



Notre Dame Law Review

Volume 33 | Issue 4

Article 4

8-1-1958

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Recommended Citation

Carl McGowan, *Problem in Historical Perspective*, 33 Notre Dame L. Rev. 527 (1958).

Available at: <http://scholarship.law.nd.edu/ndlr/vol33/iss4/4>

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The Supreme Court in the American Constitutional System

THE PROBLEM IN HISTORICAL PERSPECTIVE

Carl McGowan*

I

In January of the year 1830, Senator Robert Y. Hayne, of South Carolina, arose in his place to voice the deep and growing concern of his constituents as to the part being played by the Supreme Court of the United States in the American scheme of government. He said:

It is not my desire to excite prejudice against the Supreme Court. I not only entertain the highest respect for the individuals who compose that tribunal but I believe they have rendered important services to the country. . . . I object only to the assumption of political power by the Supreme Court, a power which belongs not to them and which they cannot safely exercise.¹

At about the same period in our national history, the governmental institutions of the New World were being examined by an unusually gifted young European, Alexis de Tocqueville. In his enduring classic, *Democracy in America*, published in 1835, he characterized the judge in our system as:

[One] brought into the political arena independently of his own will. He only judges the law because he is obliged to judge a case; the political question which he is called upon to resolve is connected with the interest of the parties and he cannot refuse to decide it without abdicating the duties of his post.²

The sharply contrasting character of these observations, made contemporaneously in point of time but in wholly different settings, invites reflection. Senator Hayne's soft disclaimer of any personal bias against the members of the Supreme Court, followed closely by his harsh assertion that they had been fishing

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¹ Quoted in 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 723 (1926).

² TOCQUEVILLE, *DEMOCRACY IN AMERICA* 96 (1899).

in political waters forbidden to them by the Constitution, sounded a refrain which has echoed sporadically but persistently throughout the life of the federal establishment.

Hayne spoke as a political leader in a movement to beat off a threat to a significant sectional interest—slavery, and the agricultural complex of which it was an essential element. He was propounding the nullification doctrine of John Calhoun—that a sovereign state need not be bound by federal laws antithetical to the state's interests, notwithstanding the Supreme Court's *imprimatur* of constitutionality. Calhoun and his adherents had become increasingly apprehensive of the eventual danger to Southern economic and social institutions implicit in the decisional trend of the Court of John Marshall towards a strong and broadly-encompassing national power. Hayne, being a politician, understood the curiously ambivalent attitude of the American people towards the powers they have placed in their judges—an attitude which enables phrases like "assumption of political power" to be used effectively as emotional slogans to belabor the court which has given offense by its judgment in a particular case.

Tocqueville, however, wrote only as a political and social scientist, with an added dimension of detachment afforded by his foreign nationality. Whatever the accuracy of his observations, they were neither clouded by personal involvement nor motivated by the political objective of mobilizing the forces of public opinion. He saw the judicial function in America as inescapably intertwined with the political process as a whole; and, with traditional Gallic realism, he concluded that the judges had never been, and could not hope to be, immune from the backlashes of contending political forces. Indeed, he may have been foreshadowing one moral which perhaps can be drawn from the Hayne statement itself—that the refusal to recognize the relationship between political issues, on the one hand, and the judicial process, on the other, gives a specious support to the slur that a court, in resolving a controversy of wide public interest, has improperly intruded itself into political questions. If the people believe the relationship to be either non-existent or always avoidable by judicial self-denial, a powerful weapon is forged for the focussing of pressure upon the courts by raising the hue and cry of political intercession.

Robert Hayne's name is now remembered chiefly as a convenient mode of reference to the devastating response he evoked from Daniel Webster. Tocqueville, however, has continued to

grow in stature, and his picture of mid-19th Century America is eagerly examined today for illumination and instruction as we enter the second half of the 20th. It would be wrong, nonetheless, to suppose from this that the objective attitude of the one towards the Supreme Court has gained universal acceptance, and that that august institution has, over the long span of intervening years, acquired a status of freedom from the charge that it meddles from time to time in political matters outside its prescribed orbit. One need only be of the current generation to be aware of the error of any such inference. The ordinary newspaper reader of today knows that the Court is repeatedly drawn into the vortex of political discussion, where it is the subject of vigorous criticism and sustained attack.

No institution of a truly democratic government can—or should—expect to be beyond criticism with respect to particular actions. This is as true of the Supreme Court as of the legislative and executive branches of the government. But any institution, and perhaps especially the Court, can fairly ask that strictures upon its acts be addressed to the merits of those acts, and not be masked in either innocent misunderstanding, or conscious misrepresentation, of its function. The Court, because it sits at the apex of a system of professional knowledge not easily accessible to laymen, is peculiarly exposed to both. Its history is full of instances of this vulnerability.

