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Supreme Court Superstars: The Ten Greatest Justices

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SUPREME COURT SUPERSTARS: THE TEN GREATEST JUSTICES

Bernard Schwartz†

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I. INTRODUCTION

“The human animal differs from the lesser primates in his passion for lists of Ten Best.”¹ To be sure, any such ranking — whether of all-star athletes or the greatest Supreme Court Justices — is a personal matter, bound to be based upon the lister’s own subjective evaluation. After all, as Justice Frankfurter points out, “Greatness in the law is

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1. DAVID WALLECHINSKY ET AL., *THE BOOK OF LISTS* at xvii (1977).

not a standardized quality, nor are the elements that combine to attain it."² There are no "objective" standards of comparison between the Justices — no batting averages like those which distinguish the Ty Cobbse or Ted Williamses from their lesser counterparts.

Perhaps the most that can be done here is to apply Justice Stewart's celebrated aphorism to Supreme Court greatness: "I could never succeed in [defining it]. But I know it when I see it"³ It may be impossible to say exactly what makes a great Justice. But I know greatness when I see it. These are the ten whom *I know* as the ten greatest in Supreme Court History:

1. John Marshall (1755-1835), Chief Justice of the United States, 1801- 1835
2. Joseph Story (1779-1845), Justice, United States Supreme Court, 1811-1845
3. Roger Brooke Taney (1777-1864), Chief Justice of the United States, 1836-1864
4. Stephen J. Field (1816-1899), Justice, United States Supreme Court, 1863-1897
5. Oliver Wendell Holmes (1841-1935), Justice, United States Supreme Court, 1902-1932
6. Louis Dembitz Brandeis (1856-1941), Justice, United States Supreme Court, 1916-1939
7. Charles Evans Hughes (1862-1948), Justice, United States Supreme Court, 1910-1916, Chief Justice of the United States, 1930-1941
8. Hugo Lafayette Black (1886-1971), Justice, United States Supreme Court, 1937-1971
9. Earl Warren (1891-1974), Chief Justice of the United States, 1953-1969
10. William J. Brennan, Jr. (1906-), Justice, United States Supreme Court, 1956-1990

II. THE JUSTICES⁴

A. *The Ten Greatest*

1. John Marshall

"[I]f American law," says Justice Holmes, "were to be represented by a single figure, sceptic [sic] and worshipper alike would

2. WILLIAM D. PEDERSON & NORMAN W. PROVIZER, GREAT JUSTICES OF THE U.S. SUPREME COURT 3 (1993) (quoting Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 784 (1957)).

3. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

4. Portions of this section of the text are derived from BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT (1993).

agree without dispute that the figure could be one alone, and that one, John Marshall.”⁵ Certainly, more so than any other justice, Marshall has been the subject of inquiry. His role in constructing the keystone of the constitutional-law arch was crucial. “[T]he extraordinary judgments of Mr. Chief Justice Marshall upon constitutional law”⁶ have been confirmed over the ages by the continuing imprimatur of the highest Court. Ever since his day, the Court’s governing approach has been associated with Marshall, has never been successfully challenged as sound constitutional principle, and has remained the keystone of our constitutional edifice.

Marshall’s task was to translate the constitutional framework into the reality of decided cases. He was not merely the expounder of our constitutional law; he was its author, its creator. “‘Marshall found the Constitution paper; and he made it power,’ said James A. Garfield. ‘He found a skeleton, and he clothed it with flesh and blood.’”⁷

The roster of Marshall’s principal decisions is a list of leading American constitutional law principles. His most important opinions were summarized by Beveridge in the following manner:

In *Marbury vs. Madison*⁸ [Marshall] established that fundamental principal of liberty that a permanent written constitution controls a temporary Congress; . . . in *M’Culloch vs. Maryland*⁹ and *Cohens vs. Virginia*¹⁰ he made the Government of the American people a living thing; but in *Gibbons vs. Ogden*,¹¹ he welded that people into a unit by the force of their mutual interests.¹²

A major part of our constitutional law has been merely gloss upon these key Marshall opinions. Without the principles established by these opinions, the American constitutional system would be entirely different.

For Marshall, the law was essentially a social instrument — with the Constitution itself to be shaped to special and particular ends. The Constitution was not to be applied formalistically; it must be applied in light of its purpose. To Marshall, there was no doubt that the

5. THE MIND AND FAITH OF JUSTICE HOLMES 385 (Max Lerner ed., 1943).

6. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES at ix (Melville M. Bigelow ed., 1905) (5th ed. 1891).

7. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 402 (Howard Fertig, Inc. ed., Little, Brown, and Co. 1966) (1911).

8. 5 U.S. (1 Cranch) 137 (1803).

9. 17 U.S. (4 Wheat.) 316 (1819).

10. 19 U.S. (6 Wheat.) 264 (1821).

11. 22 U.S. (9 Wheat.) 1 (1824).

12. 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 430 (1919).

organic instrument's overriding purpose was to establish a nation endowed with all necessary governmental powers. At the Chief Justice's death, John Quincy Adams wrote that Marshall "settled many great constitutional questions favorably to the continuance of the Union. [He] has cemented the Union. . . ."¹³

The key to Marshall's conception is his seminal dictum: "[W]e must never forget, that it is *a constitution* that we are expounding."¹⁴ Justice Frankfurter once described this as the "most important, single sentence in American Constitutional Law."¹⁵ It set the theme for constitutional construction — the Constitution should not be read as "an insurance clause in small type, but [as] a scheme of government . . . intended for the undefined and unlimited future."¹⁶

Marshall interpreted the Constitution to lay the legal foundation of an effective nation. He consistently aimed to use the Supreme Court for that purpose. During his tenure, instrumentalist jurisprudence reached its climax. More so than any other jurist, Marshall employed the law as a means to attain the political and economic ends that he favored. In this sense, he was the very paradigm, during our law's formative era, of the result-oriented judge. Moreover, the law which he used was, in major part, molded by him as well. Marshall's ability to both shape and use the law is evident in his public-law decisions: "[H]e hit the Constitution much as the Lord hit the chaos, at a time when everything needed creating."¹⁷ The constitutional principles which Marshall proclaimed in his cathedral tones were, in large part, principles of his own creation.

Marshall was undoubtedly one of the greatest legal reasoners.¹⁸ But his ability to reason effectively only masked the fact that he authored as well as expounded his legal doctrines. His public-law opinions were based on supposedly timeless basic principles which, once accepted, led by unassailable logic to the conclusions that he favored. In Marshall's seminal opinions "[t]he movement from premise to conclusion is put before the observer as something more impersonal than the working of the individual mind. It is the inevitable progress of an

13. Diary of John Quincy Adams (July 10, 1835) in WARREN, *supra* note 7, at 421.

14. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

15. FELIX FRANKFURTER REMINISCES 166 (Harlan B. Phillips ed., 1960) (emphasis omitted).

16. *Id.*

17. JOHN P. FRANK, *MARBLE PALACE* 62 (1972).

18. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 373 (1988).

inexorable force.”¹⁹ Even Marshall’s strongest critics were affected by the illusion. “All wrong, all wrong,” we are told was the despairing comment of one critic, “but no man in the United States can tell why or wherein.”²⁰

Marshall was once described by a contemporary as “too much disposed to govern the world according to rules of logic.”²¹ Marshall the logician is, of course, best seen in his magisterial opinions, which, to an age still under the sway of the syllogism, built up in broad strokes a body so logical that it baffled his critical contemporaries.²² To Marshall, however, logic, like law, was only a tool. Indeed, the great Chief Justice’s opinions taken together are a prime judicial example of the famous Holmes aphorism: “The life of the law has not been logic: it has been experience.”²³ Marshall, more than any other early judge, molded his decisions to accord with “[t]he felt necessities of the time.”²⁴ If this was often intuitive rather than conscious on his part, his intuitions certainly furthered his notion of the public interest.

For Marshall, then, the constitution was a tool, and the same was true of the common law. Both public law and private law were employed to lay the doctrinal foundations of the polity and economy which served his nationalistic vision of the new nation. Compared to Jefferson’s, Marshall’s vision may have been conservative. However, though their visions may not have been the same, both the great Chief Justice and his lifelong antagonist looked at the law from an instrumentalist point of view.

Jefferson wrote of “the rancorous hatred which Marshall bears to the government of his country.”²⁵ However, both men simply had different conceptions of what the American polity should become. Marshall himself saw all too acutely that the Jeffersonian theme was sweeping all before it. “In democracies,” he noted in 1815, “which all the world confirms to be the most perfect work of political wisdom, equality is the pivot on which the grand machine turns.”²⁶ As he grew older, Marshall fought the spread of the equality principle, notably in

19. SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 342-43 (Margaret E. Hall ed., 1947).

20. EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 124 (1919).

21. 2 BEVERIDGE, *supra* note 12, at 437.

