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Task of the Appellate Court

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The Supreme Court in the American Constitutional System

THE TASK OF THE APPELLATE COURT

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> Courts are the mere instruments of the law, and can will nothing . . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.[1]

Those are John Marshall's words, in the *United States Bank* case, in 1824. At the same time the Republicans of that day were charging Marshall with rewriting the Constitution to his own liking and with using the power of the judiciary to set up a strong central government which was not provided for in the Constitution itself. Historians now agree that what the great chief justice did is nearer to what his critics charged than to what his words described, and most of them further agree that much of America's greatness can be credited to the wisdom of what he did then, making us one strong nation rather than a loose federation of dependent states.

Marshall's words remain, inconsistent though they be with what he did, as a common theory of the nature of law and of the judicial process. Of course they were not peculiarly John Marshall's words. Laymen, lawyers and judges have always said, and still say, that courts have no business "making law," that the law is already there, that the judge's task is merely to find it, state it, apply it to the facts. On this theory decisions breaking new ground are apt to be condemned because their counterparts cannot be found in the old books. Often this overlooks the equally apparent fact that the opposite is also true — there is

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1 Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824).

simply no decision at all on the matter in the old books. The court had to break new ground or else fail to decide the case that was before it.

More than one appellate judge has said with pride in his voice, after securing approval by his brother judges in conference of an opinion he has written, "Well, we've made some new law today, and it's good law!" On a different day the same judge dissenting from another's opinion may have written: "That has not been the law in this state heretofore. As law it is as new as a statute enacted yesterday. This I assert is an invasion of the legislative function, inappropriate for the judiciary." He liked the rule of law laid down in the first case and didn't like that laid down in the second, and his written words had all the sincerity and assurance that honest partisanship can give to pious fraud.

The most magnificent piece of judicial legislation ever enacted in America is *Marbury v. Madison*,[2] holding that the courts have power superior to that of the two other supposedly coordinate branches of government, and may conclusively determine that the acts of the other two are unconstitutional. Hamilton and others in the Federalist Papers urged that the Supreme Court would in the nature of things have this power, should the Constitution be ratified by the states, but there was nothing in the document that said so. One of our greatest judges, Learned Hand, recently re-examining the history of the period, concluded it is doubtful that the Constitutional Convention would have given to the courts the power to invalidate acts of the Congress, had the issue been forced to a vote.[3] It cannot be imagined that the Convention's members did not think of the problem till after the Convention adjourned. As Franklin said, the Constitution was in many areas a compromise, the best instrument that its strong-principled Framers could agree upon when their prime concern was to agree upon something. They omitted all reference to judicial review of constitutionality, then later said the Court would settle this matter when it arose. By their deliberate silence they required the Court to act when the occasion came. By their silence they required the Court to legislate, to decide either that it could declare statutes unconstitutional or that it could not, when *either* decision would be beyond what the words of the Constitution specified. As Judge Hand says, the

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2 5 U.S. (1 Cranch) 137 (1803).

3 HAND, THE BILL OF RIGHTS 28 (1958).

conclusion reached was a practically necessary one; not even a body as inchoately vigorous as America could have thrived with three coordinate but wholly independent heads.[4]

I

Questions Without Answers

Taking the original Constitution and the Bill of Rights together, and accepting the power of judicial review prescribed by *Marbury v. Madison,* it was apparent at once that the Constitution left open a mass of other questions for future determination. That was to be expected of a constitution, which should be a statement of large principles valid for generations yet to come, and not a rulebook of minutiae. Our Constitution set out the details of governmental *organization* with fair completeness, but expressed its denials and its distributions of *power* in broad and sweeping terms, leaving definitions to the future. That meant, after *Marbury v. Madison,* that they were left for the courts.

This fact is reflected by the litigation that has arisen under the Constitution. Of congressional regulatory powers, that over "commerce among the states" turned out to be of first importance, but the very word "commerce" was replete with ambiguity.[5] In the full faith and credit clause, lawyers scarcely know today what the term "public acts" refers to, yet it is obviously a key term.[6] The prohibition against state impairment of the obligation of contracts contains no definition of a contract, though lawyers have debated the definition since law began, and it soon was evident that the word's meaning for constitutional purposes might be broader than for purposes of

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4 *Id.* at 29.

5 As an example, Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), held that the insurance business was not "commerce" within the meaning of the clause, but was overruled in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). For the changing trends of decision in this field, see ROBERTS, THE COURT AND THE CONSTITUTION c. 2 (1951). The division of interstate commerce into two areas, that in which federal regulatory power is exclusive, and that in which state regulation of the commerce is permissible until the Congress "acts" in the field, is now so well established that it is sometimes forgotten that the Supreme Court and not the Framers of the Constitution devised it. See ROTTSCHAEFER, CONSTITUTIONAL LAW 277-360 (1939); GAVIT, THE COMMERCE CLAUSE OF THE U. S. CONSTITUTION (1932).

6 See Jackson, *Full Faith and Credit — The Lawyers Clause of the Constitution,* 45 COLUM. L. REV. 1 (1945). Though Hughes v. Fetter, 341 U.S. 609 (1951) makes it clear that private rights based on state statutes, i.e., on "public acts," are sometimes entitled to faith and credit in other states, the situations in which this is so are yet to be made clear.

the marketplace.[7] When the fourteenth amendment was adopted, a new mass of ambiguity was thrown to the courts. The phrase "due process of law," though it had been in the fifth amendment and most state constitutions, had no sure meaning in itself; it was as vast as "goodness, beauty and truth" to some lawyers, and meant no more than "traditional legal procedures" to others. Which was intended the Framers did not say. "Equal protection of the laws" and "the privileges and immunities of citizens" are little if any more exact, nor are a score of other terms that were designed to guide the nation's destiny.

Obviously this inexactness leaves room for divergent views, both within a court and outside it, and leaves any answer that may be given less demonstrably the correct one. Yet someone must give the answer, and under our system it is the court's task to do it.

