within the province of judicial scrutiny, the entire process of administrative adjudication. The professional clergy was harsh on the lay preachers in the faith, refracting their works according to the triune division of powers, although it was clear that each of them contained within itself executive and legislative authority as well as judicial.

The struggle over the priority of the estates was in essence a struggle over the power to make the important economic decisions in the American community. Just as the Court frequently refused to permit legislatures to make these decisions, so did it refuse to permit the administrative tribunals to do so even when the basic legislation bore the approval of the Court. Here, however, the nature of the intervention was confused with the interest that the Court had in overseeing the activities of those it regarded as rivals in the observance of judicial forms and procedures. One interest tended to support the others: free enterprise was inherently desirable and interference with it by executive authority was undesirable—in addition, many forms of executive action were undesirable because they tended to overshadow the judiciary. The political doctrine of the separation of powers thus became an instrument of laissez faire, another political doctrine, and by its exposition of both, the Supreme Court deferred the time when, and increased the difficulty by which the people through its representatives in the legislatures and the executive seats could come to terms with the needs of that portion of the economic community that could not protect itself by self-help.

V

As one of the principal holders of public power, the Supreme Court in the general areas of political theory commented upon has frequently professed the doctrines and bespoken the interests of minority groups; the Federalists with their gospel of strong central

power and liberal interpretation; the defeated States of the South after the Civil War; the acquisitive minorities bred by the industrial revolution; and the judicial bureaucracy. The imputed views of the fictitious multitude of the Marbury Case, represented by judges, have bound the struggles of the living to move from one precarious social balance to another. One comment has summarized the political activity of the Court in the following words:[68]

"It is at once a judicial and a political body. It is judicial in that its usages are of a court of law. . . . It is political in that its orders extend far beyond the individuals immediately involved; it fixes conditions and sets bounds about the resort to law; it revises the pattern of the separation of powers among the agencies of government; it endows with intent, discovers latent meaning and resolves conflicts between legislative acts; it invokes Constitution, statute, its own decisions to hold Congress, department, administrative body in its place. Even when it imposes self-denial upon itself, politically it extends the frontiers of some other agency of control. Judgments along these lines are political, not legal, decisions. Issues of due process, equal protection, privileges and immunities are questions of the limits of the province of government. . . ." The Court, in short, has exercised a political power of the highest influence; and although subject to the chance of the docket and able only to function interstitially, as Holmes remarked, nevertheless it has been in a strategic position to cast its weight this way and that when the balance could be tipped.

In what may be thought of as the "Bloody Assizes of 1935-6," the Court attempted to save the country from the New Deal, as it had once sought to preserve it from populism. A climax was reached in 1937 when, under an aggressive pressure of opinion, the Court yielded to reforms long overdue. For it was the "Old Deal" Court that led the way with the cases of *National Labor Relations Board v. Jones and Laughlin Steel Corporation*[69] and *West Coast Hotel v. Parrish*.[70] The effect of this recantation is not done; the current court's opinions show an evident desire to retire, for the time being, from the invention and exposition of juristic theories of politics, or at least of the kind opposed to the popular view. But this change must be viewed skeptically. As has been said, "The paths of retreat from policy making are not yet beaten. Nor do

[68]Walton Hamilton and G. D. Braden, The Special Competence of the Supreme Court, (1941) 50 Yale Law Journal 1319, p. 1324.

[69](1937) 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893.

[70](1937) 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703.

they all move in a single direction. Now and then a trail, by a circuitous route, leads back to the political front. It may prove to be the rule—as it is already evident in the instance—that the liberty accorded executive and legislature is postulated upon an expectation of good behavior."[71]

Now, if it be admitted as a postulate of democracy that all holders of political power should be responsible to the people in some regular and effective way for the exercise of that power, it would seem that the Supreme Court as a political institution should similarly be made responsible for the exercise of political powers—so long as it continues to do so. Assuming that it continues to do so, how then do we make judges responsible to the people? An obvious reply would be: election of judges by ballot; and in support, it could be pointed out that direct election of judges in the States is no novelty. Indeed, in New York State the justices of the Court of Appeals are elected, and enjoy an admirable reputation throughout the country, having set marks of professional esteem usually withheld from the lower magistracy who are appointed officers. Differentials of pay and power help to maintain the differential competence, reputation and prestige between these two judicial levels naturally, but it is clear that appointment alone cannot guarantee nor election prevent the recruitment of judges of highest professional skill. And it would not be difficult to make a persuasive case for the election of the justices of the United States Supreme Court, perhaps even more easily than for the State judges, from whose courts appeals to the highest Federal tribunal proceed; for the political decisions of the Supreme Court of the United States affect the basic distribution of powers in the entire American community.

