# The Sovereignty of the Courts

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I began these talks on American jurisprudence by stating my agreement with Professor H.L.A. Hart that "American speculative thought about the general nature of law . . . is marked by a concentration, almost to the point of obsession, on the judicial process." "In fact," Professor Hart wrote, "the most famous decisions of the Supreme Court have at once been so important and controversial in character and so unlike what ordinary courts ordinarily do in deciding cases that no serious jurisprudence or philosophy of law could avoid asking with what general conception of the nature of law were such judicial powers compatible. . . ."[1]

The distinctive quality of American jurisprudence and of the American style of government is to be found in the role of the courts. There may be other distinctive qualities, but for an understanding of American jurisprudence and government, the role of the courts must be recognized and explored.

The origin of this power of the courts is important. First, it reflects the persistence and reemergence of natural rights or natural law themes, against that classical background which gives a kind of common law to our thinking about the nature of law. I explored last time the distinctions about justice made in this classical background, and the reflections of this thinking in later and newer formulations. Today one finds a renewal of conscious reformulations. The strength of the natural rights or natural law themes was increased in American history by our colonial origin in which supervision by courts and other agencies played a large part, and in which the colonists hoped to get the help of the courts for the protection or assertion of their rights. The role played by James Otis, as reported by John Adams, in the 1761 *Writs of As-*

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[1] Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 969, 971 (1977).

*sistance Case,* is a dramatic illustration of this. The colonists had an image—an idea—of what courts could do. The colonists knew the older cases of 17th-century England. They cited these cases. They did not read them in the same way that the English—after parliamentary supremacy was achieved there—came to read them. Paraphrasing or quoting three Chief Justices of the Common Pleas or the King's Bench—Coke, Hobart, and Holt—the colonists assumed courts could mold legislation or set legislation aside in response to the demands of natural rights, or equity, or natural reason, or repugnancies or contradictions. Thus one answer to Hart's question as to what concept of the nature of law these powers of the American courts were compatible with is: the conception of law the colonists believed the English courts had.

A second element which shaped our courts was the growth of positivism in the eighteenth and nineteenth centuries. Positivism carried with it—although it didn't have to—the idea that law was a closed system. Positivism emerged as a result of the clash between the natural law view and the new order of the monopoly of official power of the nation-state. Thus positivism came to assume two things. First—the point always made—that law is a command of the sovereign. There might be other interesting and persuasive directives from other sources. But it was the command of the sovereign which made positive law. This was the law the court enforced. Second—and usually not stressed as much as the first, but equally important—was the idea that there was a coherence among the commands, so one command would not be repugnant to another. The rule of law was a coherent logical rule, and it was within the web of this logical structure that the courts found and applied what the command was. The view was that the court made law only, as Holmes said, "interstitially." Its discretion usually was to appear as limited. In this tradition the written constitution could be viewed as the command of the sovereign par excellence.

But positivism never did escape from—indeed it incorporated within itself—the older tradition as to how courts knew what the law was. There was a claim to a special professional competence. The court was able to know what the law was and apply it because law was a discipline acquired, as Fortescue had said, only after twenty years of lamp-lit hard study. This is essentially what Coke told King James in asserting the independence of judges in the Writs of Prohibition case in 1607.

Sir Matthew Hale, who became Chief Justice of the King's Bench in 1671, was one of the few early writers who concerned himself with some analysis of the discipline used by courts in mak-

ing determinations.[2] He viewed the common law of England as composed of (1) common usage or custom; (2) the authority of Parliament "introducing such laws"; and (3) "judicial decisions of Courts of justice, consonant to one another in the Series and Successions of time." Judicial decisions, he wrote, "are for the matter of them three kinds." There were those judicial decisions which had their reasons "singly in the laws and customs of this Kingdom" where "the law or custom of the realm is the only Rule and Measure to judge by." In such a situation the decisions of courts were "the Conservatories and Evidences of those laws." But there were other situations where reasoning of the courts would have to proceed through deductions and inference—"illation," Hale said and Austin later repeated, "from Authorities or Decisions of Former Times in the same or like Cases, and then the Reason of the Thing itself." Then, importantly, there were situations "such as seem to have no other Guide but the Common Reason of the Thing . . . as in the exposition of the intention in Deeds, Wills, Covenants, etc." In such cases the "Judge does much better than what a bare grave Grammarian or Logician, or other prudent Men could do, for in many Cases there have been former Resolutions, either in Point or agreeing in Reason or Analogy with the Case in Question, or perhaps also the Clause to be expounded is mingled with some Terms or Clauses that require Knowledge of the Law to help out with the Construction or Exposition . . . and doubtless a good Common Lawyer is the best expositor of such clauses."

Lord Hale described the authority and special competence of the courts this way: the courts "do not make a law properly so called (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever." The judges are "chosen by the King for that Employment, as being of greater Learning, Knowledge and Experience in the Laws than others . . . they are upon their Oaths to judge accordingly to the Laws of the Kingdom . . . they have the best Helps to inform their Judgments." (By the "best Helps," Hale meant the members of the bar.) They sit as a tribunal, "and their Judgments are strengthened and upheld by

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[2] M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 44-46 (C. Gray ed. 1971) (1st ed. London 1713).

the Laws of this Kingdom, till they are by the same Law revers'd or avoided."