That the courts must give the answer affords us no ready knowledge of what answer they will give. As to the past, the answers are written in the books, and we can read them if we will, though even that does not always reveal their meaning. All of us know that the answers change somewhat when the men who give them change. That we expect, and sometimes pray for. That we will like all the answers is something few of us even hope for. That all of us should like all the answers is a possibility that no one even talks about.

We do know that the answers for awhile may follow one pattern, as a court has fairly stable membership for a period, and that the pattern may change as new judges come on the court, and then change again. From Marshall's time up to the present we know these patterns fairly well, though some new student comes along each year or two to shed new light upon them. We have become accustomed to the older patterns and the shifts back and forth that were part of them, so that we can discuss them dispassionately, and even observe their inevitability. But when decisions are new the pattern is less apparent, the inevitability far less clear, and the shock much greater when one's own side is the loser.

Today the Supreme Court of our nation is much criticized for taking too much authority upon itself, as it has been more than once criticized by earlier generations. What the Court is doing today is emphasizing and insisting upon the protection of per-

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[7] See ROTTSCHAEFER, CONSTITUTIONAL LAW 558-620 (1939); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512 (1944).

sonal rights, or human liberties, deemed inherent in the due process and equal protection clauses of the fourteenth amendment as it incorporates the Bill of Rights. During a period which ended about twenty years ago, the same Court was much criticized for over-protection of property or economic rights under the very same clauses fleshed out by the same incorporative process. In both eras the critics said that the Court was unduly invading the legislative function, that the legislative decision as the exercise of democratic will should be allowed to stand. It is notable, though, that most of the critics in the two eras came from different social or political groups, with very little common membership. Thus many of those who now criticize the New Deal Court, or today's Court, compare it unfavorably to the pre-New Deal Court which lost its strength a score of years ago. Yet the older Court claimed more *power* for itself in declaring Acts of Congress unconstitutional than the New Deal Court ever has.[8]

The fact is that most of those who criticize the Supreme Court today are complaining of the *result* in some particular case or cases. Many of the same critics would praise a Court for declaring unconstitutional other acts of Congress, or of the Executive, which they don't like, such as civil rights laws. They praise by inference the pre-1937 Court for almost that reason. Their objection to today's Court is actually not that it is exercising the power to declare legislation unconstitutional, though they may throw that in as a makeweight. What they really object to is that the legislation declared unconstitutional is legislation that they like.

II

The Answering Process

The application of law to persons is a very personal matter. Yet it is the matter that courts, including appellate courts, are set up to handle. That means the determination of lawsuits. The outcome of a lawsuit is supposed to depend upon the law. Before we can grasp the full significance of that supposition, we need to have in mind the nature of lawsuits. I am talking about the typical contested lawsuit. Such a lawsuit is one in which each of

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8 The most thorough-going recent analysis appears in SCHWARTZ, THE SUPREME COURT (1957). For a more brief, but excellent, discussion, see Rodes, *Due Process and Social Legislation in the Supreme Court — A Post Mortem*, 33 NOTRE DAME LAW. 5 (1957).

the opposing parties thinks he is right, and each thinks he has a fair chance of winning, or his lawyer thinks so, else he would not be going to the trouble and expense of contesting the case. The difference between the parties may be only as to what their facts are, in which event it does not touch our problem, but even the proof of facts is likely to turn on what the *law* is; so in most cases there are questions of law presented, and sometimes mostly law questions. Each party, or his lawyer, thinks that the law is or should be on his side. For such a case, who can with assurance say in advance what "the law" is? Would the wisest lawyer in the land be able to tell us with certainty beforehand how three of such cases hand-running would come out? The effort to forecast results of lawsuits shows us what Holmes meant when he said "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[9]

What makes a good lawyer? By Holmes' description of law he will be a good prophet. Most of us probably think of a "good lawyer" in almost exactly that sense. That doesn't mean the good lawyer devotes himself to astrology and the divination of the flight of birds, or even to extrasensory perception as to the falling of heads and tails with judicially tossed coins. He does not do that either when he is studying law generally or preparing a particular case specifically. He knows that his case is going to be decided within a framework of relevant legal rules, principles and traditions. The good lawyer knows pretty well in advance what these relevancies are, though he does not know, and knows that he does not know, just what judicial judgment they will lead to.

Does all this mean that the law is like a trackless jungle, or perhaps like one with many paths that crisscross and circle about, but lead nowhere? If it is, we cannot be surprised that courts, being under a duty in each case to come out of the jungle somewhere, come out one time at one place and another time at another place. Is that all the pattern that we have for judicial decision? We know it is not, but for some reason the nature of the judicial process remains something poorly understood by the average citizen.

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9 Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897), reprinted in COLLECTED LEGAL PAPERS 167, 173 (1920).

III

Sources of Answers

The logical place to start an inquiry about the nature of an appellate court's job would be with the origin of law, but that is a long way back. It is about as far back as if we were looking for a thunderbolt from Jove's brow, except that we could not find that if we looked for it; whereas we can find out as much about the origin of law, and its development too, as we can find out about the origin and development of our civilization, because law and civilization are parts of each other, law serving civilization. The history of either one is a history of the other too.

But we need not start so early for what can be covered here. We can start with the initial body of law in an American state — the common law. Typical is a statute of my own state:

> The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British Parliament in aid of [it] . . . made prior to the fourth year of James the First (that are applicable to our own form of government), of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or . . . of this State, shall be the rule of decision in this State unless altered or repealed by the General Assembly. . . .[10]

Some of the states, instead of taking the year 1607, adopt the English law as of 1776, or even 1492. One or two, however, refused to adopt the law of England. The Englishmen who settled Plymouth Bay Colony were trying to get away from persecutions they associated with the common law of England, so they resolved to live under the law of Moses, but it was remarkable that the law of Moses in early Massachusetts decisions turned out to be almost identical with the common law.[11] Three of the states, New Jersey, Pennsylvania and Kentucky, around 1800 enacted statutes forbidding citation of any English authority in their courts.[12] In each state the prohibition soon fell by the wayside. English cases are freely cited now in all the states. The common law is our starting point.