22. CORWIN, *supra* note 20, at 123-24.

23. OLIVER W. HOLMES, THE COMMON LAW 1 (Boston, Little Brown, and Co. 1881).

24. *Id.*

25. 9 THE WRITINGS OF THOMAS JEFFERSON 275 (Paul L. Ford ed., 1898).

26. John Marshall to Richard Peters, July 21, 1815, Marshall Papers, Library of Congress, quoted in SCHWARTZ, *supra* note 4, at 68.

the Virginia Convention of 1829-1830. As he saw it, "equality demands that he who has a surplus of anything in general demand should parcel it out among his needy fellow citizens."²⁷

However, though Marshall's last effort against the triumph of Jacksonian democracy was doomed to failure, the broader battle for acceptance of his conception of law was triumphantly vindicated. Even those persons least conversant with our public law know that Marshall's conception of the Constitution has dominated Supreme Court jurisprudence, particularly during the present century. But the same has also been true of Marshall's concept of private law. The Marshall Court decisions which adapt the common law to the needs of the expanding market economy led the way to the remaking of private law in the entrepreneurial image. Free individual action and decision became the ultimate end of law, as well as that of society itself. Law became a prime instrument for the continent's conquest and for the opening of the economy to men of all social strata. Paradoxically perhaps, it was Marshall, opponent of Jefferson-Jackson democracy though he was, whose conception of law laid the constitutional cornerstone for a legal system furthering opportunity and equality in the marketplace to an extent never before imagined.

2. Joseph Story

Joseph Story was the youngest Justice ever appointed, as well as the most learned scholar ever to sit on the Supreme Court. On the Marshall Court, Story supplied the one thing the great Chief Justice lacked — legal scholarship. "Now, Story," Marshall once said to his colleague, "that is the law; you find the precedents for it."²⁸ Story's scholarship was, indeed, prodigious. "Brother Story here . . . can give us the cases from the Twelve Tables down to the latest reports,"²⁹ Marshall said on another occasion. If Marshall disliked the labor of investigating legal authorities to support his decisions, Story reveled in it. His opinions were usually long and learned and relied heavily on prior cases and writers.

Moreover, Story himself was also a leading writer upon whom American judges relied during the last century. Indeed, when discussing the legal sources used for his study of the American democracy, de

27. *Id.*

28. CORWIN, *supra* note 20, at 116.

29. WILLIAM PLUMER, JR., *LIFE OF WILLIAM PLUMER 205-206 (1857)*, quoted in GERALD T. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 91 (1970).

Tocqueville wrote, "I have consulted the three most respected commentaries: the *Federalist*, . . . Kent's *Commentaries*, and those of Justice Story."³⁰ Kent and Story were the two great commentators on the developing law; there appeared for the first time in their works systematic expositions of early American law.

Kent was author of the American *Blackstone* — the first general survey of the law in this country³¹ — although it was Story who published the first great specialized treatises on American law. "I have now published seven volumes," he wrote in 1836, "and, in five or six more, I can accomplish all I propose."³² By the end of his career he had published nine treatises (in thirteen volumes) on subjects ranging from constitutional to commercial law. Story's treatises confirmed the victory of the common law in the United States and presented judges with authoritative guides.

Story's best-known work — his three-volume *Commentaries on the Constitution*³³ — was really just a restatement of the Marshall constitutional doctrines in textual form. Accepted as a classic as soon as it appeared, the Story volumes confirmed the Marshall construction as accepted law. They showed, through virtual clause-by-clause analysis, that the Marshall-Story jurisprudence was the "correct" constitutional doctrine. With Story's work, the nationalistic view of governmental power was firmly established, at least legally. Marshall's view could finally serve as the basis for the harmonization of law with the country's newly-emerging economic forces.

Justice Story soon became the principal supporter of the Marshall constitutional doctrines on the bench as well. Story's opinion in *Martin v. Hunter's Lessee*³⁴ contributed as much as any the Chief Justice delivered to laying the jurisprudential foundation of a strong nation. Indeed, the opinion was one that, save for some turgidity of language, the Chief Justice could have written. Without doubt, its impact was as great as any Marshall opinion. After Story delivered his *Martin* opinion, there was no disputing the appellate power of the U.S. Supreme Court over state court decisions. He demonstrated conclusively that the Union itself could not continue if state courts were able to defy it.

30. ANDRE JARDIN, *TOCQUEVILLE* 201 (1988).

31. JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (New York, O. Halsted 1826-30).

32. 2 *LIFE AND LETTERS OF JOSEPH STORY* 240 (William W. Story ed., Books for Libraries Press 1971) (1851).

33. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Boston, Little, Brown, and Company 1833).

34. 14 U.S. (1 Wheat.) 304 (1816).

But Story was not simply a junior Marshall. Much as Marshall was the prime molder of early American public law, Story left his imprint on American private law. Early American commercial and admiralty law were largely Story's creation. His opinions strikingly exemplified the common law's capacity to reshape itself to meet the changing needs of the new industrial order. Story's important decisions blended the law of trusts with the rudimentary law of corporations to produce the modern business corporation, a hybrid creature with organizational and managerial functions divorced from the control of capital, but with the ability to conduct its own affairs like a natural person.

*Bank of the United States v. Dandridge*³⁵ played a key role in the development of corporations. That case saw Chief Justice Marshall taking an unusual narrow view, and refusing to allow corporations to show approval of their agents acts by presumptive testimony, but only by written record and vote. Marshall's approach would have required corporate contracts to be cast in the elaborate forms of English law, with a record and vote required for each contract. That holding would have substantially hindered the growth of the business corporation in this country.

In *Dandridge*, however, Story, not Marshall, spoke for the Court. Story held that approval could be shown by presumptive evidence. He stated specifically that the English common law governing corporations was irrelevant to an American corporation created by statute. Instead, corporations were to be treated like natural persons: "[T]he acts of artificial persons afford the same presumptions as the acts of natural persons."³⁶

Dandridge played a vital part in the development of the business corporation, which (as Kent noted) was beginning to "increase in a rapid manner and to a most astonishing extent."³⁷ By permitting corporations to operate as freely as individuals, Story played a crucial role in accommodating the corporate form to the demands of an expanding American economy. The ability of the American courts to adapt the common law to the new nation's requirements is nowhere better seen than in *Dandridge*.

Writing to a British judge, Story noted the predicament in which American law had found itself. "We had not the benefit of a long-

35. 25 U.S. (12 Wheat.) 64 (1827).

36. *Id.* at 70.

37. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 697 (1922).

established and well-settled jurisdiction, and of an ancient customary law. . . . The . . . Law was in a great measure a new system to us; and we had to grope our way as well as we could”³⁸ Story’s great work was to restate common law and equity in American form. The result justified Story’s “hope that a foundation has now been laid, upon which my successors in America may be able to build with more ease and security than fell to my lot.”³⁹

Story was well aware of the need to modify common-law doctrines to make them suitable for the republican institutions and burgeoning economy on this side of the Atlantic. In *Van Ness v. Pacard*,⁴⁰ he consciously altered the common-law rule on fixtures to make it serve the needs of the mobile business economy and, in *Dandridge*,⁴¹ he permitted the corporate person to operate as freely as individuals.⁴² In his writings, Story also sought to build an *American* system upon the common-law foundation and to state its principles in a manner that would further the polity and economy that he favored. In this sense, he was as much an instrumentalist as Marshall or, indeed, any jurist of his time.

Above all others, Story laid the foundations of modern financial law. Though a Republican when appointed, Story had none of the Jeffersonian hostility toward business. Instead, he espoused the new gospel of capitalism. Commerce, he declared, “imparts life and intelligence to the body politic, increases the comforts and enjoyments,” and “liberalizes and expands the mind, as well as fosters the best interests of humanity.”⁴³ To this end, progress in the field depended upon the creation of a *uniform* commercial law upon which businessmen could rely. Uniform commercial law, made by the federal judges without the interference of juries (merchants, as Story noted, “are not fond of juries”)⁴⁴ and according to accepted mercantile custom and convenience, was what the commercial community wanted.⁴⁵ Some of

38. 1 STORY, *supra* note 32, at 318.

39. *Id.* at 319.

40. 27 U.S. (2 Pet.) 52 (1829).

41. 25 U.S. (12 Wheat.) 64 (1827).

42. In a letter to Kent, Story wrote, “I . . . rejoice, that the Supreme Court has at last come to the conclusion, that a corporation is a citizen, an artificial citizen, I agree, but still a citizen.” 2 STORY, *supra* note 32, at 469.

43. THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 93-94 (William W. Story ed., Da Capo Press 1972) (1852).

44. 1 STORY, *supra* note 32, at 270.

45. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 124-25 (1985).

the most important Story opinions contributed to the establishment of such a law.⁴⁶

To jurists such as Story, the instrumentalist conception of law was implicit in all their legal works. "It is obvious," Story wrote in an 1825 article, "that the law must fashion itself to the wants, and in some sort to the spirit of the age."⁴⁷ In that article Story spoke of the growth of commercial law — the field where Story's emphasis was most clearly placed on the ends to be served by the developing law. Commercial law, above all other law, "must . . . expand with the exigencies of society."⁴⁸ The old legal landmarks "no longer indicate the travelled road, or mark the busy, shifting channels of commerce."⁴⁹ Here, "[a]s new cases arise, they must be governed by new principles"⁵⁰ Above all, the law should "favor every attempt to build up commercial doctrines upon the most liberal foundation."⁵¹

Despite his Republican (Jeffersonian) origins, Story is usually considered a paradigm of the conservative judge. But his approach to private law — particularly as it relates to commercial development — was transforming. Story, more than any other Justice, helped ensure that our private law would have a common-law foundation that would be adaptable to the conditions of the new nation. Story, as well as Kent, restated the common law in American form. Their work so clearly presented American common law that the courts' energies could be devoted to applying the new principles to concrete cases.

3. Roger Brooke Taney

How can Taney, the Chief Justice who presided over the most discredited decision in Supreme Court history, be placed on a list of the ten greatest Justices? However great his one judicial blunder, the answer remains that Taney's monumental mistake in *Dred Scott*⁵² should not overshadow his numerous accomplishments on the Court. Taney was second only to Marshall in laying the foundation of our constitutional law.⁵³

46. *E.g.*, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815).

47. THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 43, at 279.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 287.

52. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

53. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 73 (1964).

Taney was the first Chief Justice to wear trousers; his predecessors had always given judgment in knee breeches.⁵⁴ There was something of portent in his wearing democratic garb beneath judicial robes,⁵⁵ under Taney and the new majority appointed by President Andrew Jackson, the Supreme Court for the first time mirrored the Jacksonian emphasis upon public power as a counterweight to the property rights stressed by the Federalists and the Whigs.

Taney was one of the foremost exponents of Jacksonian democracy; some scholars say that the Jacksonian political theory is more completely developed and more logically stated in Taney's writings than anywhere else.⁵⁶ This assertion may be extreme, but it cannot be denied that Taney's years on the Court marked a growing judicial concern for safeguarding the rights of the community — a burgeoning emphasis on public, not private, welfare. "We believe property should be held subordinate to man, and not man to property," declared a leading Jacksonian editor, "and therefore that it is always lawful to make such modifications of its constitution as the good of Humanity requires."⁵⁷ Under Chief Justice Taney, the Court elevated this concept to the constitutional plane.

The most significant development under the Taney Court was the seminal concept of the police power — the most important constitutional instrument by which property rights may be limited. It was the Taney Court which first gave to the notion of police power something like its modern connotation. "But what," Taney asked in the 1847 *Licenses Cases*,

are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion.⁵⁸

Of course, such a broad conception of state power over internal government may be inconsistent with the fullest exertion of individual rights. Taney saw this inconsistency as inherent in the very nature of

54. CARL B. SWISHER, *ROGER B. TANEY* 359 (1935).

55. *Id.*

56. CHARLES W. SMITH, *ROGER B. TANEY* 3 (1936).

57. Orestes Brownson, "Laboring Classes," *BOSTON QUARTERLY REVIEW* 481 (October 1840), quoted in ARTHUR M. SCHLESINGER, *THE AGE OF JACKSON* 312 (1945).

58. 46 U.S. (5 How.) 504, 583 (1847).

the police power. Indeed, his chief contribution was to recognize and articulate the superior claim, in appropriate cases, of public over private rights. The Taney Court developed the police power as the basic instrument through which property might be controlled in the public interest. Community rights were thus ruled "paramount to all private rights . . . , and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise."⁵⁹

It was Taney's opinion in the *License Cases* which gave currency to the "police power" concept as a necessary complement to the expansion of governmental power, an outstanding feature of the Jacksonian period. During that period "the demand went forth for a large governmental programme: for the public construction of canals and railroads, for free schools, for laws regulating the professions, for anti-liquor legislation" ⁶⁰ In the police power concept, the law developed the constitutional theory needed to enable the states to meet the public demand. The Taney Court could thus clothe the states with the authority to enact social legislation for the welfare of their citizens. Government was given the "power of accomplishing the end for which it was created."⁶¹ Through the police power a state might, "for the safety or convenience of trade, or for the protection of the health of its citizens,"⁶² regulate the rights of property and person. Thenceforth, a principal task of the Supreme Court was to be determination of the proper balance between individual rights and the police power.

Edward S. Corwin compares what he calls the "constitutional revolution" reported in "Volume 301 of the *United States Supreme Court Reports* [to] a single counterpart in the Court's annals. I mean Volume 11 of Peters's *Reports*, wherein is recorded the somewhat lesser revolution in our constitutional law precisely 100 years earlier, which followed upon Taney's succession to Marshall."⁶³

It is customary to point to the drastic change that occurred in constitutional jurisprudence when Taney succeeded Marshall. The traditional historical view was summarized over a generation ago by Justice Frankfurter:

59. *West River Bridge v. Dix*, 47 U.S. (6 How.) 507, 532 (1848).

60. Edward S. Corwin, *The Doctrine of Due Process of Law before the Civil War*, 24 HARV. L. REV. 460, 461 (1911).

61. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 547 (1837).

62. *License Cases*, 46 U.S. (5 How.) 504, 579 (1847).

63. EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* 65 (1941).

[E]ven the most sober historians have conveyed Taney as the leader of a band of militant 'agrarian,' 'localist,' 'pro-slavery' judges, in a strategy of reaction against Marshall's doctrines. They stage a dramatic conflict between Darkness and Light: Marshall, the architect of a nation; Taney, the bigoted provincial and protector of slavery.⁶⁴

Such an approach is incorrect. "It is not true that Taney accomplished a wholesale reversal of Marshall's doctrines."⁶⁵ To be sure, the Justices appointed by President Jackson and his successors inevitably had a different outlook than their predecessors, products of an earlier day. As already emphasized, Taney and his colleagues shared the Jacksonian belief that property rights must be subject to control by the community.

But the Taney Court did not translate wholesale the principles of Jacksonian democracy into constitutional law. Instead, paradoxical though it may seem, the erstwhile Jacksonian politicians did as much as Marshall and his colleagues to promote economic development and the concentrations of wealth and financial power that were its inevitable concomitants.

Chief Justice Taney may have had the strong Jacksonian bias against what Jackson called "the multitude of corporations with exclusive privileges which [the moneyed interests] have succeeded in obtaining in the different States,"⁶⁶ but it was the Taney opinions in cases like *Charles River Bridge v. Warren Bridge*⁶⁷ and *Bank of Augusta v. Earle*⁶⁸ which opened the door to the greatest period of corporate expansion in our history. The statistics underline the stimulus given to corporate expansion by the decisions favorable to corporate personality rendered by the Taney Court. In the 1830s and 1840s there was a sharp increase in the number of corporations, particularly those engaged in manufacturing.⁶⁹ Before Taney, only \$50 million was invested in manufacturing; that figure had grown to \$1 billion by 1860.⁷⁰

Perhaps the major change in the jurisprudence of the Taney Court arose from its tendency, in doubtful cases, to give the benefit of the doubt to the existence of state power far more than had been the case in Marshall's day; but this is far from saying that Taney and his

64. FRANKFURTER, *supra* note 53, at 48.

65. *Id.* at 49.

66. 3 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 306 (Washington, Government Printing Office 1896).

67. 36 U.S. (11 Pet.) 420 (1837).

68. 38 U.S. (13 Pet.) 519 (1839).

69. GEORGE H. EVANS, JR., BUSINESS INCORPORATIONS IN THE UNITED STATES 13 (1948).

70. HAROLD V. FAULKNER, AMERICAN ECONOMIC HISTORY 243 (8th ed. 1960).

confreres were ready to overturn the edifice of effective national authority constructed so carefully by their predecessors. On the contrary, like Jackson himself, they were strong believers in national supremacy where there was a clear conflict between federal and state power. When state authorities acted to interfere with federal power, Chief Justice Taney and his colleagues were firm in upholding federal supremacy. Hence, despite its greater willingness to sustain state authority, it is unfair to characterize the Taney Court as concerned only with states' rights.