The judges, then, were experts in the law. Hale recognized, as modern judges do and worry about, that society has other experts. There were men of great reason and learning who engaged in "high Speculations and abstract Notions touching Justice and Right," but those kinds of experts "are most Commonly the worst Judges that can be, because they are transported from the Ordinary Measures of right and wrong by their over-fine Speculacons [sic], Theoryes [sic], and distinctions above the Comon [sic] Staple of humane [sic] Conversations . . . ."[3]

A third element which entered into the jurisprudence and expectation of the American courts was concern about majority rule. Why is it just that the majority should compel the dissenting minority? The concern revealed a conflict between a theory of natural rights which could not be given away and the assumptions of popular sovereignty based upon a social compact resting upon consent. Justice Story in his *Commentaries on the Constitution* when discussing the theories about consent as the basis for the American social compact was uneasy about the compact idea, because many citizens he knew had not in fact consented.[4] Nevertheless it was often said men achieved freedom in the rule of law. Kant had said that. Rousseau had justified the rule of the majority on the basis of a general will in which all participated. But why were the members of the minority to be bound when they disagreed? Did the general will as found by the majority have to be such that the minority would have agreed if they had understood, and was its binding effect dependent upon a correct result good for the whole society? What curb was there to be on the will of the majority? It is especially interesting that Jefferson himself, in spite of his view that the courts had no right to decide matters of constitutionality for the legislative or executive departments—and his irritation with the power assumed by courts of construing statutes equitably to their own liking—in urging a bill of rights, stressed the importance of "the legal check which it puts into the hands of the judiciary."[5] The constitutionalism of the American republic was a limitation on

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[3] M. HALE, REFLECTIONS BY THE LRD. CHEIFE JUSTICE HALE ON MR. HOBBES HIS DIALOGUE OF THE LAWE (n.d. n.p.), *reprinted in* 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW app. 500, 503 (2d ed. 1937).

[4] *See* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 329 (Boston 1833).

[5] Letter from Thomas Jefferson to James Madison (March 15, 1789), *reprinted in* 14 THE PAPERS OF THOMAS JEFFERSON 659, 659 (J. Boyd ed. 1958).

popular sovereignty. It was a different, perhaps unique, answer to the problem of the general will.

A fourth element, as the American courts came to see their task, was really a part of the positivist view of law as a science. If law was a science, then much legislation stood in need of being corrected to fit with the science. Lemuel Shaw, later Chief Justice of the Supreme Judicial Court of Massachusetts, in 1827 gave a much admired address to the bar in which he urged that it was the bar's task to keep fresh and in order the science of law. It was a difficult task because there were so many state legislatures wont to pass laws on so many subjects and—the implication was—in so many unscientific ways, with results that didn't fit the science. He appealed to the bar to curb this unprofessional legislative approach.[6] (I realize while this was put in terms of law as a science, it could also be read as reflecting a particular set of policy views.)

Writing about the American legal system in the nineteenth century, Professor Barrett Wendell in the *Cambridge Modern History* saw a part of the role of the American courts as making livable "the incredible confusion of American legislation . . . . If the working of carelessly drawn preposterous or conflicting statutes can be stretched into practical consistency, the Courts may usually be trusted so to stretch it."[7] "The (American Judiciary) . . . has instinctively accepted its real office, which has been to establish and to preserve such order as should enable the community to manage its affairs prosperously. It has always remembered that, in so doing, it must pretend to base its decisions on principles presumed to be established. But, so long as a decision referred to these principles has proved momentarily efficient, it has rarely troubled itself much about their historic truth or their technical validity."[8] (At this point I suppose I should admit that Professor Wendell was not a professor of law, but a professor of English.)

Professor Wendell's account is at least more palatable than the outrageous report which Austin records of the treatment of legislation in the United States around the 1830's. According to Austin, Colonel Murat, "son of the late King of Naples, who curiously enough, has practiced as an English barrister in the Floridas and seems to have a very pretty knowledge of the English law . . . says

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[6] *See* Address by Lemuel Shaw delivered before the Suffolk Bar (May 1827), *extract reprinted in* 7 AM. JURIST & L. MAG. 56, 68-70 (1832).

[7] Wendell, *The American Intellect,* in THE CAMBRIDGE MODERN HISTORY 735 (A. Ward, G. Prothero & S. Leathes eds. 1903).

[8] *Id.* at 736.

that the . . . Acts of the legislatures of those States in which he has resided, are habitually overruled by the judges and the bar. At the beginning of every term they meet and settle what of the Acts of the preceding session of the legislature they will abide by; and such is the general conviction of the incapacity of the State legislature, and of the comparative capacity and the experiences of the judges and the bar, that the public habitually acquiesce in this proceeding. Accordingly, if a law, which the profession have agreed not to obey, is cited in judicial proceedings, it is absolutely rejected and put down by the lawyers *sans ceremonie*."[9]