That certainly does not mean that the common law of Arkansas or of Indiana is the same as England's, or that Indiana's and Arkansas' are the same. They have grown separately

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10 ARK. STAT. ANN. § 1-101 (1947). Generally, see Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951).

11 Dean Pound notes a similar phenomenon when the British undertook to apply "natural law" at Penang. See POUND, SOCIAL CONTROL THROUGH LAW 4 (1942).

12 See Lobingier, *Precedent in Past and Present Legal Systems*, 44 MICH. L. REV. 955, 962 (1946).

and inevitably apart, though feeding on each other and on all their neighbors' law. We cannot state the common law today except as it exists in some particular jurisdiction. We cannot state what it is, but we can say what it covers. For one thing it includes most of the law that governs us, and for another it has its being in the pronouncements of courts, with the hands of the legislatures showing only here and there. It is true that most cases today cite statutes on some point or other, but sometimes the statute merely repeats common law previously established by the courts, and at other times it is on some incidental point. Legislation is comparatively more important now than it used to be, but it leaves unanswered most of the questions that come to state appellate courts. Further, the court pronouncements that contain the bulk of the common law are tolerably recent ones. They have their roots in the old decisions, but the pre-1607 English cases are not much cited (the fact is that there were only a few of them, and these few have little relevance to today's problems). Even old cases from the same American state are seldom cited if recent cases can be found, as usually they can be. For still another thing, the law has changed tremendously in its substantive content as the centuries have passed. In understanding the judicial process in our system, the most important matter of all to remember is that these changes in the law have been made by courts almost altogether, by legislatures seldom, and yet the judges making them have stayed within the common law when they made the changes.

IV

The Common Law Method

The key to understanding here is that the common law consists not only of detailed rules but of principles, standards, doctrines and traditions, which in longtime effectiveness far outweigh the little rules. Some courts once laid down a rule that an autoist approaching a railroad track must not only stop, look and listen, but must get out of his car and look down the track if his view be otherwise obscured, before crossing it,[13] else be deemed guilty of contributory negligence if his car is struck by a negligently operated train. The rule was preposterous, because it failed to take into account the possibility that in some circumstances a train might come into sight, and even reach the

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13 Baltimore & O. R.R. v. Goodman, 275 U.S. 66 (1927).

crossing, while the driver was returning to and restarting his car. It was out of keeping with the facts of life as they relate to driving automobiles on modern highways. Soon the earlier case was overruled, and the courts returned to the true common law guide for such cases, which is a standard of reasonable care, the care which an ordinary prudent man would exercise under the same or similar circumstances.[14] The amount and types of diligence necessary for compliance with the standard of reasonable care under the circumstances vary on similar sets of facts, sometimes from jury to jury but more significantly from generation to generation. Thus in automobile cases conditions of transportation and transportation values change, and applications of the standard have changed with them. Little rules as to what constitutes reasonable care in this or that situation have come and gone, been asserted and then retracted, but the common law standard has remained.

The requirement that there be a relationship of proximate causation between a defendant's act and a plaintiff's injury, as a condition to tort recovery, likewise illustrates the breadth of judicial function. When first stated this requirement sounds like a simple, sensible, mechanical rule, but when we examine what common law courts mean by it we find that the proximate causation concept has a truly amazing content which varies much from state to state. It may include factors of foreseeability, of directness, of distance in time and space, of substantiality, of interventions, of relative losses and costs, as well as cause and effect.[15] What on its face is a legal rule becomes in practice a doctrinal generalization to which an appellate court can give such policy content as to it seems sound. Not all courts think that proximate causation should be dealt with that way, and some courts would quit using the term altogether, but dropping the language does not drop the problem, and the courts of each state must lay down some kind of law to govern the shifting of accident losses. Either they will shift losses (in the long run usually to liability insurance companies) if a defendant's negligence has even a little connection with a plaintiff's injury, or they will leave losses where they lie on injured plaintiffs unless a defendant's negligence has close and direct connection with the

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14 Pokora v. Wabash Ry., 292 U.S. 98 (1934).

15 See Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928) (majority and dissenting opinions); GREEN, THE RATIONALE OF PROXIMATE CAUSE (1927).

injury, or they will put the law somewhere in between. That is a decision on social policy. Pointing out that a problem involves considerations of social policy does not excuse the courts from deciding it, but only makes it clear that questions of social policy must be decided by courts.

In the criminal law we have a doctrine that there can be no guilt without a guilty mind. It is said that *mens rea* must be present before the criminal defendant may be found guilty. Where did that requirement come from? In most states it was never enacted by the legislature. It is derived from the common law. The legislature may have provided flatly that "the doing of x act shall be a felony." D is proved to have done x act, but shows that he did it in his sleep, or was unaware of facts which gave his act x character. He may have married a second wife while he had a first wife living, which the statute defines as bigamy, but he honestly believed his first wife was dead. The courts say that such a man is not guilty of bigamy.[16] But they also say that for some other crimes a guilty mind is not required. If D is color-blind so that he thinks red is green, and he runs a stoplight, he will be held guilty despite his moral innocence. When we deal with types of conduct upon which a mass of other people must rely objectively with no opportunity to gauge the actor's inner innocence, we say he acts at his peril even for purposes of the criminal law.[17] The distinction makes sense, and our criminal law achieves a nice balance of fairness with efficiency by means of it, but we need to remember that both the rule and the distinction were made up by the courts.