When the occasion demanded, Taney could assert federal power in terms characterized by Chief Justice Hughes as "even more 'national' than Marshall himself."⁷¹ This is shown dramatically by *The Genesee Chief v. Fitzhugh*,⁷² which arose out of a collision between two ships on Lake Ontario. A damage suit was brought in a federal court under an 1845 statute extending federal admiralty jurisdiction to the Great Lakes and connecting navigable waters. The constitutionality of this law was upheld in *The Genesee Chief*. An earlier case⁷³ had confined the territorial extent of federal admiralty jurisdiction to that followed under English doctrine, namely, to the high seas and to rivers only as far as the ebb and flow of the tide extended. In a small island like Britain, where practically all streams are tidal, such a limitation might be adequate, but it hardly proved so in a country of continental extent.

The Taney opinion in *The Genesee Chief* well illustrates the manner in which the law changes to meet changed external conditions. When the Constitution went into operation, the English "tidal flow" test of admiralty jurisdiction may well have sufficed. In the original thirteen states, as in England, almost all navigable waters were tide-waters. With the movement of the nation west and the consequent growth of commerce on the inland waterways, the English test became inadequate. "It is evident," says the Taney opinion,

that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not

71. Charles E. Hughes, *Roger Brooke Taney*, 17 A.B.A. J. 785, 787 (1931).

72. 53 U.S. (12 How.) 443 (1852).

73. *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825).

apply with equal force to any other public water used for commercial purposes⁷⁴

An inexorable advocate of states' rights would scarcely have written *The Genesee Chief* opinion. In fact, the extreme Jacksonian on the Court, Justice Daniel, flatly refused to countenance the "revolutionary"⁷⁵ enlargement of federal jurisdiction approved by the decision and delivered a stinging dissent. But Daniel's opinion was (as he himself conceded) "contracted and antiquated, unsuited to the day in which we live."⁷⁶ The Taney opinion was dictated by sound common sense; it was a legitimate nationalizing decision brought on by the changed conditions resulting from the geographic growth of the nation. As Ralph Waldo Emerson put it, in commenting on the case, "The commerce of rivers, the commerce of railroads, and who knows but the commerce of air balloons, must add an American extension to the pondhole of admiralty."⁷⁷

A decision like *The Genesee Chief* shows how difficult it is to pigeonhole Justices like Taney. His states'-rights heritage did not blind him to the need for effective federal governmental power. His distrust of corporations did not make him disregard the practical possibilities of the corporate device and its utility in an expanding economy. Indeed, it was Taney, Justice Frankfurter tells us, "who adapted the Constitution to the emerging forces of modern economic society."⁷⁸ Jacksonianism was, at bottom, only an ethical conception of the social responsibilities of private property.⁷⁹ To translate that conception into decisions like that in the *Charles River Bridge* case was the great constitutional contribution of the Taney Court.

Henry Clay, who had led the fight against Taney's confirmation, was later to tell the Chief Justice that "no man in the United States could have been selected, more abundantly able to wear the ermine which Chief Justice Marshall honored."⁸⁰ The judgment of history has confirmed the Clay estimate. The pendulum has shifted from the post-*Dred Scott* censures by men like Charles Sumner to the more sober estimate of those who sat with Taney on the bench or argued

74. 53 U.S. (12 How.) at 457.

75. The term used in 2 WARREN, *supra* note 37, at 239.

76. 53 U.S. (12 How.) at 465.

77. Quoted in BERNARD C. STEINER, *LIFE OF ROGER BROOKE TANEY* 292 n.48 (1922).

78. FELIX FRANKFURTER ON THE SUPREME COURT 462 (Philip B. Kurland ed., 1970).

79. FRANKFURTER, *supra* note 53, at 71.

80. 2 WARREN, *supra* note 37, at 16.

before him at the Bar. According to a vituperative denunciation published at his death, Taney "was, next to Pontius Pilate, perhaps the worst that ever occupied the seat of judgment."⁸¹ Today we reject such partisan bias and agree with the estimate of Justice Frankfurter:

The devastation of the Civil War for a long time obliterated the truth about Taney. And the blaze of Marshall's glory will permanently overshadow him. But the intellectual power of his opinions and their enduring contribution to a workable adjustment of the theoretical distribution of authority between two governments for a single people, place Taney second only to Marshall in the constitutional history of our country.⁸²

4. Stephen J. Field

If influence upon the law is a criterion of judicial greatness, there were few Justices who deserve inclusion in my list more than Stephen J. Field. For it was he who elevated the laissez-faire conception of law to the level of accepted doctrine. That occurred toward the end of the nineteenth century when, as Justice Frankfurter tells us, the Justices "wrote Mr. Justice Field's dissents into the opinions of the Court."⁸³ It was Justice Stephen J. Field who was largely responsible for the expansion of substantive due process that became the major theme of constitutional jurisprudence during the Gilded Age.

Field himself was one of the most colorful men ever to sit on the highest Court. He was the brother of David Dudley Field (himself one of the great names in American legal history), studied law in his brother's New York office, and began his legal career there as a partner in 1841. A few years later, he was, as he put it, "swept away by the current which set, in 1849, for the Eldorado of the West."⁸⁴ He joined the gold rush to California, becoming a frontier lawyer and carrying a pistol and bowie knife. He became involved in a quarrel with a judge, during which he was disbarred, sent to jail, fined, and embroiled in a duel.⁸⁵ His lengthy feud with another judge, David Terry (Chief Justice of the California Supreme Court when Field won election to that body in 1857), led Terry to threaten to shoot Field. Years later, in

81. WALKER LEWIS, *WITHOUT FEAR OR FAVOR* 477 (1965).

82. FRANKFURTER, *supra* note 53, at 72-73.

83. Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 141-42 (1927).

84. Stephen J. Field, *The Centenary of the Supreme Court of the United States*, 24 AM. L. REV. 351 (1890).

85. Field himself wrote about his California experience in STEPHEN J. FIELD, *PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA* (1893).

1889, when Field had long been a Justice of the United States Supreme Court, Terry assaulted him in a restaurant and was shot by a federal marshal assigned to guard Field. The marshal was indicted for murder, but the Supreme Court held the killing justified.⁸⁶

Field was appointed to the Supreme Court by President Lincoln in 1863. His years on the Court saw the law responding to the demands of the burgeoning capitalism of the post-Civil War period by insulating business from governmental interference. Field was the leader in inducing the Court to employ the Due Process Clause to protect property rights. He served in an influential capacity on the Court for over thirty-four years — the longest tenure save that of Justice William O. Douglas. While on the Court, Field wrote 620 opinions, then a record for any Justice.

Justice Field's most important opinions were dissents, but as the Frankfurter quote above tells us, they were ultimately written into Supreme Court jurisprudence. Indeed, it was Field who first showed the potential of the dissenting opinion as what Chief Justice Hughes was to call "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."⁸⁷ Field's appeals for the constitutionalization of *laissez faire* may not at first have swayed a majority of his colleagues; but it took only a quarter century for "the rejected dissents of Mr. Justice Field [to have] gradually established themselves as the views of the Court."⁸⁸

The starting point for this development was the *Slaughter-House Cases*.⁸⁹ That decision set the early theme for interpretation of the recently adopted Fourteenth Amendment — a restrictive approach which adopted the limited view that the amendment was intended only to protect the Negro in his newly acquired freedom. Under that view, the Due Process Clause could not be used to strike down state restrictions on property rights. For over a decade after it was decided, *Slaughter-House* sharply confined the reach of the Fourteenth Amendment and its Due Process Clause.⁹⁰

86. *In re Neagle*, 135 U.S. 1 (1890).

87. CHARLES E. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

88. Frankfurter, *supra* note 83, at 141.

89. 83 U.S. (16 Wall.) 36 (1873).

90. Charles M. Hough, *Due Process of Law — Today*, 32 HARV. L. REV. 218, 224, 226 (1919).

The law at issue in *Slaughter-House* gave one company the exclusive right to slaughter livestock in New Orleans. This law, voted amid charges of widespread bribery, put one thousand butchers out of business. But it was held constitutional despite the Fourteenth Amendment. Four Justices, however, strongly disputed the Court's "casual dismissal" of the Due Process Clause.⁹¹ As summarized by Justice Frankfurter, "four dissenting Justices, under the lead of Mr. Justice Field, sought to encrust upon the undefined language of the due process clause the eighteenth century 'law-of-nature' doctrines."⁹²

To Justice Field, the Fourteenth Amendment was not limited to protection of the emancipated race. Instead, "It is general and universal in its application" and "was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes."⁹³

Moving from the rights guaranteed in the Declaration of Independence to substantive due process was a natural transition for the *Slaughter-House* dissenters. As they saw it, "Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law"⁹⁴ A law like that at issue in *Slaughter-House*, in the dissenting view, did violate due process: "[A] law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law."⁹⁵

Much of the substance of public law history in the next quarter century involved the elevation of the *Slaughter-House* dissents into the law of the land. The judicial development starts with cases involving railroad regulation. In the *Granger Cases*,⁹⁶ the Court followed the strict *Slaughter-House* approach, ruling that the Due Process Clause did not subject the legislative judgment in fixing rates to judicial review: "For protection against abuses by legislatures the people must resort to the polls, not to the courts."⁹⁷

91. The term used in EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* 122 (1948).

92. Frankfurter, *supra* note 83.

93. 83 U.S. (16 Wall.) at 90, 105.