The American courts combined the traditions and outlooks of these sources and influences. On the one hand there was the free court which protected the rights of free individuals, or natural rights, which was not the same as protecting popular sovereignty; on the other hand, there was the court as the interpreter of the law, that is equipped through special study and a discipline to find the meaning of words, to understand situations, and to know the importance of similar treatment. Constitutionalism combined these two aspects. It claimed for the court a protective automaticity in the construction of statutes or constitutional provisions—as Marshall did in *Marbury v. Madison*. It claimed also for the court the understanding of words which were gateways to the natural law or natural rights. This was why during the era of substantive due process in 1879, Judge Andrews of the New York Court of Appeals, in sustaining an absolute liability statute against the owner of premises used by a lessee, with the owner's knowledge, for the sale of liquor, could write: "The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. Indeed, under the broad and liberal interpretation now given to constitutional guarantees, there can be no violation of fundamental rights of legislation which will not fall within the express or implied prohibition and restraints of the Constitution, and it is unnecessary to seek for principles outside of the Constitution under which such legislation may be condemned."[10]

Judge Andrews was writing five years after *Loan Association*

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[9] 2 J. AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 656 (R. Campbell ed. 5th rev. ed. 1885) (1st ed. London 1869).

[10] Bertholf v. O'Reilly, 74 N.Y. 509, 514-15 (1879).

*v. Topeka*[11] in the United States Supreme Court which held unconstitutional a state statute without reference to any specific constitutional provision but rather to inherent limitations on governmental power "which grow out of the essential nature of all free governments." In a later case Justice Miller implied that his *Topeka* opinion was based on "principles of general constitutional law," perhaps a reminder of Chief Justice Marshall's language in his summation in *Fletcher v. Peck* of "general principles which are common to our free institutions."

*Topeka* was followed by the famous or infamous *Lochner* case[12] in the United States Supreme Court in 1905 where the Court struck down as unconstitutional a New York statute which would have limited the number of hours per week (sixty hours) and per day (ten) for those working in a bakery. The statute was condemned as an invasion of "liberty" protected by the Fourteenth Amendment, which had been passed as a result of the Civil War and was applicable to the states, as the fifth amendment, with much of the same language, was applicable to the federal government. Mr. Justice Peckham said: "The general right to make a contract in relation to his business is part of liberty protected by the Fourteenth Amendment of the federal constitution . . . . The right to purchase or sell labor is part of the liberty . . . ." It was to this opinion that Mr. Justice Holmes wrote his dissent which included the sentence: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." More significantly, Holmes said: "I think the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles, as they have been understood by the traditions of our people and our law." One has to notice that even Justice Holmes was accepting the position of the superintendence of a court over legislation to the extent that it was similar to a court setting aside a verdict of a jury. The majority, of course, denied that the judgment of the court was being substituted for that of the legislature. The question was not policy but solely whether the legislation was within the power of the state. It used the shield of automaticity.

In explaining the present position of the Court, I suppose one must also make at least passing reference to the natural tendency

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[11] 87 U.S. (20 Wall.) 655 (1874); *see* Davidson v. New Orleans, 96 U.S. 97, 105 (1877).

[12] Lochner v. New York, 198 U.S. 45 (1905).

on the part of governmental powers to expand when they can do so. One could make a good argument, indeed, that this was the intentional design, or in any event the necessary consequence, of the American Constitution; that is, when one department becomes weak or vulnerable, another grows stronger to take up the slack. The doctrine is usually put the other way. The American government was founded with a separation of powers theory, and with a theory of federalism—both reflecting a distrust of government. The form compels competition among the branches of government. In this competition the courts have done well. Severe attacks upon the Court have not prevented its apparent gain in jurisdiction and influence. One would have thought, for example, that the decision in the *Dred Scott* case in 1856, which held the Missouri compromise unconstitutional and denied the right of the free states to make a black a citizen of the United States—and also the power of Congress to do so—would have greatly weakened the Supreme Court. The opinion of Chief Justice Taney is regarded as a disaster. But, as Professor Rostow points out, ten years and a civil war later the Court was as strong as ever, holding that Lincoln as President had no right to have an active southern sympathizer (accused of conspiring against the government, affording aid and comfort to rebels, and inciting the people to insurrection) tried by a military commission in a border state, and apparently determining that the Congress would have "no power to indemnify the officers who composed the commission against liability in a civil court for acting as members" of the commission. Chief Justice Chase in a separate opinion wondered whether this kind of a decision, limiting national power to use military tribunals in border areas when "some portions of the country are invaded, and all are exposed to invasion" was a realistic approach to the Civil War experience or for future contingencies of a similar kind.[13]

The ability to decide matters of this kind after the fact is of great help in this competition, and this vision of hindsight is probably necessary to maintain the kind of moral commitment required to values which underlie constitutional doctrines. The Japanese west coast exclusion cases are illustrative. Because of the threat of Japanese invasion of the west coast following Pearl Harbor and the fear of sabotage and espionage, the Roosevelt administration, acting through a military commander for the area, required Americans of Japanese descent to leave certain areas, to go to assembly

[13] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 118-26 (1866).

and relocation centers, and then, until released, to live in these war relocation centers. This was in 1942. In 1943, the Court upheld the curfew order which was part of this scheme.[14] Then in 1944, it upheld the criminal sanction for the requirement of removal from the area,[15] but at the same time, in a separate case, held unlawful the detention of loyal American citizens in the relocation centers.[16] Most people I am sure today approve of this last decision, and disapprove of the policy behind the removal of Americans of Japanese ancestry from the west coast, since it infringes an important principle and now seems to have been not only unnecessary but corrupted by a mingling of improper motives. It did not seem so unnecessary in 1942, although the danger had passed in 1944.