A century or so ago *caveat emptor* was the rule of the marketplace, and the courts applied it in cases that came from the marketplace. It was a law of dog eat dog, and of dog eat sheep, too. Gradually the courts began to develop the law of fraud and deceit, and partially eaten sheep began to get compensation for the bites that had been taken out of them. Usually court relief became available only after old practices had been long deplored by ethical laymen, so that the courts could scarcely be said to have been the leaders in making up new rules as to what constituted fraud.[18] Rather they began to enforce standards that

16 *Cf.* The Queen v. Tolson [1889] 23 Q.B.D. 168; Dotson v. State, 62 Ala. 141 (1878); People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956).

17 PERKINS, CRIMINAL LAW 829-32 (1957); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

18 Pasley v. Freeman, 3 T.R. 51, 100 Eng. Rep. 450 (K.B. 1789); Schlossman's, Inc. v. Niewinski, 12 N.J. Super. 500, 79 A.2d 870 (1951). See also Reno v. Bull, 226 N.Y. 546, 124 N.E. 144 (1919). See HARPER & JAMES, TORTS §§ 7.1-.15 (1956).

were already accepted by the better element, probably the majority, of those who populated the marketplace. The fact I emphasize is that it was the courts which gave the character of law to these socially accepted standards in the field of fraud and deceit. My guess is that improving ethical standards in the trades and professions will aid the courts to make a good deal more law in this area. The requirement that a fiduciary employ the highest measure of good faith in dealings with those who trust him[19] is similarly a creation of the courts, and its breadth and strength are still developing as ethical standards rise. In fact a whole mass of ethical principles was translated into that part of the law which we know as equity, and though it had its greatest growth in a separate set of courts called Chancery some centuries ago, equity still has a part of its function in today's courts — the infusion of equitable, which means ethical, principles into law. An appellate court sitting today in an equity case should be, and usually is, as ready as the Chancellor of another day to listen to the voice of conscience in developing substantive rules to fit new facts or variations of old ones.

The unjust enrichment principle, which is that the law should not permit one person to be unjustly enriched at the expense of another, sounds like a pious generalization, and perhaps it is. Possibly courts have been a little afraid of it because of its unlimited potentialities, and for that reason have been reluctant to employ it as fully as they might have. Yet they have used it to give relief when payments have been made under compulsion or mistake of fact, to authorize recoveries when improvements have been made in good faith on another's property, when one debtor has paid a debt that was also owed by another, or when good conscience justified contribution or indemnification in a dozen other situations. The principle is far from being fully developed, and it is altogether possible that future courts may find much more in it than has yet been judicially announced.[20]

A good illustration of current growth in the common law may be taken from the field of defamation. When I was a law student the rule was that a tort occurred at each time and each place a libel or slander was published, and publication occurred each

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19 3 BOGERT, TRUSTS AND TRUSTEES § 481 (1946); 3 SCOTT, TRUSTS § 495 (1939).

20 RESTATEMENT, RESTITUTION §§ 160-79 (1937). Interestingly, this growth in the law of unjust enrichment seems to be more rapid today in England than in the United States. See JACKSON, HISTORY OF QUASI-CONTRACT IN ENGLISH LAW (1936); WINFIELD, THE LAW OF QUASI-CONTRACTS (1952).

time the defendant caused it to be read or heard by any person. With radio and television, and the great national magazines, that meant an almost uncountable number of publications with separate torts in each state where the magazine was circulated or the broadcast heard, and repeated torts each time a newsstand copy was perused or a library reader saw the offending article. New and separate actions could be brought almost interminably, and adjudication of one claim would leave the others still unsettled. To meet this situation the courts, not the legislatures, in the 1940's devised the single publication rule, which is that publication to the whole mass of readers or listeners is one transaction occurring one time and constituting one tort.[21] That was not the law anywhere in America thirty years ago, but it is now in several states.

A much larger development some time ago was Lord Mansfield's integration of the law merchant into the common law. When Mansfield became Chief Justice there was no systematized law in the books to govern commercial transactions. A variety of sales of goods, contracts, bills of lading, promissory notes, bills of exchange and the like were well known in the marts of trade, but dependent for interpretation and enforcement more on the good faith of merchants than upon sanctions afforded by the law. When Mansfield left the bench the customs of the merchants had become rules of law, with no aid from Parliament.[22] It is interesting that Mansfield's tenure, during which this growth in the law was accomplished, was 1756 to 1788, thus ending well past the dates when the American states adopted the common law of England. There is no question, however, that Mansfield's innovations have become part of the common law of the American states.

Areas of growth in the law in our own time, comparable in importance but even greater in size, arise from the new complexities of a twentieth century economy. Labor law serves as an example. When cases concerning organized labor began to come to the courts a century or so ago, the courts sought to solve them without innovation, by precedents and analogies from a past which envisioned laborers altogether as individuals, not as a corporate group in any sense. The effort was not successful, and what the courts then did with labor cases is history only, and not the law of today. A fresh start had to be made when the

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21 See HARPER & JAMES, TORTS § 5.16 (1956).

22 See FIFOOT, LORD MANSFIELD 82-229 (1936).

essentially corporate character of our new economy became evident to most students of it. To bring the law governing the activities and relationships of organized labor into line with its function in our society became a major task, after that false start, and aid from legislative enactments was required where some special areas were concerned. But the courts too were able to make the adjustment. They found better precedents and better analogies, and the standard techniques of the law enabled them in time to develop the rules we have today which, though still in flux, serve reasonably well to resolve the disputes which the relationship of big labor with big industry bring to the courts.[23] So it has been with the old decisions relating to business combinations and restraint of trade; they represented attitudes characteristic of another economic era, and because they did not fit our times they have fallen by the wayside.[24]

The vast new development of the law of taxation is different in a major respect, in that it has a statutory base. But it too illustrates the creative aspect of the judicial function, in that questions of interpretation, of permissible modes of administration, collection and enforcement generally, questions of property and contract and reimbursement which grow out of modern taxation, come constantly before the courts and demand solution. The common law which governs the peripheral problems of taxation is a vast new mass of decisional precedent,[25] law which would hardly have been imagined even a third of a century ago.