However, it would be difficult to achieve a system of direct election of the Supreme Court although the direct election of judges is as familiar now as it was a century ago, because in the interval the cult of the Constitution and the mythology of the judges have become imbedded in the American political tradition. The influence of lawyers in our public life has been conspicuous since DeTocqueville, at least. As a people, we have a quality of legalism in our national habits perhaps not equalled in any other country, and our great political debates have frequently been disputations akin to lawyer's wrangles. A fairly recent instance of this legalism was the sense of betrayal evident in some newspapers and political

[71]Walton and Braden, *op. cit.*, p. 1369.

speeches when it was discovered that the Atlantic Charter was not a written text to be expounded. As a verbal understanding, it wasn't worth the paper it was written on, to paraphrase the well known jest. Moreover, our political philosophy has usually been couched in the forms of legal debate: consider for example the main question of the American Revolution—whether we were to have the "rights" of Englishmen in the colonies. It was only in the latest phase that we began to argue with Paine about the rights of man in a free society. This propensity to legalism and a general distrust of government have helped to maintain the cult of the Constitution in which the written document is regarded as the source from which right principles can be drawn for the guidance of men in their everyday affairs despite the fact that the words are all too general and the meaning must be found in the deed.

Along with the cult of the Constitution flourish the companion myths about the judiciary, which is often looked upon as a group of wise men aloof from the storms and stresses of will and emotion that beset other people. It is thought somehow to be profane to think that they wear trousers beneath their judicial robes and that they should be subjected like other officers of the government to that periodic scrutiny of their records by which a people keeps itself free in a democracy. Popular election of the judges of the Supreme Court is likely to be the most remote kind of event, then. It would be as difficult to imagine the popular election of the dogmatic clergy although, to be sure, some denominations have succeeded in combining responsiveness to the congregation with respect for the cloth.

A second possibility is the recall of judicial decisions by legislative action. This course also assumes the continued intervention of the Supreme Court in matters of political concern. This possibility meets the same compunction and inchoate resistance as the direct election of judges and for substantially the same reasons. And yet, if it be felt that the judges in matters of constitutional construction (i.e. political doctrine) under a procedure for the recall of decisions, would be subject to the "whims" of a legislature, it can be replied that juristic theories of politics subject the legislature to the whims of the judges. If any body has superior claim to the ultimate word in matters of political doctrine it should perhaps be the legislature, which can be made responsible directly for its acts. It is not enough either to employ the ancient argument of Chief Justice Marshall that the judges take an oath to support

the Constitution and they must perforce expound and enforce it as they understand it, else they will be in violation of their oaths. The legislatures and the executive are also bound to enforce the Constitution as they understand it, and it has never been thought to be inconsistent with this obligation for the judges to have the last and final decision about constitutional meanings. An official who honestly votes his understanding of the Constitution has fully discharged his oath, even if he be overruled in the matter. This has always been true when judges overruled legislatures; it should be equally true if legislatures overrule judges.

Neither of these two possibilities is probably available yet as a course of action for making justices responsible for their political doctrines. Clemenceau is supposed once to have said that war is too serious and important to be left to generals. With equal cogency it can be said that the basic political decisions about the American society are too serious and important to be left to the judges. The only recourse that lies at present is the self denial of the justices themselves. Some would regret a complete abdication of the Court from the field of political doctrine on the ground that the country would lose something of a stabilizing influence. And yet it is difficult to appreciate the merit of this view when it is recalled how unstabilizing the Court has been in rate-making for example, or intergovernmental taxation, or in multiple taxation. So long as presidents continue to appoint members of their own party, as they have in the past, an oblique and indirect kind of responsiveness, sometimes long delayed, and always circuitous will operate. This is indeed a roundabout way however, and only Providence can guarantee that presidents will have an opportunity to express the desires of the electorate in the judiciary, and then only rarely is it that a Jackson, Lincoln, Taft, or Roosevelt has an opportunity to appoint a new court majority.

As was said at the outset, each generation defines the basic constitution of the public power for itself, and the political apparatus gives effect to this decision. As part of this political apparatus, the justices eventually too have come to give effect to these decisions, but the lag is sometimes long and always delayed. With respect to politics and policy, the Court is now in a quiescent phase, but its license to oversee "the commonwealth and the economy" is not revoked, but merely suspended by its own action. Whether the suspension is sometime made irrevocable remains to be seen.