The Supreme Court did not come out of this episode with all of its flags flying, but after the fact it did leave one—perhaps small—flag for civil liberties. It is more difficult for an executive who has to act to do that. The Court has a special ability to compromise, to speak enigmatically, to explain later, to change.

In a separate opinion in the 1944 *Korematsu* case, which upheld the use of the criminal sanction in the civil courts for removal from the area, Justice Jackson, in dissent, posed one of the dilemmas for a law-abiding and court-governed society. Justice Jackson was not critical of the military commander for issuing the order for removal. Justice Jackson said he could not find in the evidence before him that the commanding General's orders were not reasonably expedient military precautions, nor could he say they were. "The armed services," he wrote, "must protect a society, not merely its constitution . . . . Defense measures will not, and often should not, be held within the limits that bind civil authorities in peace . . . . The military reasonableness of these orders can only be determined by military superiors . . . . The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history." In his opinion, Justice Jackson also wrote, "But once a judicial opinion rationalizes . . . the Constitution to show that the Constitution sanctions such an order, the Court for all times has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." He "did not suggest that the courts should have attempted to interfere with the Army

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[14] *See* Hirabayashi v. United States, 320 U.S. 81, 91, 101-02 (1943).

[15] *See* Korematsu v. United States, 323 U.S. 214, 214-19 (1944).

[16] *See Ex parte* Mitsuye Endo, 323 U.S. 283, 297-307 (1944).

in carrying out its task." But he did not think "they may be asked to execute a military expedient that has no place in law under the Constitution."

Justice Jackson's dissent suggests a boundary between court-directed law and certain governmental actions. As though in partial comment on this, Professor Lon Fuller has written, "The internal morality of law . . . is not and cannot be a morality appropriate for every kind of governmental action."[17] Such boundaries do not find easy acceptance. One wonders in a country of law, if such an occasion should arise again, what would a president do, what would a military commander do—what assurance would be required or appropriate that the Constitution was not being violated?

The special continuity of the Court also makes it possible for it to renounce in time its own doctrines. The substantive due process doctrine of *Lochner* was publicly renounced by the Court in 1963 in the case of *Ferguson v. Skrupa.*[18] The doctrine which *Topeka* helped spawn in 1874 had come under terrific attack in the New Deal days, and before, since it was one of the bulwarks against social legislation. It was only right that it should be declared moribund about one hundred years after *Topeka* so that it could be immediately revived, as it was, for cases of personal liberties.[19] If it is the Court's function to give to the country it governs the doctrines it needs for a particular time, as well as some other doctrines forever, then the change in substantive due process is a good example. The change in the separate but equal doctrine for racial discrimination is another example.

The growing strength of the Supreme Court, and therefore the courts in general—although the courts have had to face difficult periods which they have sometimes done with great courage—is to be contrasted with the position of the executive under the American Constitution. Save in war time—and one does not know what that situation might be—the American presidency is a weak office. It has long been acknowledged to be weak, although this is frequently forgotten. Woodrow Wilson, writing his doctoral dissertation at Johns Hopkins University in 1885, thought the presidency under the American Constitution was so weak that the only hope was to change the American government into a more parliamentary

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[17] L. Fuller, The Morality of Law 171 (rev. ed. 1969).

[18] 372 U.S. 726, 730 (1963).

[19] *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1969).

form.[20]

I turn now for a quick moment to comment on the alternation of stages of behavior which it seems one may expect in judiciary law.

Karl Llewellyn and more recently Grant Gilmore, for example, have seen the behavior of American courts as falling into three stages. Gilmore[21] called his three stages as follows. First there was the age of discovery. It went from the American revolution through the Civil War in 1860. That period was one where we developed our own great judges: Marshall, Story, Kent, Shaw, and others. There was great admiration for Lord Mansfield—at a time when his reputation in England had faded somewhat. Industrialization was going ahead in the United States and with it the development of commercial law. It was a time for the creation of new doctrines. There were the first rumblings of a desire for codification. While *Blackstone's Commentaries* was still for a long time the dominant work, the American treatises on law of Kent and Story were being written and published. We developed our own doctrine of precedent.

The second period, according to Gilmore, was the age of faith. This age went from the end of the Civil War to the beginning of World War I. The age of faith had a shared belief in the power of the reigning establishment. It was the age of substantive due process used to protect property rights from the legislation of the states. It was the age of reconstruction following the Civil War and the occupation of the South. The fourteenth amendment, which arose out of the Civil War, in its terms declared that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court in 1873 in the *Slaughter House Cases*[22] refused to apply this amendment to hold unconstitutional a state statute in Louisiana which gave a monopoly of the slaughtering business in the New Orleans area, even though it was claimed that the statute deprived individuals the freedom to engage in the business of their own choosing. The Court said the fourteenth amendment was adopted mainly if not exclusively to

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[20] *See* W. WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 242-93 (1925).

[21] *See* G. GILMORE, THE AGES OF AMERICAN LAW 11 (1977).