V

The Imperfect Seeking Perfection

From what I have been saying one who did not know better might think that the common law as administered by the courts is a body of adjudication that always keeps abreast of the needs of society, that responds like a delicate seismograph connected with some intricate machine which promptly translates its perceptions of movement in society into law appropriate to the new

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23 See Holdsworth, *Industrial Combinations and the Law in the Eighteenth Century*, 18 MINN. L. REV. 369 (1934); Nelles, *The First American Labor Case*, 41 YALE L. J. 165 (1931); Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922).

24 *Compare* Mogul Steamship Co. v. McGregor, Gow & Co. [1889] 23 Q.B.D. 598, confirming a right to engage in a free-wheeling type of cut-throat competition, *with* Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 867 (1946), which enforced minimum ethical standards in a comparable situation. Generally, see HARPER & JAMES, TORTS § 6.13 (1956).

25 See PAUL, FEDERAL ESTATE AND GIFT TAXATION §§ 1.10-.12 (1942).

conditions when legislatures have failed to act as promptly as they might have. We know that nothing is further from the fact. Despite the history I have just recited, judicial lawmaking is a slow and cumbersome process, a case-by-case approach which, as Holmes observed, often does no more than carry us from tuft to tuft across the morass, seldom presenting problems whole, but in little pieces only, so that the broad complete solutions which a legislature can achieve are almost never possible. Judicial timidity also takes its toll from progress, for it is often easier to see the past than the present, and a judge who craves easy certainty finds it more readily if he does not look too much beyond the lawbooks in his chambers. Every one of us can think of rules of law that have been obsolete for a long time, yet are still followed in the courts. One that every doctor and psychologist in America can tell us about is that which governs the relation between insanity and crime. The rule we follow is one that was laid down by the judges in the English House of Lords, in a series of questions and answers in *McNaghten's Case,*[26] in 1843. It sets up a test of the defendant's ability to distinguish between right and wrong with respect to the act done. This is a test based on capacity to reason, yet many scientists today tell us that diseases of the mind take many forms, destruction of the reasoning powers being incident only to some of them. The insanity that we talk about in our criminal law is not the insanity of the psychiatric studies. A few courts, New Hampshire back in 1871,[27] the District of Columbia four years ago,[28] have had the courage to break away from the time-honored *McNaghten* rule, but most courts have not. The same story could be told concerning the courts' slow and reluctant recognition of new types of interests, like that of the child injured prenatally, born with physical defects caused by a defendant's misconduct, yet denied recovery because he was not yet a separate human being when he was injured;[29] the courts' unwillingness to discard old rules of evidence which bar relevant testimony at trials, thus working toward concealment rather than ascertainment of the truth;[30] their frequent insistence upon retaining old procedural forms

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26 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

27 State v. Jones, 50 N.H. 369, 9 Atl. 242 (1871).

28 Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

29 See Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951), in which recovery for prenatal harms was allowed, superseding the older rule as set out in Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

30 See 1 WIGMORE, EVIDENCE §§ 8-8c (3rd ed. 1940).

and practices which slow down without aiding the processes of justice[31] — these things are the common substance of standard complaints, too often justified, concerning the law and its administration.

One thing stands out above all else from this — our courts have made most of our law, the mass of our common law. Courts do make law. It is their business to make law. At least that is true of appellate courts. They do not merely decide single cases, but lay down precedent which is a guide to future decision in the same jurisdiction and persuasive in other jurisdictions, and, therefore, is "law" in the sense that it is a basis for Holmesian prophecy as to what a court will do in the next case of the same sort that comes along. A basis for prophecy, we can say, but not a basis for mathematical calculation, since judges who make law can, if they will, make new law and make it different from the old. One of the complaints we have against them is that sometimes they do not make new law when we think they should.

Someone may say that this system of judge-made law does not fit in with the ideal of a government by law and not by men. This objection assumes that appellate judges are men, which can be conceded. They are human beings, though not as "human" as baseball fans are. But who is to make our laws, if not men? It is only a question of which men. That is part of the answer. The rest of the answer to the objection, and the main part of the answer, is that this system of judicial lawmaking is the Anglo-American system, the system that our nation has known and followed since its beginnings, the system that we are talking about when we boast that ours is a land of law and not of tyranny. It is our system and it always has been. The Germans and French and Italians have a different system, based upon legislated codes rather than upon judge-made common law. The Russian system is closer to the continental European system than to ours. A good many of the newer nations in the world, coming fresh upon the problems of modern civilization, have chosen to set up codes modeled on those of continental Europe. But English-speaking countries in general have preferred to follow the common law way. That of course does not prove that it is the better way, and certainly does not prove that it is perfect,

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31 See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (pt. 1 1906); Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUD. SOC'Y 176 (1937); HARDING, THE ADMINISTRATION OF JUSTICE IN RETROSPECT (1957). The latter volume is a symposium commemorating the semi-centennial of Dean Pound's epochal address.

but it does prove that it is not un-American, for whatever that signifies. It also proves that it is a system under which a nation such as ours can live for almost two hundred years and grow great in the process, while at the same time achieving a considerable world reputation for its justice under law. Remember, we are not talking about some marvelously perfect system of justice ordained and administered from heaven above, but about our system of judge-made law.

What makes the system work so well? Why is it that our system has not, save in rare instances, descended to tyranny? How is it that we have come to think of it, at least in rosy retrospect, as justice administered according to law and not according to the whims of men, when the fact is that the judges who head up the courts not only make the law as they decide the cases, but also sometimes remake it anew in the very process of deciding the cases? If we were men from Mars, or even from Russia, that might be hard for us to understand, and it is worth analyzing even for us who have lived in the midst of it all our lives.