A brief glance at the Court in some of its more tumultuous phases may serve at least three purposes relevant to the discussion for which we are assembled today. First, it will show how the Court's normal discharge of its responsibilities periodically places it in the very center of violent controversy. Second, it will demonstrate that the recurring assaults upon it are diffuse in their origins and are not the exclusive hallmark of any one geographical area or of any one grouping of economic or social interests. And, lastly, it will provide, for this moment in time, the reassurance for our present alarms which is the gift of historical perspective.

II

The New York Times, in May of 1861, characterized the then Chief Justice of the United States as "too feeble to wield the sword against the Constitution, too old and palsied and weak to march in the ranks of rebellion and fight against the Union, he uses the powers of his office to serve the cause of the traitors."³

³ Quoted in 2 WARREN, *op. cit. supra* at 370.

The New York Tribune, addressing itself to the same grievance, concluded its complaint with this remarkable admonition: "Let us not be afraid of military despotism. . . . Of all the tyrannies that afflict mankind, that of the Judiciary is the most insidious, the most intolerable, the most dangerous."⁴ These are, obviously, strong words to flow from the pens of editorial writers for responsible newspapers. What was it, then, that prompted these feverish outbursts of indignation?

In the early months of the Civil War, the Union Army had seized and imprisoned a respected civilian resident of Baltimore. The prisoner had applied to Chief Justice Taney, as the circuit justice, for a writ of habeas corpus; and the Chief Justice had issued the writ, commanding the prisoner to be brought into court for an inquiry into the propriety of his arrest and detention. The military officer upon whom the writ was served declined to obey it; and Taney, in accordance with the usual procedure in such a case, directed that contempt proceedings be instituted, which proceedings were frustrated by the military's refusal to permit the appropriate papers to be served. In this state of affairs, Taney, who understood the realities of power and who had thought already to have placed himself in personal jeopardy, simply filed an opinion in which he held the arrest to be in violation of the Constitution. He tempted fate one last degree by directing that a copy of the opinion be sent to the President of the United States, who, as a lawyer by trade, may conceivably have noted with interest what the opinion said but who, as Commander in Chief in a nation at war, certainly gave it no recognition in the disposition of this case.⁵

To us of a later generation whose emotions have become reasonably disengaged from Civil War issues, it would seem that the Chief Justice was rising to one of the greatest of our national traditions, namely, the assertion of the civil power as against encroachments by the military. Indeed, in the highly agitated temper of the times, we would suppose that the Chief Justice had acted with singular courage and devotion. And yet the outcry against him personally at the time was so bitter in Northern quarters that it succeeded in causing, as we have seen above, a prominent newspaper to advance the astonishing pro-

⁴ *Ibid.*

⁵ *Ex parte Merryman*, 17 Fed. Cas. 144, No. 9487 (C.C.D. Md. 1861). Congress eventually passed a statute which, in effect, ratified the handling of this matter by the Executive.

position that the abiding dangers to the liberties of a free people are to be found not in uncontrolled military force but in the judiciary itself.

It may be said, of course, that Chief Justice Taney was personally suspect because he had spoken for the Court four years earlier in the case of *Dred Scott v. Sandford*.⁶ In that case, which had outraged the sensibilities of the North, the Supreme Court had held unconstitutional an Act of Congress. The statute so invalidated had rested upon an assumed power in the Congress to exclude slavery from the territories; and, thus, when the Court came to pass on that power, it found itself in the midst of all of the passions which were boiling up to produce the war between the states.

The vexation which the Northern newspapers had expressed at the decision knew no bounds. The New York Tribune, for example, said that "the Court has rushed into politics, voluntarily and without other purpose than to subserve the cause of slavery."⁷ Its Washington correspondent described the decision as the subject of "mingled derision and contempt", and went on to say that "if epithets and denunciation could sink a judicial body, the Supreme Court of the United States would never be heard of again."⁸ The New York Post said:

[T]he moral authority and consequent usefulness of [the Supreme Court] . . . is seriously impaired, if not destroyed A majority of its members have consented to become parties to a combination with the Administration to transfer the political control of the government to the hands of the slave oligarchy.⁹

Chief Justice Taney, as the head of the Court and the writer of the majority opinion, bore the brunt of the critical clamor; and it is, therefore, not surprising that his first encounter with the Union Army during the war itself should have made him peculiarly subject to attack by the partisans of that Army. But sectional feeling in this period of our history did not require a scapegoat of Southern origins in order to vent itself in slander of the Court. A year and a half after the war was over, and at a time when the Court had been reconstituted mainly by appointees of President Lincoln, the Court again came under heavy attack because of its reassertion of the pre-eminence of the civil over the military power.

6 60 U.S. (19 How.) 393 (1856).

7 Quoted in 2 WARREN, *op. cit. supra* at 304.

8 Quoted in 2 *id.* 305.

9 Quoted in 2 *id.* 307.

Late in 1866 the Court decided the case of *Ex parte Milligan*.¹⁰ Here the Court was passing upon the propriety of the arrest of a Southern sympathizer by the Union military authorities in Indiana, and his trial by a military commission in 1864. Two of the Justices appointed by President Lincoln joined with three of the prewar Court to hold that neither the President nor the Congress had the authority under the Constitution to authorize the trial of civilians by military commissions in areas where the civil courts were still open for business. The opinion itself was written by the one of Lincoln's appointees who was also an intimate personal friend of long standing—David Davis of Illinois.