[22] 83 U.S. (16 Wall.) 36 (1873).

help the former black slaves and that it was not intended as a general matter to transfer the security and protection of civil rights from the state governments to the federal government. The Court realized that the amendment had changed the balance between the states and the national government somewhat, but not that much. To quote the Court: "Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of persons and property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation."[23]

But this did not keep the Court, one year later, from declaring unconstitutional a state statute in the *Topeka* case permitting the grant of funds in the form of bonds to private manufacturing firms whose industry was of support to a city. But this statute, viewed by the Court as similar to an enactment that the homestead owned by *A* should henceforth be the property of *B* (to take from Peter and give it to Paul, Justice Symonds had said in *Giddings v. Brown* in 1657) apparently required no reference to a specific constitutional provision to hold its application void. It violated the "limitations . . . which grow out of the essential nature of all free governments." Otherwise the government would be "but a despotism."

Then in 1883 in the *Civil Rights Cases*,[24] the Court held unconstitutional the federal statute which made it a criminal offense to deny accommodations in an inn or public conveyance or a theatre or other place of public amusement on the basis of race or color. The cases involved this kind of denial to black persons. The Court said this was not state action (although it followed a state custom from the slavery period), and the Fourteenth Amendment only applied to state action. Moreover, the Court said, "If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property?"[25] And the Court seemed to deny any special required continued concern for the former slaves. It said: "When a man has

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[23] *Id.* at 82.

[24] 109 U.S. 3 (1883).

[25] *Id.* at 14.

emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be a special favorite of the law, and when his rights as a citizen or as a man, are to be protected in the ordinary modes by which other men's rights are protected."[26]

Eugene Rostow explains the *Civil Rights Cases* on the basis that the country was tired—tired of the Civil War and the problems of reconstruction; that if a court is to reflect the emerging collective morality of a society, this thrust for better treatment of the blacks was not then part of the "inner condition of the law."[27]

Then in 1896, in the case of *Plessy v. Ferguson,*[28] the Court upheld the state action of a statute of Louisiana which required separate accommodations in intrastate railroads for black persons and white persons. This is where the doctrine of separate but equal, which held sway for 58 years, until *Brown v. Board of Education*[29] set it aside, comes from. The Court in *Plessy v. Ferguson* said that "The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[30]

In the meantime, the Court continued to find the Fourteenth Amendment useful as a shield against social reform legislation in the states on the ground of substantive due process. Hence the *Lochner* case in 1905.

Gilmore describes this second period of our law, from the end of the Civil War to the time of World War I, as "the law's black night . . . . Never had lawyers and judges been so confident, so self-assured, so convinced beyond the shadow of a doubt, that they were serving not only righteousness but truth."[31] There was faith that the inner workings of the law were automatically on the right track. It was the time of the development of the case method in

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[26] *Id.* at 25.

[27] E. Rostow, The Ideal in Law 60 (1978).

[28] 163 U.S. 537 (1896).

[29] 347 U.S. 483 (1954).

[30] 163 U.S. at 544.

[31] G. Gilmore, *supra* note 21, at 41.

American law schools. It was indeed a period which became one of positive law, viewed as a closed system. For some quixotic and paradoxical reason, according to Gilmore, Holmes was the intellectual darling of this era. This was because Holmes, with a mixture of both cynicism and optimism, saw law in an evolutionary framework, where the form of law would accommodate as the substance changed in some evolutionary way, according to influences beyond human reach.

The third stage, according to Gilmore, begins with the period after World War I and continues through the present. Gilmore calls this the Age of Anxiety. He thinks that the beginning of this age is symbolized by Chief Judge—later Justice—Cardozo, who realized that creation, not discovery, was the proper function of a judge, but in a setting of the pattern of legal reasoning. It was a time when the legal realists came into prominence with their attacks on legal positivism as a closed system. It was realized that legal reasoning was a technique which could be used to change the law, to make it responsive to different values and ideas. Proper legal realists, aside from describing law as simply an argumentative technique, began to worry about how better social results could be achieved, and how the symbols of law could be used for the purpose. But it was—and continues to be—according to Gilmore, an age of anxiety—one of doubts, problems, and uncertainty.

Karl Llewellyn also divided American law into three stages with roughly the same periods as Gilmore later used.[32] In the beginning and up to the time of the Civil War, what Llewellyn called the Grand Style was dominant. After the Civil War to the end of World War I, the Formal Style was dominant. But then after World War I and at least until 1960, the Grand Style returned. In the Grand Style, the judge, in making his determination of the law and in applying the law, explicitly takes into account the needs of policy. Precedent is also taken into account, and is more persuasive if it comes from a good judge. Moreover, in applying the law and changing it, it is of importance that the judge move with the grain of the law; that is, his opinion must fit in and help shape the momentum of the law. The judge must not attempt the impossible.