94. *Id.* at 116.

95. *Id.* at 122.

96. 94 U.S. 113 (1876).

97. *Id.* at 134.

Justice Field wrote a dissent that was a strong protest against the *Granger* decision. If, he asserted, the majority position

be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature.⁹⁸

The Due Process Clause, Field went on, “has a much more extended operation than [the] court . . . has given to it.”⁹⁹ The clause, he stressed, protects “liberty” and “property.” For Field, “liberty” meant

freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.¹⁰⁰

According to one commentator, this statement illustrates “Field’s conviction that the word secures the beneficent state of economic affairs which is the first condition of social justice. . . . It is economic liberty he is talking about; it is Summerism he is preaching.”¹⁰¹ More specifically, the Field statement defines liberty in terms of Herbert Spencer’s first principle¹⁰² and is, like it, based upon hostility toward governmental interferences with economic liberty.

Field goes on in his *Granger* dissent to say that the “same liberal construction . . . should be applied to the protection of private property”¹⁰³ in the Due Process Clause, which “places property under the same protection as life and liberty.”¹⁰⁴ “Of what avail,” Field asked in one of the *Granger Cases*, “is the constitutional provision that no State shall deprive any person of his property except by due process of law, if the State can, by fixing the compensation which he may receive for its use, take from him all that is valuable in the property?”¹⁰⁵

Field’s dissents fell on anything but deaf ears. The extreme *Granger* approach was itself abandoned during the next decade. The

98. *Id.* at 140.

99. *Id.* at 141.

100. *Id.* at 142.

101. ROBERT G. McCLOSKEY, *AMERICAN CONSERVATISM IN THE ERA OF ENTERPRISE* 81 (1964).

102. “Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man.” HERBERT SPENCER, *SOCIAL STATICS* 55 (D. Appleton and Company 1896) (1850).

103. *Granger*, 94 U.S. at 142.

104. *Id.* at 141.

105. *Stone v. Wisconsin*, 94 U.S. 181, 186 (1876).

Court soon held that the power to regulate was not the power to confiscate;¹⁰⁶ whether rates fixed were unreasonable “is eminently a question for judicial investigation, requiring due process of law.”¹⁰⁷ The rule laid down was that the Due Process Clause permits the courts to review the substance of rate fixing legislation — at least to determine whether particular rates are so low as to be confiscatory.¹⁰⁸

The judicial balance definitely shifted toward Justice Field’s due process approach during the 1880s and 1890s. This was true not only in the Supreme Court, but also in the state courts. “With Field as their chief authority, the state courts in decision after decision made it clear that liberty, property, and due process of law were not to be narrowly construed.”¹⁰⁹ The New York court, which had first given due process its substantive gloss in the pre-Civil War period,¹¹⁰ again led the way. Anticipating the language of the Supreme Court in cases such as *Allgeyer v. Louisiana*¹¹¹ and *Lochner v. New York*,¹¹² the New York court declared in 1885 that the “liberty” protected by due process meant one’s right to live and work where and how he will;¹¹³ laws that limit one’s choice or place of work “are infringements upon his fundamental rights of liberty, which are under constitutional protection.”¹¹⁴ Other state courts followed a similar due process approach during the next few years; particularly the courts in Illinois and Pennsylvania.¹¹⁵ The state decisions had a direct influence on the Supreme Court’s adoption of the substantive due process concept: “All that happened was that the Supreme Court joined hands with most of the appellate tribunals of the older states.”¹¹⁶

The joining of hands occurred in *Allgeyer v. Louisiana*,¹¹⁷ a decision which, according to Justice Frankfurter, “wrote Mr. Justice Field’s dissents into the opinions of the Court.”¹¹⁸ In *Allgeyer*, for the first time, a state law was set aside on the ground that it infringed upon the

106. Railroad Commission Cases, 116 U.S. 307, 331 (1886).

107. *Chicago, M, & St. P. Ry. v. Minnesota*, 134 U.S. 418, 458 (1890).

108. *See Smyth v. Ames*, 169 U.S. 466, 526 (1898) (holding that state deprivation of private property without compensation violates due process).

109. SIDNEY FINE, *Laissez Faire and the General Welfare State* 150 (1964).

110. *Wynehamer v. People*, 13 N.Y. 378 (1856).

111. 165 U.S. 578 (1897).

112. 198 U.S. 45 (1905).

113. *Application of Jacobs*, 98 N.Y. 98, 105 (1897).

114. *Id.* at 107.

115. *Frorer v. People*, 31 N.E. 395 (Ill. 1892); *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886).

116. Hough, *supra* note 90, at 228.

117. 165 U.S. 578 (1897).

118. Frankfurter, *supra* note 83, at 141-42.

“liberty” guaranteed by due process. The statute in question prohibited an individual from contracting with an out-of-state insurance company for a policy covering property within the state. Such a law, it was held, “deprives the defendants of their liberty without due process of law.”¹¹⁹ The “liberty” referred to in the Due Process Clause, said the opinion, embraces property rights, including that to pursue any lawful calling: “In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto”¹²⁰ A state law that takes from its citizens the right to contract outside the state for insurance on their property deprives them of their “liberty” without due process.

Between the dictum of the *Granger Cases*, that for protection against legislative abuse “the people must resort to the polls, not to the courts,” and *Allgeyer v. Louisiana* and its progeny “lies the history of the emergence of modern large-scale industry, of the consequent public control of business, and of judicial review of such regulation.”¹²¹ Thenceforth, all governmental action — whether federal or state — would have to run the gauntlet of substantive due process. The substantive as well as the procedural aspect of such action would be subject to the scrutiny of the highest Court: “The legislatures had not only domestic censors, but another far away in Washington, to pass on their handiwork.”¹²²

For Justice Field and the Court that adopted his approach, substantive due process was not utilized merely to control governmental action in the abstract. Court control was directed to a particular purpose, namely, the invalidation of state legislation that conflicted with the doctrine of *laissez faire* that dominated thinking at the turn of the century.¹²³ What Justice Frankfurter termed “the shibboleths of a pre-machine age . . . were reflected in juridical assumptions that survived the facts on which they were based. . . . Basic human rights expressed by the constitutional conception of ‘liberty’ were equated with theories of *laissez faire*.”¹²⁴ The result was that due process “became the rallying point for judicial resistance to the efforts of the

119. *Allgeyer*, 165 U.S. at 591.

120. *Id.* at 591.

121. Compare Frankfurter, *supra* note 83, at 142 (discussing the propriety of judicial review of commerce regulation).

122. Hough, *supra* note 90, at 228.

123. See *Hume v. Moore-McCormack Lines*, 121 F.2d 336, 339-40 (2d Cir. 1942) (discussing the Court’s willingness to strike down “legislative interference” with freedom of contract).

124. *American Fed. of Labor v. American Sash and Door Co.*, 335 U.S. 538, 543 (1949).

states to control the excesses and relieve the oppressions of the rising industrial economy."¹²⁵

To Justice Field, the law had become a negative concept to be used to implement a laissez-faire policy. He dissented in the *Granger Cases* because the law "sanctions intermeddling with all business and pursuits in property in the community."¹²⁶ In an important opinion, Field quoted Adam Smith on the worker's property interest in his labor: "To hinder his employing this strength and dexterity in what manner he thinks proper" is "a manifest encroachment upon the just liberty both of the workman" and his employer.¹²⁷ Among the "inalienable rights" protected by due process is "the right to pursue any lawful business or vocation . . . without let or hindrance."¹²⁸ By this he meant the right to engage in economic activity "in any manner not inconsistent with the equal rights of others"¹²⁹ — still another version of Herbert Spencer's first principle.¹³⁰

Upon his retirement in 1897, Field delivered a valedictory which stated that the law was "[t]he safeguard that keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety."¹³¹ The role of the jurist was not to create new rules and doctrines that would further societal development but to follow a nonintervention policy while such development proceeded unimpaired. Jurists were needed who would ensure that economic forces could assert themselves freely.