These significant differences in the personal backgrounds of the Justices involved did not, however, save the Court from the same kind of vituperative comment which had greeted Taney's earlier brush with the military and presidential power. Said the *New York Times*:

In the conflict of principle thus evoked, the States which sustained the cause of the Union will recognize an old foe with a new face. . . . The Supreme Court, we regret to find, throws the great weight of its influence into the scale of those who assailed the Union and step after step impugned the constitutionality of nearly everything that was done to uphold it. . . .¹¹

The Indianapolis Journal, after a grudging admission that in a proper case there was something to be said for subordinating military power to the civil authority, concluded that this decision was not to be absolved by this principle for the reason that "it is intended only to aid the Johnson men, and is so clearly a forerunner of other decisions looking to a defeat of Republican ascendancy and to a restoration of Southern domination, that the indignation against the Court is just and warranted."¹² Harper's Weekly described the decision as "not a judicial opinion; it is a political act";¹³ and the Washington Chronicle lamented that "the hearts of traitors will be glad by the announcement that treason, vanquished upon the battlefield and hunted from every other retreat, has at last found a secure shelter in the bosom of the Supreme Court."¹⁴ Such were some of the contemporary judgments passed upon a decision which is now

¹⁰ 71 U.S. (4 Wall.) 2 (1866).

¹¹ Quoted in 2 WARREN, *op. cit. supra* at 429.

¹² Quoted in 2 *id.* 429-30.

¹³ Quoted in 2 *id.* 432.

¹⁴ Quoted in 2 *id.* 433.

generally looked upon as a long forward step in the age-old struggle to establish the supremacy of civil processes over military might!

The *Dred Scott* case was only the second time in the then 68-year-old history of the Supreme Court that it had held an Act of Congress unconstitutional. The criticisms of that decision were not, however, addressed in the main to the existence of such a power, but rather to the result of its exercise in the particular case. This was also true of the popular reaction to the first occasion on which the Supreme Court had invalidated a congressional statute—*Marbury v. Madison*,¹⁵ decided in 1803. This decision evoked a storm of critical comment, but principally for the political reason that the administration party did not like the suggestions in Chief Justice Marshall's opinion that the judiciary could, and might on occasion find it necessary to, sit in judgment on the acts of the Executive branch of the government.

The matter at issue in *Marbury v. Madison* was whether a minor officeholder, appointed in the expiring hours of the Adams administration, was entitled to have his commission delivered to him by the incoming administration of Thomas Jefferson. Although involving simply the legal right of an individual to claim an unimportant office, the resolution of that issue had intensely political overtones. Editorial comment in the press of the day divided along the traditional party lines. A Jeffersonian paper had this to say:

The efforts of Federalism to exalt the Judiciary over the Executive and Legislative, and to give that favorite department a political character and influence, may operate for a time to come, as it has already, to the promotion of one party and the depression of the other, but it will probably terminate in the degradation and disgrace of the Judiciary. Politics are more improper and dangerous in a Court of Justice, if possible, than in the pulpit. . . . The Court must be defeated and retreat from the attack; or march on until they incur impeachment and removal from office. . . .¹⁶

This case had the effect of marshaling against the Court the individual influence of one formidable opponent, Thomas Jefferson. Throughout the many years remaining in his life, Jefferson

¹⁵ 5 U.S. (1 Cranch) 137 (1803). For one politician-turned-author's admiring account of another politician-turned-judge's adroitness in the handling of this troublesome case, the layman may find of interest Senator Beveridge's treatment of this matter in 3 BEVERIDGE, LIFE OF JOHN MARSHALL c. 3 (1919).

¹⁶ Quoted in 1 WARREN, *op. cit. supra* at 249.

continually adverted to the sense of personal injustice he felt about this decision. In 1807, for example, he wrote to a correspondent that "I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, and denounced as not law, and I think the present a fortunate one, because it occupies such a place in the public attention."¹⁷ Indeed, Jefferson's brooding about the slight which he thought the decision represented to him caused him over the years to magnify his resentment of a particular decision into a feeling of hostility towards the Supreme Court generally. In 1820 he wrote: "The Judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric."¹⁸ And in 1821 he confided to Judge Spencer Roane of Virginia that:

The great object of my fear is the Federal Judiciary. That body like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is ingulphing insidiously the special governments into the jaws of that which feeds them. . . . Let the eye of vigilance never be closed.¹⁹

In circulating these complaints, Jefferson was able, in form at least, to base them on a broader ground than mere personal irritation at John Marshall's action in calling his administration to account in a highly political context. As President he had on occasion adopted a singularly latitudinarian construction of the powers vested in the national government by the Constitution—most manifest perhaps in the Louisiana Purchase and in his efforts by the use of arbitrary restrictions upon ocean-going trade to forestall involvement in the wars between France and England (efforts which, incidentally, infuriated New England both with Jefferson himself and the federal judges who uniformly sustained them, and brought that stolidly loyal section of the country to the very brink of secession). In his post-presidential period, however, Jefferson reverted completely to his perennial suspicion of a strong central government. He objected vigorously to the Supreme Court's course in finding generous grants of national power within the generalized clauses of the Constitution. He and his adherents saw the fount of this evil, if such it was, in the landmark case of *McCulloch v. Maryland*²⁰ decided in 1819.