The Formal Style was very different. The doctrine of the separation of powers which allocates change to the legislature denies creation to the court. The existing legal authorities are regarded as

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[32] *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 35-45, 189-91 (1960); K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 178-84, 215-29 (1962) [hereinafter cited as K. LLEWELLYN, JURISPRUDENCE].

containing all the answers. Justice is relevant—where there are problems where answers seem doubtful—but clarity and certainty of rule are the true goals of a court. But even legislation, if it changes things too much, particularly the pattern which the Court has lived by and created, is to be frowned upon, narrowly construed, and if it attempts too much, to be held unconstitutional. In the Formal Style—which held sway for Gilmore's black night—the purpose of the existing legal system, according to Llewellyn, "was not to follow society, but to discipline society and to control it; criteria for handling cases are to be found . . . exclusively within the legal system, not outside it; and what a court deduces from the existing materials is what it is that court's duty to proclaim, come hell or high water, and that is what both judicial conscience and judicial independence are for."[33]

Jurisprudential scholars have always looked for stages in the law—whether it is in their own law or Roman law, and the search seems to be to find something inevitable in the movement. To some extent it is like tracing the development of a language, as Savigny pointed out,[34] for law is a language and subject to the same kinds of influences. What one sees in the Llewellyn and Gilmore formulations, at least in part, is the alternation of periods of expansion in the law with periods of consolidation. Llewellyn, commenting on Roscoe Pound's division of American law into three eras: formative, mature, and sociological, wrote, "The sequence 'movement-consolidation-movement' holds, without question."[35] I think we have to realize that we are not just talking law then, but government, and not just government, but the society as a whole. But it is correct that one can find periods when the Court takes for itself a greater leeway of action, and this affects the Court's technique, and, of course, it affects the law itself.

There is, I think, a pattern of judicial reasoning in common law cases, which grows by comparing cases and reasoning by example or analogy from one particular situation to another—thus having a strong inductive element, and yet feeling the necessity to remold and announce rules which justify the new result reached. The new rule, which may have found new meanings in old language, thus becomes a kind of neutral principle which will be changed again in the future. The development of the law of torts is

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[33] K. LLEWELLYN, JURISPRUDENCE, *supra* note 32, at 303-04.

[34] *See* F. VON SAVIGNY, *Origin of Positive Law*, in OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 24-31 (A. Hayward trans. London 1831).

[35] K. LLEWELLYN, JURISPRUDENCE, *supra* note 32, at 179.

filled with such examples. On the other hand, the interpretation of legislation places a different task on the courts and involves a kind of deductive reasoning, since the words are fixed in the statute and are there to be applied. The initial interpretation of these words—which may be very ambiguous words—by the courts, in early decisions under the statute, are likely to fix the meaning of the legislation in a way that subsequent decisions of the courts in common law cases are not fixed. So there is a rigidity and fixity in statutory interpretation. A third kind of reasoning involves the written constitution. Written constitutional provisions are like statutes in that the constitution has set words. But when the court says this is a *constitution* and not a statute, it often means that the words are to be allowed to change in meaning, and that they are subject to reinterpretation as though they were common law concepts. And then the court means something more. It means, as Justice Frankfurter said (almost as soon as he found his seat on the bench), "The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[36] The written constitution therefore gives the court great power—not just great power to declare legislation invalid, as Chief Justice Marshall found, but great power to disregard prior decisions of the court itself, to tear up whole periods of interpretation, and to start over again. It was not until 1966 that the Law Lords in England announced that they were not absolutely bound by their prior decisions. One has to compare with this the American Court's view that where the written Constitution is involved, a Court cannot be bound by its prior opinions. Of course it is somewhat bound—otherwise judicial opinions would be, as Justice Roberts complained (and almost every United States Supreme Court Justice who sits long enough has sometimes complained) a "restricted railroad ticket, good for this day and train only."[37]

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[36] Graves v. New York *ex rel.* O'Keefe, 300 U.S. 466, 491-92 (1939).

[37] Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). *See* Screws v. United States, 325 U.S. 91, 112 (1945) (Douglas, J.) ("It [a rule of law] should be good for more than one day only.").

In support of his argument that it was intended by the framers of the Constitution that the Supreme Court of the United States should be the final arbiter of the constitutionality of acts by the state, by the national authority, by the legislature, or by the executive, Justice Story, in his COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 4, emphasizes that "by the known course of the common law," judicial decisions of the highest tribunal set principles which "bind future cases of the same nature." *Id.* § 377. He writes: "A more alarming doctrine could not be promulgated by an American court, than, that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles." *Id.*

So there is a good deal of the common law type of reasoning in the constitutional cases, incremental reasoning—reasoning by example—which it is easier for a court to use when big changes would be bogged down by hot disputes covering matters of policy. Thus at a time when the United States Supreme Court was refusing to permit national regulation to wipe out child labor in the states by closing the channels of interstate commerce to the products of that labor, it found no difficulty in closing the channels of interstate commerce to the transportation of women for immoral purposes or to the transportation of diseased cattle, or adulterated foods, or similar products in which it found similarity. And when the Court had walked a considerable distance down this road, it found it easier to uphold a national statute regulating wages and hours. When the Court did so, it referred to these cases where obnoxious things had been kept out of interstate commerce to show there was a general power to prohibit and regulate, for the distinction which had made an exception of deleterious and harmful products "was novel when made and unsupported by any provision of the Constitution."[38] Those cases had been used as stepping stones, and when they were no longer needed, their separate classification was abandoned. You will find this going on continually. It makes for a certain adroitness on the part of the Court.

It is the same kind of adroitness which is exhibited by the Supreme Court in the *Griswold* case in 1965 when it held unconstitutional a Connecticut statute which made it a criminal offense to use "any drug, medicinal article or instrument for the purpose of preventing conception." The statute was unconstitutional, the Court said, through Justice Douglas, because it applied to married persons, and "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[39] Marriage was "an association for as noble a purpose as any involved in our prior decisions." Then seven years later the Court in *Eisenstadt v. Baird*,[40] dealing with a Massachusetts statute

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[38] United States v. Darby, 312 U.S. 100, 116 (1941).