For one thing, the judicial lawmaking process is pretty well confined to appellate courts, and we can for our purposes think of it in terms of the highest courts of state or nation, not intermediate appellate courts, though much of what we are saying applies to them too. In general, I am not distinguishing between state supreme courts and the United States Supreme Court, since each is broadly supreme within its jurisdiction, the federal high court being different only in that its jurisdiction includes federal questions that can come up through the state courts.

VI

Limits on Judicial Choice

Substantially the question is what leads these high courts to the decisions they render. Since the courts are as free as they are, why isn't it the whim of the judges' personal preference? What are the limits on judicial choice, and how do these limits enforce themselves?

Basic to the answer, I believe, is a recognition of the sense of human and professional responsibility which is characteristic of men trained and dedicated to a task. The lawyer who becomes an appellate judge, whatever his immediate background, knows that certain things are expected of him by his fellowmen, lawyers and laymen alike, and that the obligations of his office are large and serious. His duties as a judge are outlined for him by rich

and vast experience that has preceded him, creating a tradition, a set of techniques, standards that he knows are laid down for him to follow. A few men fail to live up to the minimum standards. There have been judges who were sent from the bench to the penitentiary. They are so few that we are not much concerned with them save to wonder how they came to be selected in the first place. The great mass of judges do the best they can, not just to be good men on the bench, but to comply with the traditional standards of what a judge should be and do. That is the acceptance of professional responsibility. It is not peculiar to judges. Members of the medical profession have the same attitude, and with them it is something far beyond what any set of laws could enforce against them. Scientists have it, in their search for truth which yields them satisfactions measurable only in terms of their profession. Artists have it, in terms and techniques less exact than in other professions, but equally exacting, and it is characteristic of scholars generally. With judges of high courts the sense of professional responsibility comes near its maximum, since other incentives that move men to act have for them largely disappeared. Economic gain does not come from deciding cases one way or another. Personal acclaim for deciding this case or that is negligible. Total reputation is the main reward the world can give, and the sense of duty well performed may be more important than reputation to the individual judge. Unless we bear these facts in mind, it will be difficult to understand why appellate judges behave as they do.

An appellate judge goes to his judgeship trained in the law, and the longer he stays a judge the more he becomes immersed in the techniques and traditions both of the law and of the judging craft, serving it not with incantations, though some do, but rather with the labors and the performances which best achieve the judicial function as he understands it.

The greatest single, limiting factor set up by judicial tradition upon judicial freedom is without doubt the doctrine of precedent, stare decisis. No common law court disregards this doctrine. That obviously does not mean that our appellate courts undertake to follow their prior decisions in every subsequent case. We know they do not. The doctrine of stare decisis does not call for that.

Stare decisis is common law doctrine, not constitutional law. It is no more prescribed by our constitutions than is the Rule in Shelley's Case. Our supreme courts could conceivably have read it into the due process clauses of our constitutions, but they

have not done so. And even if they did, it would presumably be the same doctrine of stare decisis that they apply as common law courts. By that test the doctrine includes not only situations in which prior cases are followed but also the situations in which they are not followed. The doctrine is really a summary of what courts *do* by way of following and not following their past decisions.[32]

Appellate courts make a general practice of following their past decisions. To a lesser extent courts also make a practice of following their past dicta, their nonessential statements about what the law is, distinguishable from the *ratio decidendi* which actually control their cases. Cardozo speaks of "static" and "dynamic" precedents,[33] those which are limited narrowly and those which the courts choose to expand and extend. The static ones look mostly to the past, the dynamic are springboards for growth in law because they speak in terms of the present and the future. Also there are precedents upon which people rely in entering upon life's transactions, and others upon which reliance is seldom placed until there is a case in court involving them. Precedents which lay down rules of property, or which state the effect of commercial transactions, are of the first sort. For special reasons rules of criminal law are placed in this category too. Courts seldom overturn these precedents. To be contrasted are the cases which state rules to govern civil liability for bad conduct, either negligent or intentional. The allegedly negligent auto driver does not assert reliance upon a judicial precedent as his reason for driving as he did. A change in the rule of case law will not be unfair to him if he was not measuring his conduct by it in the first place. Rules governing the procedural conduct of cases already in court would seem to fall in this category, and there are plenty of other illustrations. In these areas courts are not reluctant to overrule old decisions which lead to injustice. Certainty in the law is not so important here. And even in the property and commercial cases certainty may sometimes be deemed less important than the elimination of an old, bad rule.[34]

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32 See VON MOSCHZISKER, STARE DECISIS 5, 21 (1929); SCHAEFER, PRECEDENT AND POLICY 21 (1956); Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613 (1954); Archibald, *Stare Decisis and the Ohio Supreme Court*, 9 WESTERN RES. L. REV. 23 (1957).

33 CARDOZO, NATURE OF THE JUDICIAL PROCESS 163-64 (1921).

34 One way that these extreme cases may be handled is by the *caveat* technique, under which a new rule announced by a new case is made in the manner of legislation, prospectively rather than retroactively effective. See Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932); Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952).

The strength of a particular case as precedent varies, according to the availability of alternative grounds for decision, the field of law in which the case falls, the breadth of the principle it represents, the judicial reputation of the man who wrote the opinion, the comparability of the surrounding facts in successive cases, and a dozen other factors. This variability characterizes the strength as precedent of both *ratio decidendi* and dictum. Strong precedents are seldom overruled expressly, though this does happen; they are more likely to be "distinguished" if they are not to be followed. Sometimes the process of distinguishing them leaves life in them, and sometimes it practically takes the life out of them. Distinguishing them, however, preserves the link of continuity with them, avoids the sharp break with the past that an outright overruling involves.

Continuity is the hallmark of judicial respectability, the formality that satisfies convention. If the form of continuity is preserved, regardless of what judicial advance be made, the court has stayed within the convention of precedent. If precedent is openly rejected, innovation is apparent. Growth without innovation is the conventional ideal of the common law. The doctrine of precedents does not oppose growth, nor favor it either. Rather, it aids and abets growth, leaves open the opportunity for it.