¹⁷ 11 WRITINGS OF THOMAS JEFFERSON 215 (1904).

¹⁸ 15 *id.* 297.

¹⁹ 15 *id.* 326.

²⁰ 17 U.S. (4 Wheat.) 316 (1819).

This was the case in which the Marshall Court laid down the important doctrine that the federal powers are not confined to those spelled out expressly in the Constitution but embrace as well all things necessary and proper to the effective exercise of the former. The particular controversy which evoked this significant gloss upon the basic charter was precipitated by the action of the State of Maryland in levying a tax upon a creature of the Federal Government in the person of the second Bank of the United States. The Court held the Maryland law invalid as an impermissible interference by a state with the operation of a national agency in an area legitimately committed to it by the Congress of the United States.

The Bank was not a popular institution, notably in the West and South—those sections of the country which, in the earlier years of the Republic as later, were peculiarly prone to economic distress and which have never been behind-hand about embodying financial ills in political outcries. The period immediately preceding the decision had been one of hard times, particularly in the inland states; and, rightly or wrongly, the Bank was identified as the cause of these hardships. To those of this persuasion, accordingly, the Court's action was anathema.

John Marshall himself took note of the storm in his private correspondence with a fellow offender,²¹ saying:

Our opinion in the Bank case has aroused the sleeping spirit of Virginia, if indeed it ever sleeps. It will, I understand, be attacked in the papers with some asperity, and as those who favor it never write for the publick, it will remain undefended and of course be considered as damnably heretical.²²

A Tennessee editor wrote:

This Court, above the law and beyond the control of public opinion, has lately made a decision that prostrates the state sovereignty entirely. The extraordinary determination to prevent the states taxing the capital of the United States Bank, and the decree declaring the state insolvent laws unconstitutional has awakened public attention to the aristocratical character of the Court, and must sooner or later bring down on the members of it the execration of the community. . . . We are consoled with

²¹ Justice Joseph Story of Massachusetts. One of the first appointments to the Court which fell to the Jeffersonians, and affiliated with that party himself at the time of his selection, Story soon found his mind paralleling that of John Marshall in grappling with the great issues coming before the Court. The Court's history is, of course, happily ornamented with many instances of similarly disappointed expectations.

²² Quoted in 1 WARREN, *op. cit. supra* at 515.

the idea that the public opinion will not support the Supreme Court. Our government is made for the people, not the people for governors.²³

And a journal in Georgia purported to see in the decision "an unusual appearance upon our political horizon, and if not big with disaster, at least alarming in aspect . . . when another Supreme Court shall sit in judgment on the State laws, depend upon it, the crisis is at hand; the moderation of a generous and forbearing people will be tried to the bottom."²⁴

It was not, however, the legendarily volatile and hot-tempered Southerners who translated their indignation at the Court into active defiance. Below the Mason and Dixon line, there was sound and fury in plenty, but it was only in that meeting ground of the sober virtues of the East and the Middle West—Ohio—that dissidence erupted into disobedience. Here, financial stringency had been felt most severely, and hostility to the Court's decision—cloaked in concern about states' rights—was most lacking in moderation.

A few days before the Court struck down the Maryland tax, the Ohio legislature had enacted a patently punitive annual levy upon each branch of the Bank within the state; and the Ohio officials, strongly supported by popular opinion, determined to enforce their law despite its obvious illegality under the reach of the *McCulloch* decision. In open disregard of an injunction against such enforcement issuing out of the Federal Circuit Court, those officials seized assets of the Bank by force. Even the Southern papers, which had been highly vocal in criticizing the Supreme Court's outlawing of the Maryland statute, found this strong medicine indeed, and began to draw distinctions between verbal complaints, on the one hand, and rebellious conduct, on the other.

The embattled Buckeyes, however, were wholly unrepentant. The State Treasurer continued to defy orders of the Federal Court to return the Bank's money and eventually found himself committed to prison for contempt. With his personal guardianship removed in this convenient manner, federal officials physically recovered the disputed funds from his office. The immediate controversy thus ended with the citizens of Ohio loudly lamenting the failure of their similarly aggrieved sister states to the South to rally actively to the support of their effort to maintain the rights of a sovereign state against the oppressions

²³ Quoted in 1 *id.* 519-520.