[39] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[40] 405 U.S. 438 (1972). Though Justice Brennan's opinion was for the Court, it represented the views of only four of the seven Justices sitting in the case. Indeed, Justice Douglas, who was one of those joining Brennan's opinion, preferred the narrower ground that Baird's violation was a giving away of a package of contraceptives in the course of a lecture and that this act was protected by the first amendment. *Id.* at 455-60. Justice White, joined by Justice Blackmun, concurred in the result: the record did not disclose the marital status of the recipient and therefore "I perceive no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried." *Id.* at 465. Chief Justice Burger dissented. *Id.* at 465-72.

which prohibited the sale or the exhibiting or offering to give away of contraceptives, but made special provisions for married persons, said that such a prohibition was a denial of equal protection to unmarried persons, since under *Griswold* the restriction on the sale to married persons would be unconstitutional. It is hard to believe the Court in *Griswold* didn't know where it was going. But it didn't say so. It took one step at a time and then in *Eisenstadt* disclosed what it had done.

If one tries to answer, or perhaps avoid answering, Hart's question as to what general conception of the nature of law the American government of superintendence over the country by courts is compatible with, possibly one should say it arises out of the necessities of American life. It is a companion of the freedom we desire and the cruelty and ruggedness of human nature. I am not particularly pleased with this answer, but I fear it has a lot to it. Much of American history, and the history of the courts in the United States, has been shaped by the existence of slavery, for almost half the existence of the American republic, and the continuation of the after effects of slavery during the republic's second century. It was this taint which made John Adams shudder in recalling James Otis' argument based on natural rights in the Writs of Assistance case. The taint of black chattel slavery was built into the American Constitution. The fugitive slave provision of the Constitution was an essential part of the bargain which made for the original compact. It explicitly prevented free states from giving freedom to slaves escaping from slave states. It was a lawyer's provision intended to keep Lord Mansfield's judgment in the 1772 case of James Sommersett[41] from being applicable as among the states of the Union. James Sommersett had been purchased as a slave in Virginia, taken by his master to England, had escaped in England, then seized by agents for his master and placed in chains on a boat lying in the Thames. The boat was to go to Jamaica where Sommersett was to be resold. A motion for a writ of habeas corpus was brought before Lord Mansfield. He granted the writ and ultimately ordered that "the black must be discharged." Mansfield refused to accept, as a justification for holding Sommersett in irons in England, the Virginia law of slavery. "The state of slavery . . . is so odious that nothing can be suffered to support it but positive law." Mansfield found no such positive law in England supportive of the Virginia imposed slave status. The fugitive slave

[41] Sommersett v. Stewart, 98 Eng. Rep. 499 (K.B. 1772).

provision of the Constitution supplied that positive law as among the states. Distinguished judges such as Justice Story and Chief Justice Shaw had to bow to it. The history gives evidence of the force of a custom and prejudice so strong that one cannot say Chief Justice Taney was wrong in the conclusion that a country whose documents spoke so nobly of the rights of men, simply did not include in its compact the idea that slaves were of the human race intended by these words. Nor can one say that Justice Douglas was wrong as late as 1968 when concurring with an opinion, reviving and changing completely the interpretation of a civil rights statute originally passed in 1866, giving all citizens the same rights as white citizens to purchase, lease and sell real and personal property, he spoke of the "jurisprudence of a nation striving to rejoin the human race."[42]

Professor Enker* has discussed *Brown v. Mississippi*.[43] This case was pivotal in changing the approach of the United States Supreme Court toward state court criminal trials. One has to ask how in 1936, in a civilized country, with state government officials and courts on duty, a case would have to come to the Supreme Court of the federal government from proceedings in a state court, where under the guidance of a deputy sheriff, defendants had confessions beaten out of them over a period of days; and all of this was admitted. Chief Justice Hughes characterized what had occurred as "trial by ordeal." One has to ask where were the judge and the lawyers and the state officials with responsibility for the minimum essentials of fair criminal justice procedures and for the correction within the state itself for such egregious deviations.

So far as the aftermath of slavery was concerned, federalism has not worked in the United States if one removes the supervision of the Supreme Court. Granted that at times the leadership of the United States Supreme Court was not helpful, the hands-off attitude of the Supreme Court, both for itself and for the federal government as a whole, did not result in justice. It did not result in justice in criminal proceedings; it did not result in justice in the ordinary affairs of life, such as buying or selling or gaining accommodations; and it did not result in justice in schooling. The intervention of the Court was a necessity, and so interrelated are the

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[42] Jones v. Alfred M. Mayer Co., 392 U.S. 409, 449 n.6 (1968).

*[EDITOR'S NOTE: Arnold N. Enker, Professor of Law at Bar Ilan University, Israel, lectured at the Salzburg Seminar on American criminal law. He was a Visiting Professor at the University of Chicago Law School during the 1976-77 academic year.]