To us, a century later, Field's laissez-faire approach appears an extreme shifting of the balance in favor of property rights. However, it set the tone for constitutional law for half a century. That Justice Field's own views were, indeed, extreme is shown by his opinion in the *Income Tax Case*.¹³² The Court there ruled invalid the federal income tax law of 1894, even though a similar statute had previously been upheld. The decision can be explained less in legal terms than in terms of the personal antipathies of the Justices. Opposing the statute, Joseph H. Choate depicted the income tax as "a doctrine worthy of a Jacobin Club,"¹³³ the "new doctrine of this army of 60,000,000 —

125. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 48 (1941).

126. *Stone v. Wisconsin*, 94 U.S. 181, 186-87 (1876) (Field, J., dissenting).

127. *Butchers' Union v. Crescent City*, 111 U.S. 746, 757 (1884) (Field, J. concurring).

128. *Id.*

129. *Id.*

130. SPENCER, *supra* note 102.

131. Field, *supra* note 84, at 366-67.

132. 157 U.S. 429 (1895).

133. *Id.* at 549.

this triumphant and tyrannical majority — who want to punish men who are rich and confiscate their property.”¹³⁴

Such an attack upon the income tax (though, technically speaking, irrelevant) found a receptive ear. “The present assault upon capital,” declared Justice Field, “is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.” If the Court were to sanction the income tax law, “it will mark the hour when the sure decadence of our present government will commence.”¹³⁵

The judge who felt this way about a tax of 2 percent on annual incomes above \$4,000 was the same Justice who furnished the newly fashioned tool of substantive due process, by which the law was made into an instrument for the judicial protection of private enterprise.

5. Oliver Wendell Holmes

Oliver Wendell Holmes is usually considered the most influential Associate Justice ever to sit on the Supreme Court. I have already quoted Holmes’ statement that if American law were to be represented by a single figure, all would agree that the figure would be John Marshall. It is also true that if our law were to be represented by a second figure, most jurists would say that it should be Holmes himself. It was Holmes, more than any other legal thinker, who set the agenda for modern American jurisprudence. In doing so, he became as much a part of American legend as law: the Yankee from Olympus — the patrician from Boston who made his mark on his own age and on ages still unborn as few men have done. To summarize Holmes’s work is to trace the development of law from the nineteenth-century to the present day. Indeed, a major part of twentieth-century Supreme Court doctrine is a product of Holmes’ handiwork.

The great Holmes theme was stated at the very outset of his career, in *The Common Law*:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a

134. *The Income Tax Case*, 39 L. Ed. 759, 807 (1895).

135. *Id.* at 607.

good deal more to do than the syllogism in determining the rules by which men should be governed.¹³⁶

When Holmes wrote these words, he was pointing the way to a new era of jurisprudence that would, in Francis Biddle's words, "break down the walls of formalism and empty traditionalism which had grown up around the inner life of the law in America."¹³⁷ The courts, Holmes urged, should recognize that they must perform a legislative function, in its deeper sense. "[T]he secret root from which the law draws" its life is "consideration of what is expedient for the community . . ."¹³⁸ "The felt necessities of the time," intuitions of what best serve the public interest, "even the prejudices which judges share with their fellowmen" — all have much more to do with determining the legal rules which govern the society than does logic.¹³⁹ The formalistic jurisprudence that judges professed to be applying early in this century was actually the result of their view of public policy, perhaps "the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis."¹⁴⁰

On the Supreme Court itself, Holmes' two great contributions were recently summarized by Judge Posner:

1. In the *Lochner* dissent and other famous opinions opposing the use of the due process clause of the Fourteenth Amendment to prevent social and economic experimentation by the states, Holmes created the . . . theory of judicial self-restraint. . . .
2. In his opinions in *Schenck*, *Abrams*, and *Gitlow*, which launched the "clear and present danger" test and the "marketplace of ideas" conception of free speech, Holmes laid the foundations not only for the expansive modern American view of free speech but also for the double standard in constitutional adjudication that is so conspicuous a feature of modern constitutional law: laws restricting economic freedom are scrutinized much less stringently than those restricting speech and other noneconomic freedoms.¹⁴¹

The theme of judicial self-restraint was repeated many times in Holmes opinions. Its most famous expression was in *Lochner v. New York*¹⁴² — aptly characterized by Chief Justice Rehnquist as "one of

136. HOLMES, *supra* note 23.

137. FRANCIS BIDDLE, MR. JUSTICE HOLMES 61 (1942 ed.).

138. HOLMES, *supra* note 23, at 35.

139. *Id.* at 1.

140. *Id.* at 36.

141. Richard A. Posner, *Introduction to THE ESSENTIAL HOLMES* at xii (Richard A. Posner ed., 1992).

142. 198 U.S. 45 (1905).

the most ill-starred decisions that [the Court] ever rendered.”¹⁴³ The *Lochner* statute prescribed the maximum hours bakers could work in a week. In holding the law invalid, the majority substituted its independent judgment for that of the legislature and decided for itself that the statute was not reasonably related to any of the ends for which governmental power might validly be exercised.¹⁴⁴ The *Lochner* Court struck down the statute as unreasonable because a majority of the Justices disagreed with the economic theory on which the state legislature had acted.

Justice Holmes consistently rejected such an approach. “[A] constitution,” he urged, “is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.”¹⁴⁵ Holmes continually reiterated that, “as a judge he was not concerned with the wisdom of the social policy involved” in a challenged legislative act.¹⁴⁶ The responsibility for determining what measures were necessary to deal with economic and other problems lay with the people and their elected representatives, not judges. In Holmes’ view, the test to be applied was whether a reasonable legislator — the legislative version of the “reasonable man” — could have adopted a law like that at issue. Was the statute as applied so clearly arbitrary that “legislators acting reasonably could not have believed it to be necessary or appropriate” for public health, safety, morals, or welfare?¹⁴⁷

In the individual case, to be sure, the legislative judgment might well be debatable. But that was the whole point about Holmes’ approach. Under it, opposed views of public policy, respecting business, economic, and social affairs, were considerations for the legislative choice¹⁴⁸ to which the courts must defer unless it was demonstrably arbitrary and irrational.¹⁴⁹ “In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . . in the local economic sphere, it is only the . . . wholly arbitrary act, which cannot stand”¹⁵⁰

But, the theme of judicial restraint was overridden by another Holmes theme in cases involving the freedom of expression guaranteed by the First Amendment. The governing criterion here was the

143. WILLIAM REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 205 (1987).

144. *Lochner*, 198 U.S. at 64.

145. *Id.* at 75 (Holmes, J., dissenting).

146. MAX LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 92 (1943).

147. *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924).

148. *North Dakota Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 167 (1973).

149. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 84 (1978).

150. *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976) (per curiam).

Clear and Present Danger Test which Holmes developed just after World War I. Under this test, even speech advocating unlawful action was not to be restricted unless "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."¹⁵¹ Speech may be restricted only if there is a real threat — a danger, both clear and present, that the speech will lead to an evil that the legislature has the power to prevent.

Although the Clear and Present Danger Test has been criticized by some as too restrictive, it represented a real step forward in favor of free speech. As characterized by Justice Brandeis, Holmes' test "is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities."¹⁵²

Holmes' contribution was, however, greater than the constitutional doctrines just discussed. Holmes, more than any other Justice, pointed the way to a whole new era of jurisprudence. Holmes' concept of law was essentially positivist. Hence, he once wrote, "I don't care a damn if twenty professors tell me that a decision is not law if I know that the courts will enforce it."¹⁵³

Holmes' positivist approach was, however, different in important respects from that followed by other jurists at the time. In the first place, he rejected the mechanical formalism that characterized the law of the period. From his early days, he deprecated "the notion that the only force at work in the development of the law is logic."¹⁵⁴ At the beginning of *The Common Law*, he specifically denied that the law could be dealt with as if it were contained in a book of mathematics.¹⁵⁵ The legal process is not the same as doing one's sums right.

Of course, formal logic is the method of jurisprudence; the language of law is mainly the language of logic. "And the logical method and form flatter that longing for certainty and for repose which is in every human mind." But the longing can never be satisfied: "[C]ertainty generally is illusion, and repose is not the destiny of man." To be sure, "You can give any conclusion a logical form. You

151. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

152. *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., concurring).

153. 1 HOLMES-LASKI LETTERS 115 (Mark D. Howe ed., 1953).

154. OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 180 (1920).

155. HOLMES, *supra* note 23.

always can imply a condition in a contract. But why do you imply it?"¹⁵⁶

Holmes answers "[you imply i]t . . . because of some belief as to the practice of the community or of a class, or because of some opinion as to policy."¹⁵⁷ Here we have the principal difference between Holmes' conception of law and that of the dominant jurisprudence of the day. For Holmes, the law was consciously made to give effect to the policies that would promote the needs of the society. Neither logic nor "*elegantia juris*" was the life of the law; the life of the law was the work of the courts based on "considerations of what is expedient for the community concerned."¹⁵⁸ The key to Holmes' conception lies in what he wrote of Chief Justice Lemuel Shaw: "[F]ew have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred."¹⁵⁹ At the time, the law was looked upon as something developed through gradual accretion — found through discovering and applying principles that were "the necessary product of the life of society, and therefore incapable of being made at all . . ."¹⁶⁰ Jurisprudence was based upon the assumption that the law was a closed, logical system. "Judges do not make law: they merely declare the law which, in some Platonic sense, already exists."¹⁶¹ The judicial function was limited to the discovery of the true rules of law and had nothing to do with adapting them to changing needs.

Holmes' concept of law was, on the contrary, based upon "conscious recognition of the legislative function of the courts."¹⁶² In a 1909 opinion, Holmes wrote, "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts."¹⁶³ The judges may have professed to deduce their rules from a priori postulates, but they were "able and experienced men, who know too much to sacrifice good sense to a syllogism."¹⁶⁴ In a deeper sense, Holmes declared, the work of the courts is legislative:

It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root

156. HOLMES, *supra* note 154, at 181.

157. *Id.*

158. HOLMES, *supra* note 23, at 35.

159. *Id.* at 106.

160. JAMES C. CARTER, *LAW: ITS ORIGIN, GROWTH, AND FUNCTION* 182 (1907).

161. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 62 (1977).

162. HOLMES, *supra* note 23, at 36.

163. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

164. HOLMES, *supra* note 23, at 36.

from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important [legal] principle . . . is in fact and at bottom the result of more or less definitely understood views of public policy.¹⁶⁵

Hence, "every rule [a body of law] contains is referred articulately and definitely to an end which it subserves. . . ."¹⁶⁶

Holmes not only showed that the law was made in accordance with policy considerations, he also believed that it should consciously be so made. Instead of a system based upon logical deduction from a priori principles, the Holmes concept was one of law fashioned to meet the needs of the community. Law was once again to be a "utilitarian instrument" for the satisfaction of social needs.¹⁶⁷ Legal principles were to be derived from "accurately measured social desires" and, for these, "[w]hat proximate test . . . can be found except . . . conformity to the wishes of the dominant power . . . in the community?"¹⁶⁸

The law was to be judged, not by "the simple tool of logic,"¹⁶⁹ but by "its effects and results."¹⁷⁰ More than that, the law could be molded to yield the results best suited to the particular society. A famous Holmes statement speaks of "[l]aw, wherein, as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have been!"¹⁷¹ To Holmes, however, the law was more than a reflection of society. It also served the society which it reflected and could be shaped to further the goals sought by the community. Holmes would have none of the negative approach to conscious law-making followed by the dominant jurisprudence. James C. Carter, the leading legal philosopher of the day, had declared, "The *Written Law* is victorious upon paper and powerless elsewhere."¹⁷² To Holmes this was — to use one of his favorite epithets — "humbug."¹⁷³

Yet, if Holmes opened the door to the twentieth-century conception of law, he himself did not enter fully into the legal edifice that lay beyond. Holmes anticipated the later approach to law as consisting of

165. *Id.* at 35.

166. HOLMES, *supra* note 154, at 186.

167. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 788 (1989).

168. HOLMES, *supra* note 154, at 226, 258.

169. *Id.* at 239.

170. 1 *HOLMES-LASKI LETTERS*, *supra* note 153, at 20.

171. HOLMES, *supra* note 154, at 26.

172. CARTER, *supra* note 160, at 213.

173. EDWARD J. BANDER, *JUSTICE HOLMES EX CATHEDRA* 453 (1966).

patterns of judicial conduct. He showed that law should be defined, not in terms of rules derived from a priori immutable postulates, but in terms of the way judges act. In addition, he stressed that “the judges themselves [had] their duty of weighing considerations of social advantage.”¹⁷⁴ Not logic, but “the felt necessities of the time”¹⁷⁵ are the primary forces at work in the development of the law.¹⁷⁶ Once again, the law was seen to be a means to an end — the instrument by which the society secures “the ends which the several rules seek to accomplish.”¹⁷⁷

Still, though Holmes’ jurisprudence was to return American law to an instrumentalist conception, it was, in Holmes himself, largely a value-free instrumentalism. For Holmes “the proper attitude is that we know nothing of . . . values and bow our heads — seeing reason enough for doing all we can and not demanding the plan of campaign of the General — or even asking whether there is any general or any plan.”¹⁷⁸ The law was to serve social ends, but it was not for the jurist to determine those ends. Instead, he should give effect to “the existing notions of public policy.”¹⁷⁹ When it came to “the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough”¹⁸⁰

It so happened that the Holmes concept of law led to his doctrine of judicial restraint. That, in turn, led to his reluctance to invalidate regulatory legislation.¹⁸¹ Thus, he came to be lionized as the great “liberal” on the bench. Yet the whole point about Holmes’ jurisprudence was that his personal views (“he was ‘liberal’ only in the nineteenth-century sense of that term,”¹⁸² basically “uncritical about the orthodox economic axioms on which he had been brought up”)¹⁸³ were irrelevant to his legal work.

What is plain, however, is that it was Holmes who set legal thought on its coming course. When Holmes asserted in *The Common Law* that, “[t]he life of the law has not been logic: it has been

174. HOLMES, *supra* note 154, at 184.

175. HOLMES, *supra* note 23.

176. See HOLMES, *supra* note 154, at 180 (“The fallacy . . . is the notion that . . . the force at work in the development of law is logic.”).

177. *Id.* at 198.

178. 2 HOLMES-POLLOCK LETTERS 163 (1991).

179. JUSTICE HOLMES TO DOCTOR WU 1921-1932, at 38 (Central Book Co. n.d.).

180. *Id.* at 37.

181. William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes’s Early Legal Scholarship*, 90 COLUM. L. REV. 809, 832 (1990).

182. *Id.*

183. BIDDLE, *supra* note 137, at 88.

experience,” and that the law finds its philosophy in “considerations of what is expedient for the community concerned,”¹⁸⁴ he was sounding the clarion of twentieth-century jurisprudence. If the law reflected the “felt necessities of the time,”¹⁸⁵ then those needs rather than theory should determine what the law should be. These were not, to be sure, the views followed by American judges and lawyers at the beginning of this century — or even by the majority of the Supreme Court during Holmes’ tenure on that tribunal. But the good that men do also lives after them. If the nineteenth century was dominated by the passive jurisprudence of men like James C. Carter, the twentieth was, ultimately, to be that of Mr. Justice Holmes.

6. Louis D. Brandeis

Louis D. Brandeis was another Justice who added a new dimension to legal thought — one that emphasized the facts to which the law applied. “In the past,” Brandeis tells us, “the courts have reached their conclusions largely deductively from preconceived notions and precedents. The method I have tried to employ in arguing cases before them has been inductive, reasoning from the facts.”¹⁸⁶

The Brandeis method was inaugurated by the brief submitted by him in *Muller v. Oregon*¹⁸⁷ — a new form of legal argument, ever since referred to as the Brandeis Brief. To persuade the Court to uphold an Oregon law prohibiting women from working in factories more than ten hours a day, Brandeis marshaled an impressive mass of statistics to demonstrate “that there is reasonable ground for holding that to permit women in Oregon to work . . . more than ten hours in one day is dangerous to the public health, safety, morals or welfare.”¹⁸⁸ The Brandeis Brief and argument in *Muller* were devoted almost entirely to the facts — and to facts not in the record, but which the Court was asked to accept as “facts of common knowledge.”¹⁸⁹ The *Muller* brief contains 113 pages; only two of them are devoted to argument on the law.

The *Muller* Court upheld the Oregon law and did so by relying upon the Brandeis approach, expressly noting in its opinion how the

184. HOLMES, *supra* note 23, at 1, 35.

185. *Id.* at 1.

186. THE WORDS OF JUSTICE BRANDEIS 78 (Solomom Goldman ed. 1953).

187. 208 U.S. 412 (1908).

188. *Id.* at 416.

189. Brief for Defendant in Error, *id.*, reprinted in LOUIS D. BRANDEIS AND JOSEPHINE GOLDMARK, WOMEN IN INDUSTRY 10 (1969).

Brandeis Brief had supplied the factual basis for its decision. *Muller* thus was, as Justice Frankfurter termed it, “‘epoch making,’ . . . because of the authoritative recognition by the Supreme Court that the way in which Mr. Brandeis presented the case — the support of legislation by an array of facts which established the *reasonableness* of the legislative action, however it may be with its wisdom — laid down a new technique for counsel.”¹⁹⁰ The Brandeis Brief still remains the model for constitutional cases.