²⁴ Quoted in 1 *id.* 520.

of the central government—encroachments which, so the Ohioans stubbornly persisted in saying, did not become legal simply because the Supreme Court said they were.²⁵

III

The preceding events were but a few of the violent controversies which swirled about the heads of the Justices of the Supreme Court during the first century of its existence. The close of its second hundred years is almost in view, but the pattern has been no different. One product of the Civil War, for example, was the fourteenth amendment, with its charter of restrictions upon state action. That has been a most abundant source of violent involvement of the Court in the ebb and flow of political and social tension.

There was that long period from the close of the last century through the great depression of the 1930's when the Court's assiduous assertion of freedom of contract and the rights of property kindled a resentment against it among the economic liberals which found voice in indefensibly intemperate expressions of hostility. This, coupled with a period of narrow construction of federal powers invoked in aid of programs hastily devised to break the grip of economic stagnation, culminated in the extraordinary spectacle of a President at the summit of his popularity convening a press conference to denounce the Court as a barrier to the national ideal of self-government. Latterly, the Court's preoccupation with the fourteenth amendment as a guarantee of personal and social rights has precipitated another crisis in which the shadow of John Calhoun has once again fallen across a sizable sector of the land. Small wonder, then, that one of the wisest of the Court's members in its second century—Oliver Wendell Holmes—once said of it: "We are very quiet there, but it is the quiet of a storm centre, as we all know."²⁶ Why is it that this must be so?

The Constitution of the United States says simply that "the Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may

²⁵ When the legal proceedings in Ohio finally were passed upon by the Supreme Court several years later, the decision confirmed the national sovereignty in all respects. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 737 (1824). This decision, however, prompted relatively little controversy in Ohio, for the reason that improving business conditions had caused a corresponding loss of interest in the battle for states' rights.

²⁶ HOLMES, COLLECTED LEGAL PAPERS 292 (1920).

from time to time ordain and establish.”²⁷ It goes on to say, however, that “the Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;”²⁸ and it then enumerates certain specific classes of controversies, such as those between citizens of different states, which are within the scope of this grant.

The key words for our purposes are three—“the Judicial Power.” Whatever else the Framers of the Constitution meant by their authorship of the judicial article—however broad or however narrow were their conscious intentions with respect to the scope of the functions they sought to vest in the Supreme Court by the words they used—they were referring, in the phrase “the Judicial Power,” to a standard of universally-accepted content in at least one important sense. This was the idea that courts exist to resolve controversies between man and man, and between man and government. These concepts were familiar to the people who made the Constitution, reaching back at least as far as the rudimentary beginnings in our Anglo-Saxon heritage of a machinery provided by the early Kings of England for the administration of justice among, and to, their subjects of all degree. And this, of course, was no more than a recognition of the fact that men cannot live in an organized and stable social order without some means of peaceful accommodation of the conflicts which inevitably develop among them.

The essence of judicial power is that it is a solvent of personal frictions, whether they grow out of the relationships of individuals to each other, or of the individual, on the one hand, and the collectivity of mankind represented by the state, on the other. When the clash comes, it is the judicial power which must settle it, if a society is to be ordered by reason rather than by superior force alone, which is the very negation of civilized living. The idea is really a very simple one, and it should be no occasion for wonder that the Framers found it unnecessary to use more than a few plain words to embody it. The striking scarcity of discussion of the judicial article in the Constitutional Convention at Philadelphia in itself suggests that the members considered that, in this instance, they were dealing with a self-evident principle.

This is not to say that the wise and experienced men who

²⁷ U.S. CONST. art III, § 1.

²⁸ *Id.* § 2.

created the Federal Government failed to appreciate the immensity of the task they were devolving upon the Supreme Court, or that they did not anticipate the controversial character of the role they were fashioning for it to play. They were too sophisticated not to know that the way of the peacemaker is hard, that he who sits in judgment will inevitably become the focus of the passions of those against whom the judgment goes. What they certainly knew was that, without the function of judgment, the ship they were launching would surely founder.

Neither is it to be supposed that they were so naive as to think that the judges could be above the *sturm und drang* of partisan strife. There are, of course, many law suits which are of little or no interest to those other than the immediate parties. But there are also the big cases—big in the sense that many people are interested in the outcome, whose economic or other interests are directly affected, or whose emotions are engaged by the contending principles involved. This is the stuff of politics in the larger sense, and we can almost hear the gentle, disbelieving chuckle of Benjamin Franklin if he had been told that the Court he was helping to create was to be above the clamor because its functions were completely tangential to the surging streams of political life.

Indeed, the evidence as to the understanding of the Framers in this regard is just the other way. Knowing that the judges must surely become on occasion the focal point of controversy, and knowing also that they neither could nor should be endowed with the usual weapons of political power—the direct appeal for votes, the resources of patronage, the spending of public funds—they gave the Court the protection of life terms, hedged about by an unusually intricate impeachment process and an absolute guaranty against diminution of compensation. They saw to it, in short, that the branch of the new government which they summoned into being for the assumption and exercise of ultimate political power whenever that proved necessary for the doing of justice was deceptively armored by an apparent lack of political power in its more immediate and superficial aspects, while at the same time its foundations were securely anchored in minimum, but virtually unbreakable, guarantees of personal independence. For the discharge of its great tasks, the Court is at once weak and strong. But in that paradox there is a strength which its architects knew to be of elemental necessity if it were to survive the rigors inseparable from the effective performance of its assigned function.