[43] 297 U.S. 278 (1936).

affairs of life that once begun it is hard to know where there is an area for nonintervention. The intervention of the Court in *Brown v. Board of Education* in 1954 to stop state segregation of black and white school children involved the Supreme Court in a bitter fight of many years. It no doubt helped convince many judges of the evil intentions of their fellow citizens—and that too is a legacy which has to be overcome. The form of the intervention, too—making the federal district courts almost and sometimes in fact receivers for the schools—pushed the courts into a kind of administration which we had learned to expect for failed railroads, but not over units of local government. Again the proliferations of these kinds of intervention into other fields are many—to state prisons, hospitals for the mentally retarded, hiring for police departments—not complete supervision over local functions, but close to it. Mayors and governors discovered how not to do their duty, but to leave it to the federal courts. But what reason is there to think that the needed steps would ever have been taken without federal court intervention?

Perhaps among the most surprising of the interventions by the Supreme Court was in the 1960's when it ordered changes in the districting for voters both for state legislatures and for the federal congress. A believer in democratic government, with the voice of the people expressed through their legislative representatives, might have thought these legislative bodies could have been relied upon to take care of such a matter. But it did not happen that way. With this intervention into what seems a political sphere, one wonders what is left of the idea that matters of political speculation are for the legislative branch, not the court. Each intervention by the Court has brought it new cases, and with it a sense of injustice if the Court does not act. The contraceptive statutes were silly statutes, as Justice Stewart wrote in *Griswold* in dissent from his colleagues. He pointed out that the Court only two years before had pronounced that the due process clause was no longer regarded as a proper instrument for determining "the wisdom, need and propriety of state laws."[44] But he was in dissent. A court that holds itself out to correct the injustices of the statutes of fifty states and of the federal government itself has become, as Learned Hand predicted, a bevy of guardians. But perhaps a necessary bevy of guardians.

It is not surprising either, with so much injustice to correct,

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[44] *Griswold*, 381 U.S. at 528 (Stewart, J., dissenting) (referring to the Court's decision two years earlier in Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).

that the interpretation of the Constitution has been reinvigorated almost in natural law terms. In *Griswold,* the Court noticed that the Ninth Amendment stated that "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[45] So there it was in plain words—the rights which the people had before, their natural rights one might as well say, were now part of the Constitution itself. Thus no specific provision of the Constitution need be relied upon in dealing, for example, with the right to travel,[46] or in taking the lead in effect to enact within the Court a statute on abortion.[47] And so when it comes to the injustice of a city's housing code, which defined a single family so as to exclude within the permitted family unit a grandchild with the relationship of first cousinship to another resident grandchild, Justice Powell corrects the injustice.[48] For the violation of the city ordinance, the grandmother had been convicted of a crime; the Ohio Court of Appeals had affirmed the conviction, and the Ohio Supreme Court had denied review. Justice Powell recognizes that what he is doing, although "history counsels caution and restraint," is a continuation of substantive due process. The sanctity of the family was involved. James Wilson perhaps would have included the circumstances of this family unit within the category of natural rights which he termed "peculiar relations."[49]

This then is a description of the sovereignty of the courts—of their superintendence over a society—"so unlike what ordinary courts ordinarily do." It is a description of perhaps the most important aspect of the present American form of governance. The form is a unique answer to the problems of popular sovereignty and of federalism. It has its proponents and its critics. Critics see the courts deciding policy matters which perhaps life-tenured judges do not hold their commissions to determine, and of turning policy matters into principles beyond the reach of political discussion and voting. The critics see the courts as having made it easy

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[45] *Griswold,* 381 U.S. at 484. *See* Olff v. East Side High School Dist., 404 U.S. 1042, 1044 (1972) (Douglas, J., dissenting from denial of certiorari) ("The word 'liberty' is not defined in the Constitution. But, as we held in *Griswold v. Connecticut,* . . . it includes at least the fundamental rights 'retained by the people' under the Ninth Amendment.").

[46] *See* Shapiro v. Thompson, 394 U.S. 618, 630 (1969).

[47] *See* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

[48] *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[49] J. Wilson, *Lectures on Law,* in 2 The Works of James Wilson 592 (R. McCloskey ed. 1967); *cf.* Carey v. Population Servs. Int'l, 431 U.S. 678, 707-11 (1977) (Powell, J., concurring in part and in result) (encouraging adolescents to seek guidance from parents is a constitutionally permissible end).

for democratic assemblies not to grow in responsibility; as having turned local issues into national ones, and then failing to make the national Congress and not the Court the legislative assembly on many issues now made national.[50] The assumption of executive powers by the courts seems to the critics often to have been awkward and irresponsible. The proponents see the growth of court government as a wonderful invention through which the Court, as a tribune of the people, incorporates a kind of participatory democracy, keeps fresh the discussion of basic values, protects popular sovereignty while limiting it, corrects voting by special protection for the weak and minorities, and helps steer the course of a country by an inner compass.[51]

In any event, if we would understand it, we should remember the necessities out of which this form of government has grown—the accidents of history but also the strengths and weaknesses of our nature. No doubt the form will continue to grow and perhaps to change.

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[50] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 678-80 (1966) (Black, J., dissenting); *cf.* Katzenbach v. Morgan, 384 U.S. 641, 649, 658 (1966) (discussing whether Congress, legislating under § 5 of the fourteenth amendment, may prohibit enforcement of a state law without regard to whether the judiciary would find that the equal protection clause nullifies the state law); *id.* at 665-67 (Harlan, J., dissenting) (same).

[51] For emphasis on the inner compass, see E. ROSTOW, *supra* note 27, at 81.