VII

The Hard Case

It will help for us to suppose that a court has before it a case that is hard to decide. The precedents are not decisive, either because there are none that are really in point, or because there are too many of them and they point confusingly in different directions; or perhaps some ancient precedent does seem to apply but is illogical or contrary to common understanding and out of keeping with the spirit of the times. We need to say at once that this is not an average case. In the average case, even before a supreme court, the guidelines from the past are clearer than that. In half the cases the precedents provide an answer that all the judges on the court can agree to. The use of simple logic, the rejection of a *non sequitur*, an observation that the precedents form living law because they have been relied on and freely approved in recent years—these decide the case. Four out of five or nine out of ten of the remaining cases, though harder, will yield to the same treatment though with more argument, perhaps with a dissent or two. But then comes the hard

case. It has got to be decided. This is the time when a court might like to have a mechanical justice machine—so that the facts could be fed into the machine, the right levers pulled, and the correct answer automatically pushed out on a neat slip of paper. But there is no such machine. The judicial tradition does not permit the chief justice to toss a coin for the court, though some of our citizens not trained for the bench might settle it that way. Nor are the latest election returns controlling. Mr. Dooley once implied that they were, but a little reflection on the present Supreme Court's persistent indulgence in unpopularity convincingly proves the contrary. No Gallup poll is used. The members of the court do not talk with other lawyers, with public leaders or citizens generally about their hard case. Physically, we know what they do. They read the briefs and listen to the arguments, they read and study and talk among themselves, and write out their thoughts. But what crystalizes the thoughts?

Even in the hardest case, there is something in the books to start from, maybe several things in the books, looking in different directions. Counsel have pointed these out to the court. The matter in the books that has been pointed out and studied includes not only earlier cases, but also treatises—maybe old ones like Blackstone but surely new ones in the field. These are part of the "law" as much as the cases are. That is true also of learned articles in the law reviews. In fact, much of the most important part of the law is to be found in scholarly writing other than the opinions. That is where legal principles and doctrines are likely to have been formulated, through the sort of study and analysis that brings many cases and many considerations together for synthesis and evaluation. If it were not for the formulation of principles and doctrines in the treatises, a legal system based on precedent would be a wilderness of single instances, a multitude of trees in an unpatterned forest.

What about books that do not have the word "law" on their covers? If the court's hard case involves a contract to pay in installments for goods purchased, is it permissible for judges to study books on the economics of installment selling? If it involves a claim that freedom of the press is being invaded by a tax on advertising revenues, what may the court read? Or if the case involves the right of a newspaper to advocate unpopular theories of government? Of course it is proper for the court to study books labeled "history," but what if they are labeled "political science" or "sociology" or "the anatomy of human freedom"?

VIII

Is Society's Welfare Relevant?

Ever since so-called "Brandeis briefs" were filed in the Oregon ten-hour day for women workers case[35] a half-century ago, it has been respectable for lawyers to argue social implications openly. Before that they did it, but did it subtly, under the pretense that they were merely analyzing the cases. They had to argue such matters because they knew that few courts would render any decision without taking account of its practical effect. A decision on the law of sales of goods or bills of lading or trust receipts that is contrary to good commercial practice would be bad law, and one way or another the judges deciding the cases undertake to get relevant information about the facts of life in the field before they render their decision. They would do the same in any other area. Legal problems arise in every area of human life and activity, and the law's answers are good answers, therefore good law, only as they are good in terms of our life and our civilization. Law is supposed to serve society, not society the law, and the main virtue of our common law system as distinguished from the Roman system of codified law is that it can be more flexible, more sensitive to the needs of time and place. It is part of stare decisis, the doctrine of precedents, that this flexibility be preserved. In general our American courts, both state and national, have found more flexibility in stare decisis than have the English courts. Perhaps that is one reason why more freedom of initiative has been exercised here, why vigorous growth, the opportunity to do new things, have been a bit easier here than under more rigid rules of law in the old country. American courts have never thought of law as separated from the public welfare, and the American people would be shocked if their courts held that the two are unrelated.

Today we hear courts criticized because, it is said, they are deciding cases not on law but on sociology. If that implies that our courts are breaking away altogether from the doctrine of precedents and the techniques that are part of the doctrine, and are claiming freedom to decide cases without regard to it, we have a serious criticism. If it means, however, only that the courts are taking sociology into account in reaching their decisions in areas where law governs social relationships, then the courts are being criticized for doing what they have always done

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35 Muller v. Oregon, 208 U.S. 412 (1908).

in our system. Perhaps the fact is that they are merely indiscreet in being unsubtle about what they are doing by open use of the word "sociology", where older courts used verbiage that had more sound of law books to it.

Our hard case is still before us, undecided.[36] You may have felt that I was trying to get rid of it by talking it to death. That might be easier than deciding it. Actually, I have said about all that I can, without more elaboration than I have time for, about what the judges of our appellate court will do. They will be thoroughly familiar with the precedents, whatever they are, and with the relevant principles and doctrines. They will use the tools of logic, the lessons of history, their own sense of ethics and morality, to give meaning to the legal materials in terms of the problem before them. They will look at the habits and customs of their society, with reference to the matter in dispute. All these approaches and considerations will be weighed together, first by the judges singly, then assembled in conference. Perhaps one judge will conclude that the best answer is to decide the case as nearly as possible like a preceding similar case. Another will say that no precedent binds them, that ethics and custom look toward a different decision which will better serve the total interests of society. Both positions are legitimate. So are others in between. The judges vote, the majority take one view or the other, or perhaps to get a majority they must agree on something in between. At any rate, they agree, or a majority do. Preparation of the opinion is assigned to one of the judges, perhaps the one whose view prevailed, perhaps another. He does not write the opinion exactly as he would like to have it written, but so that each of his majority will still agree with it and so that he may possibly pick up the support of one or two of the erstwhile dissenters. At any rate the case is decided. But that is not all. Law is also laid down for the future—not inexorably binding law, but something which lawyers can use in prophesying how the next case will be decided. One other fact also is clear: however the case was decided, the decision constituted a choice between social values, with one value or set of values rejected and another, or others, accepted.