That function remains what it always was and what it always will be under any society which pretends to live under law—the disposition of disputes by reference to those rules, however embodied, which make up the law. It is the peculiar position of the Supreme Court, however, that the disputes which fall to it for decision are governed by principles which have a special political origin and purpose. This is notably true of that set of rules we call the Federal Constitution, and a court which must resolve a controversy before it by reference to the terms of that document is, of necessity, operating in a highly political context. There are many who feel that the genius of our Constitution resides in the generality of its language, with the scope that gives for adaptability to change and growth. Whether this be true or not, the fact is that the constitutional grants and limitations are couched in verbalizations of a most imprecise nature. This has the effect of causing the final interpreter to be engaged in what approaches a continuous process of constitution-making; and, indeed, the Supreme Court, in this aspect of its work, has been likened to a permanent constitutional convention.

The point is that if the controversies which arise daily are to be resolved by a judicial power functioning within the framework of broad constitutional rules, the Court's role could not be otherwise. And if the Court must actually decide cases against this background, it cannot hope to be completely isolated from the dust and heat of political contention. It never has been; it never will be. What it—and we—can hope is that there may be understanding of the inevitability of this state of affairs so long as we, as a people, hold the view that any civilized government provides independent judicial tribunals where men may assert what they believe to be their rights and secure a determination of them.

This point—which seems to me to be of critical importance to the theme of our meeting today—perhaps can be restated in another way. If we accept and require the peaceful resolution of controversies as they arise by the exercise of an independent judicial power, then we must be prepared to pay the price that some of those controversies will have political consequences, thereby laying the tribunal itself open to a charge by the unsuccessful litigant that it has wrongfully assumed political power or, at the least, has improperly reflected political considerations in the result reached. We cannot have it both ways. If we want a judicial power to decide our cases, we must recognize that this in itself is a basic political decision; and that, accordingly,

the exercise of judicial power is political in this fundamental sense. And if we want all our cases to be amenable to the judicial power, and not merely those which are politically colorless, we must be prepared to weigh the disappointment some of us may feel with particular decisions in the light of the considerations which led us as a people to evolve the judicial power as a factor in our plan of government.

The way in which the seemingly small and unimportant lawsuit may become tossed upon the seething political tides of the times is evident if we will look back for a moment at some of the cases which agitated the country in its first century. *Marbury v. Madison*, after all, was prompted by the feeling of an individual that he had been arbitrarily and unfairly denied a job to which he had been lawfully appointed. In our scale of values, if a man really wants to be a justice of the peace and thinks he has been illegally deprived of his right to be one, we believe he has a right to a judicial determination of his claim. Ordinarily, this matter would be of little interest to anyone other than the claimant himself, but it became a big case in this instance because the resolution of this trivial matter turned upon principles which were of wide interest indeed. Out of this inconsequential set of facts came some conclusions of tremendous significance, notably the assumption by the Court of power to invalidate acts of Congress and the suggestion that the Court will, if requisite to the doing of justice to the individual litigant before it, define the legitimate sphere of action of the Executive. In this latter connection, it was only a relatively short time ago that the steel industry of the United States successfully invoked the protection of the Court against Presidential seizure.²⁹ The immediate stakes were larger than those involved in *Marbury v. Madison*, but the principle of the Court's authority was the same.

McCulloch v. Maryland was simply an effort by a taxpayer to assert the impropriety of the tax imposed—a right of proceeding which we believe in as firmly today as our ancestors did in the early 1800's. But the Court could not resolve this one dispute without exploring the explosive subject of the lines of demarcation between the federal government and the states.

²⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Black, speaking for the Court in rejecting the powers claimed by the President over the labor problem in issue, held that the Framers had vested such powers only in Congress; and he referred to "the fears of power and the hopes for freedom that lay behind their choice." *Id.* at 589.

Dred Scott himself was only a slave who was suing his master for his freedom, but the private lawsuit of these two persons had reference to opposed principles for which literally millions of Americans were prepared to battle to the death. Although this decision was one of what Charles Evans Hughes once called the Court's "self-inflicted wounds," it seems unlikely that any different decision or any different treatment of the points involved would have saved the Court from outcry or would have dispersed the gathering clouds of national disunion. And yet no one would say that a human being who asserts a right as fundamental as that pursued by Dred Scott should not be able to go to court and get a decision, although the times are unpropitious in the sense that any decision will provoke dangerous reactions.

In *Ex parte Milligan*, the controversy before the Court presented the important issue of the citizen's right to protection from arbitrary action by his government. Again, the timing of this adjudication was most inconvenient in that the passions inflamed by the Civil War had not subsided and a decision upholding the right claimed carried implications of rebuke to an heroic Army and a martyred President. But convenience in these terms is not a characteristic of any judicial system with pretensions to real integrity and independence.

The great cases, thus, have their seeds in the day-to-day interests and experiences of individual citizens. The Court has no control over the depth or timing of the personal sense of outrage or frustration which sets in motion the lawsuit which one day may reach it for final resolution. Moreover, the Court must, in arriving at its decision, take into account all those matters which are relevant. This may well mean that, in order to do justice as between the litigants, the Court must construe the meaning of an Act of Congress or even declare it to be invalid altogether; or say that the President of the United States has overstepped the bounds of action permitted to him by the Constitution; or nullify the efforts of a state legislature to prescribe laws for the people it represents; or overturn the judgments of the highest courts of the states in matters of federal concern; or direct all governments, state and federal, to accord those assurances of personal rights which it derives from its reading of the Federal Bill of Rights.

These are the things the Court does; and, it seems fair to say, these are the things which we have commonly consented that it should do. This being so, there is little profit in debating their characterization as political or otherwise. What can be readily

seen is that the Court, in doing these things, is certain to collide with firmly-held opinions and deep emotional attachments which themselves find expression in political terms. This in itself makes it certain that the Court periodically must find itself the center of political tempests. Were it otherwise, we might have a real, albeit a different, cause for concern about the current state of health of the judicial power.

IV

The critics of the Supreme Court in its periods of turbulence have, thus, freely resorted to the charge that it has reached out for political power. Over the years this claim has been made by a succession of groups spanning the entire spectrum of sectional and social interests. This, as we have also seen, is unavoidable if the Court is to exercise from case to case the judicial power committed to it by the Constitution.

This constitutional grant is, however, stated in the traditionally broad terms, and the Court has, accordingly, considerable latitude for the definition of the power granted. In addition, it has assumed some measure of prerogative in determining the occasions for the exercise, or the withholding of the exercise, of judicial power. The thread which runs through these is one of discretionary self-denial—the discharge of what Justice Frankfurter has called “one very important and very troublesome aspect of the Court’s functioning — its duty not to decide.”³⁰ These actions go far to negate the accusations of conscious political encroachment.

Early in the life of the new nation, President Washington found himself with the difficult problem of maintaining neutrality in the conflicts of France and England. The country was sharply divided into active partisans of the two belligerents, although the national interest of the young and struggling nation was obviously to stay aloof from both. France in particular pressed its popularity as a recent ally by using our ports as fitting-out points for privateers and as forums for prize adjudications. There was real doubt as to whether American shipowners who were victims of these activities could seek redress in the federal courts. The President considered such jurisdiction to be vital to his policy of neutrality, and he was dismayed when a district judge at Philadelphia held himself to be powerless in this area. Presi-

30 FRANKFURTER, OF LAW AND MEN 34 (1956).

dent Washington then directed his Secretary of State to address an inquiry on his behalf to the Supreme Court, which contained these words:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty. . . . The President would, therefore, be much relieved if he found himself free to refer questions of this description to the opinions of the Judges of the Supreme Court of the United States, whose knowledge of the subject would secure us as against errors dangerous to the peace of the United States. . . . He has therefore asked the attendance of such of the Judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public may, with propriety, be availed of their advice on these questions. And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur. . . .³¹

To this letter were appended 29 questions involving the meaning of treaties and the rules of international law, prepared at the President's direction by Alexander Hamilton although he himself regarded the inquiry as improper.

Chief Justice Jay and his associates—all appointees, and many, personal friends, of the President—were greatly troubled by this submission, but at length the Chief Justice replied for the Court and respectfully declined to follow the course suggested as constituting extra-judicial action. Thus was there early laid to rest any thought that the Court either could or should render advisory opinions on abstract legal questions not presented to it in actual controversies. It happens to be a practice which is followed by the highest courts of some states at this moment, but the Supreme Court of the United States has never considered that the judicial power in its charge extends to any legal issues not shaped for decision in an actual case or controversy. Moreover, it has normally been alert to keep from being tricked into such a course by feigned disputes and sham lawsuits. Its purpose is to protect its jurisdiction from being imposed upon by parties whose interests in the matter at issue are neither substantial nor truly opposed.

A second means by which the Court has sought to limit its exposure on the political front is to be found in its so-called "political questions" doctrine. The Court has on occasion declined to rule on the merits of a case because it presents, in the Court's phrase, a political, rather than a judicial, question. This

31 9 WRITINGS OF THOMAS JEFFERSON 167-168 (1904).

has a somewhat paradoxical sound in view of what has been said above, but the doctrine has not been of great consequence as a practical matter and there are those who feel that it is one of the least satisfactory of the Court's jurisdictional reservations.