What critics of the courts are concerned about, of course, is not that social values are being taken into account by a court,

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36 For a study of how one court has handled its hard cases, see Trammell, *The Unprovided Case in the Arkansas Supreme Court — A Jurisprudential Inquiry*, 7 ARK. L. REV. 77 (1953).

but that the court has not accepted the critics' own social values. It is one group's sociology against another's. There are sociologists and sociologists, some professionals and some amateurs. I suppose that anyone who studies in the field of human relations, including race relations, whether he studies wisely or poorly, writes a thick book or makes a speech before five people, is a sociologist, and if he makes money out of it he is a professional. The sociologist who believes in racial segregation has a grievance against the United States Supreme Court today, but the grievance is not that the Court made a choice between views on race relations. It is that the Court made its choice against his views. The grievance is made a little worse by the fact that the Court was tactlessly frank about what it was doing.[37]

IX

"So Long as Men Speak Freely . . ."

Another area of decision in which the United States Supreme Court is being criticized today is that which deals with the national security, where the guarantees of free speech are invoked by persons whose utterances are designed to incite opposition to our form of government. The Court is employing here what is called the "clear and present danger" test, formulated some forty years ago.[38] Several state and federal efforts to punish for such utterances and related activities have been defeated under it. For that the Court is criticized, at times with the implication that the test is somehow beyond the Court's province. Perhaps the test is not an ideal one. I am not prepared to debate that one way or the other. But if that test is not to be applied, then some other test must be devised, and it will have to be devised by the Court, for there is no one else to do it. No

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37 Brown v. Board of Educ., 347 U.S. 483 (1954). The major portion of the text of this opinion dealt with statutes and prior decisions of the courts, and other orthodox legal materials, as did twelve of the fourteen footnotes. But two of the footnotes, and the text to which they related, dealt with the history of American public education (note 4) and with developments in what are called the social sciences, particularly psychology, during recent years (note 11). At the end of the last-named footnote, after citation of six other books or articles, there appears as a sort of addendum: "And see generally Myrdal, An American Dilemma (1944)." Many critics cite this as the true basis of the Court's opinion.

38 "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Holmes, J., in Schenck v. United States, 249 U.S. 47, 52 (1919). To bring application of the test up to date, see Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States 354 U.S. 298 (1957).

other agency in our land has the final authority to tell us what free speech the Constitution guarantees. If the courts set up no limit on restraint of speech, then any legislature may at the bidding of a dominant political group successfully enact that "no newspaper shall print bad things of Big Brother, no preacher preach such things, no person say them." It is to prevent that sort of threat to liberty that we have a Constitution, and courts to implement it.

The business of law is as broad as life itself, and as unfinished. Dean O'Meara has compared it to a tapestry the weaving of which is never done, which repeats many of the patterns of the past but is constantly adding new patterns and variations on old ones.[39] He emphasizes that in every case there are problems of appraisal, valuation and choice, but in every case a choice must be made. The appellate judge is under a duty to write an opinion explaining his choice, a necessity that does not rest on most of us. Tradition says the explanation should be in the language of the law, intelligible too often only to lawyers. Laymen object to this, call it a language of obfuscation, and ask the judges to speak English. Sometimes judges do speak English, hoping thereby to help laymen understand that law is made not of occult mysteries, but of the stuff of life itself, all life. Then it is that they are accused of operating "outside the law," of following sociology and not law.

One thing that any judge soon learns is that losing parties do not like his decisions. I have heard appellate judges say that the most effective way to write an opinion is to aim it at the losing lawyer; if it convinces him it will convince anybody. I am sure that losing lawyers are sometimes convinced by such opinions, especially when later on they have a case that is on the other side of the issue. But the losing litigant is almost never convinced. Ordinarily all we do is give the loser our sympathy, then leave him, though he may still be muttering unhappily. When the losing party, however, is a sovereign state, or some large fraction of the nation's population, it is not easy to pass him by with sympathetic generality, though his criticism has obviously the same bias as that of the little loser. The criticism may have inherent worth no greater, or no less, than that of John Doe who lost a thousand dollar judgment, but in a democratic nation mere weight of numbers gives it more effect. More

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39 O'Meara, *The Notre Dame Program: Training Skilled Craftsmen and Leaders*, 43 A.B.A.J. 614, 670 (1957).

important than that, all of us privately would be willing to admit that sometimes there is reason to the laments of even the littlest loser. Justice sometimes seems blind.

That brings me to the final aspect of an appellate court's task that I will mention. This the task of accepting criticism. Perhaps of all the judge's obligations this is the hardest to perform, since by tradition the judge may not speak up to defend himself. Silently he must study the next case, maintaining judicial calm. That is his duty. Courts are a part of government, with us, democratic government. The gist of the democratic process is in the Bill of Rights, free speech and press, free religion. The essence of the gist is freedom of thought, which has meaning as there is freedom to express thought. That gives us Holmes' free marketplace of ideas. The marketplace is not free unless every idea that is held can be offered there—uninformed, foolish and vicious ideas, as well as the good, the wise and the eternal ones. It is from this competition that society's choice of ideas emerges. For good or bad that is the democratic process. At its center is the right to criticize our government and our governors, which inevitably includes our supreme courts and their judges, both individually and collectively. And today our people who criticize the Supreme Court of the United States can do so with thankful confidence that if any power in the land promulgates an order forbidding such criticism, the Supreme Court itself can hold, and will hold, that the forbidding order is unconstitutional and no law at all.