Its significance for our discussion is that it emphasizes the Court's reluctance to rush into political areas. It was first spelled out in detail by the Court in 1845 in a case cast up by a bitter political struggle in Rhode Island known as Dorr's Rebellion. One faction took over the government of the state under the authority of a new constitution, and the issue in the case at bar turned upon the legality of the attempted substitution of a new system of government for the one in being. The sympathies of the two prevailing national political parties divided on party lines between the contenders in Rhode Island; and, since eight of the Supreme Court judges were of the same party, it was widely assumed that the faction favored by their party would win. This cynical expectation proved groundless, however, when the Court unanimously concluded not to pass upon the issue, which it characterized as one of purely political power, not appropriate for judicial decision but to be left for resolution to the political agencies of the state.

Latterly, the political question doctrine has been applied in cases where challenge is made to the acts or omissions of state legislatures in apportioning congressional representation or the drawing of election districts.³² A counterpart of this doctrine is one of more recent vintage, namely, the Court's recognition of the wide latitude to be accorded acts by the President in the conduct of the external relations of the nation.³³ As national politics have become increasingly preoccupied with international issues, it will be seen that this self-denying standard is a long step away from the center of political control.

A third circumscription by the Supreme Court of the area of judicial power is its rejection of the theory of a federal common law. The Court reached this result haltingly and only after several false starts. In its early years it appeared to assume that there was a federal common law of crimes, but it at length

³² For a very recent and vigorous criticism of the federal courts for their inaction in this field, see Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958). It is of interest here to note that this well-reasoned reaction comes from one who is technically a layman, although Mr. Lewis, in his careful preparation for, and his effective performance of, his present assignment of covering the Supreme Court for the New York Times, had already lost most of his amateur standing before this article appeared.

³³ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

abandoned this approach in favor of the doctrine that only those acts which Congress, in the exercise of powers reposed in it by the Constitution, expressly defines as crimes and for which it provides punishments by statute can be considered as federal crimes.³⁴ For many years longer there persisted within the Court the principle that the Court could make its own law in the general commercial field, but this was finally laid aside by the Court as recently as 1938.³⁵ This voluntary renunciation has carved a large area out of the Court's potential range of power.

Lastly, there are the self-originated canons of judicial administration which the Court has observed in varying, frequently uneven, but significantly continuous, degrees. These include, notably, the rule that the Court will avoid the resolution of constitutional issues tendered to it if the case can be made to turn on less exalted—and normally less provocative—grounds. An incidental effect of this rule is to provide the Court with some room to defer the decision of constitutional questions past the time when they are uppermost in the popular mind and when the consciousness of change has not created an atmosphere of acceptance of the Court's solution. The mere existence of the canon is a self-imposed, but nonetheless compelling, limitation upon the Court's reaching out to mould the political structure.

Another of these canons is the deference which the Court pays to the determinations of state law and the construction of state statutes by the state courts, and the Court's care to search for adequate state law grounds upon which to rest a decision brought to it for review. A corollary of this is the restraints which the Supreme Court applies, in the discharge of its task of supervising the lower federal courts, for the purpose of preventing the latter from interfering with the normal functioning of the state judicial, legislative, and administrative processes.

These are but a few of the ways in which the Supreme Court on its own motion seeks to strike a proper balance between the judicial power entrusted to it, and the powers committed to other agencies of government, be they state or federal. We may feel from time to time that the Court has wavered in these objectives or been something less than completely faithful to its own professions in this regard. There is, however, an identifiable and permanent pattern and, in the long view, it seems fair

³⁴ *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816).

³⁵ *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

to say that this is one tradition where the honors lie with the observance rather than the breach.

V

I recall being present on one occasion when Robert Jackson, then Solicitor General of the United States and later to be a Justice of the Supreme Court, was addressing a group of lawyers. This was the period in the late 30's when the lines of decision of the Court were undergoing a rapid transformation, and the scope and pace of this alteration were alarming to many. He was asked a question as to the meaning and longer-range implications of a case which had just come down to the accompaniment of a considerable amount of head-shaking.

His reply I have always found to be enormously sensible. He said: "I think it means that someone has just won a lawsuit." And he went on to add that he found it both useful and time-saving to reflect that speculations as to the future significance of today's lawsuits yield to the practical principle that each generation can, and will, dispose of its own lawsuits in its own way.

This has some of the advocate's art of over-simplification; but it is also a shrewd perception, and one which I hope may be instructive for this meeting. For it is the business of courts in general, and of the Supreme Court in particular, to decide lawsuits. If we think we want or need courts at all, this is the work we want them to do. But it is not work which can be done in a vacuum, because there is a continuing vitality in Tocqueville's statement that "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question."

The act of decision inescapably creates disappointment; and disappointment releases itself in criticism, which may in many cases be well-founded. But it is one thing to be critical of the Court's handling of particular issues, and quite another to carry attack to the point of obscuring the nature of the judicial function in such manner as to risk its permanent impairment. Justice Holmes once said of criticism of the latter sort that it bespoke "an unrest that seems vaguely to wonder whether law and order pay."

For nihilism of this kind, the antidote is understanding—understanding of the great role we have assigned to the Court to play. Happily, this understanding is not the professional secret of lawyers. It is open to the lay public as well.