With the Brandeis Brief, the courts were brought down to the solid earth of facts. Interventions in the economy were to be judged, not by whether they were logically consistent with an a priori principle of absolute liberty of contract, but by whether they were justified by the factual background that had led to their enactment. According to a critic of the prior prevailing jurisprudence, “For one who really understands the facts and forces involved, it is mere juggling with words and empty legal phrases.”¹⁹¹ The Brandeis Brief ensured that the judges would begin to understand the “facts and forces involved.”

For Brandeis, his *Muller* brief marked the culmination of his career before his Supreme Court appointment. He grew up in Louisville, attended Harvard Law School (where he compiled an academic record still unequaled), and went into practice in Boston in 1879, where he formed a partnership with his fellow Harvard classmate, Samuel D. Warren. The firm prospered, and its success gave Brandeis the financial independence to devote an increasing amount of time to work, often without pay, on behalf of unions, consumers, and small stockholders. He came to be known as the “People’s Attorney” for his dedication “with a monastic fervor to what he conceived to be the service of the public.”¹⁹²

Brandeis was appointed to the Supreme Court in 1916 and was confirmed over bitter opposition, both by business interests and the organized Bar (Brandeis himself wrote that “[t]he dominant reasons for the opposition . . . are that he is considered a radical and is a Jew.”)¹⁹³ On the bench, Justice Brandeis continued to use the new technique he had developed in his *Muller* brief — emphasizing the

190. Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 365 (1916).

191. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 n.3 (1909) (quoting RICHARD T. ELY, *ECONOMIC THEORY AND LABOR LEGISLATION* 18 (n.d.)).

192. Max Lerner, *The Social Thought of Mr. Justice Brandeis*, in MR. JUSTICE BRANDEIS 14 (Felix Frankfurter ed., 1932).

193. PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 293 (1984).

facts in the resolution of legal issues, particularly "the facts of modern industry which provoke regulatory legislation."¹⁹⁴

Brandeis on the bench was only a more exalted version of Brandeis in the forum. If the Brandeis Brief replaced the "black-letter" judge with "the man of statistics and the master of economics,"¹⁹⁵ Justice Brandeis himself was the prime exemplar of the new jurist in action. Above all, as in his brief, the Justice was a master of the facts in his opinions. For him the search of the legal authorities was the beginning, not the end, of research. He saw that the issues which came to the Court were framed by social and economic conditions unimagined even a generation before. Hence, "the judicial weighing of the interests involved should, he believed, be made in the light of facts, sociologically determined and more contemporary than those which underlay the judicial approach to labor questions at the time."¹⁹⁶

Detailed knowledge of the facts was the foundation of the Brandeis process of decision. Justice Holmes recalled that his colleague "had an insatiable appetite for facts."¹⁹⁷ Once, after Brandeis had marshaled his usual mass of facts in one of his opinions, Holmes characterized a Justice who had written the other way, "I should think [he] would feel as if a steam roller had gone over him."¹⁹⁸

The Brandeis emphasis upon facts, both at the Bar and on the high bench, created what Justice Frankfurter calls "a new technique" in jurisprudence.¹⁹⁹ Until Brandeis, says Frankfurter, "social legislation was supported before the courts largely *in vacuo* — as an abstract dialectic between 'liberty' and 'police power,' unrelated to a world of trusts and unions, of large-scale industry and all its implications."²⁰⁰ With Brandeis, all this changed. In his briefs and opinions, "the facts of modern industry which provoke regulatory legislation were, for the first time, adequately marshaled before the Court."²⁰¹

194. Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, in *MR. JUSTICE BRANDEIS* 52 (Felix Frankfurter ed., 1932).

195. HOLMES, *supra* note 154, at 187.

196. DEAN ACHESON, *MORNING AND NOON* 82 (1965).

197. 2 HOLMES-LASKI, *supra* note 153, at 28.

198. *Id.* at 209.

199. Frankfurter, *supra* note 194, at 52.

200. *Id.*

201. *Id.*

Brandeis' fact-centered style may have "rarely sparkled," but the Justice's "purpose was education and persuasion" rather than attainment of the Holmes-like epigrammatic immortality.²⁰² A Brandeis opinion referred to

[t]he change in the law by which strikes once illegal and even criminal are now recognized as lawful. . . . This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life.²⁰³

Brandeis himself was the means by which this realization was achieved.²⁰⁴

The Brandeis method was used for a particular purpose. The Justice completely rejected the prevailing notion that the law was to be "equated with theories of *laissez faire*."²⁰⁵ Brandeis firmly believed that "[r]egulation . . . is necessary to the preservation and best development of liberty. We have long curbed the physically strong, to protect those physically weaker. More recently we have extended such prohibitions to business. . . . The right to competition must be limited in order to preserve it."²⁰⁶

If twentieth-century law has enabled the society to move from *laissez faire* to the Welfare State, that has been true in large part because it has accepted the Brandeis approach. Emphasis upon the facts has led to increasing understanding of the reality that called for interventions in the economy. "The small man," said Brandeis, "needs the protection of the law," but, under the *laissez-faire* conception, "the law becomes the instrument by which he is destroyed."²⁰⁷ If the law simply allows the market to operate, "you have necessarily a condition of inequality between the two contending forces."²⁰⁸

To prevent that result, "business must yield to the paramount interests of the community."²⁰⁹ The social and economic perils of the industrial age require interventions in the economy that business considers arbitrary and oppressive.²¹⁰ The Brandeis jurisprudence was a

202. ACHESON, *supra* note 196, at 83.

203. Duplex Printing Co. v. Deering, 254 U.S. 443, 481 (1921) (Brandeis, J., dissenting).

204. Acheson, *supra* note 196, at 84.

205. American Fed'n of Labor v. American Sash and Door Co., 335 U.S. 538, 543 (1949) (Frankfurter, J., concurring).

206. THE WORDS OF JUSTICE BRANDEIS, *supra* note 186, at 154.

207. *Id.* at 148.

208. *Id.* at 135.

209. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 574 (1933) (Brandeis, J., dissenting).

210. Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

major factor in leading the law to adopt a more benign attitude to economic regulation. "Nobody," Brandeis once wrote, "can form a judgment that is worth having without a fairly detailed and intimate knowledge of the facts."²¹¹ The Brandeis technique helped persuade jurists that the legal conception of "liberty" should no longer be "synonymous with the laissez faire of Herbert Spencer."²¹² Instead, jurists have come to believe with Brandeis that "[r]egulation . . . is necessary to the preservation and best development of liberty."²¹³ That in turn has led to acceptance of the Brandeis rejection of laissez faire as the foundation of our jurisprudence.

7. Charles Evans Hughes

When Chief Justice Taft resigned, President Hoover nominated Charles Evans Hughes to succeed him. Hoover later wrote, "It was the obvious appointment."²¹⁴ Despite Hughes' eminent qualifications, his nomination led to the bitterest confirmation fight over a Chief Justice since Chief Justice Taney was named a century earlier. Hughes' chief opponent was Senator George Norris, who asserted, "No man in public life so exemplifies the influence of powerful combinations in the political and financial world as does Mr. Hughes."²¹⁵ Despite the opposition, Hughes was confirmed by a vote of fifty-two to twenty-six.

Chief Justice Hughes was sixty-eight when he was appointed — the oldest man chosen to head the Court. However, he undertook his new duties with the vigor of a much younger person. In addition, his more than distinguished career endowed him with prestige which few in the highest judicial office had had. "He took his seat at the center of the Court," Justice Frankfurter was to write, "with a mastery, I suspect, unparalleled in the history of the court"²¹⁶

"Central casting," Chief Justice Rehnquist tells us, "could not have produced a better image of a chief justice, and his presence matched his appearance."²¹⁷ As a leader of the Court, Hughes must be ranked with Marshall and Taney. Whatever the test of leadership,

211. THE WORDS OF JUSTICE BRANDEIS, *supra* note 186, at 134.

212. ALPHEUS T. MASON, BRANDEIS: A FREE MAN'S LIFE 581 (1956).

213. THE WORDS OF JUSTICE BRANDEIS, *supra* note 186, at 154.

214. 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 651 (1963).

215. 3 LEON FRIEDMAN & FRED L. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1903 (1969).

216. FRANKFURTER, *supra* note 78, at 491.

217. REHNQUIST, *supra* note 143, at 222.

in Frankfurter's words, "Chief Justice Hughes possessed it to a conspicuous degree. In open court he exerted this authority by the mastery and distinction with which he presided. He radiated this authority in the conference room."²¹⁸ The Hughes manner of conducting the Court's business has been described by Frankfurter, who had served as a Justice under him:

In Court and in conference he struck the pitch, as it were, for the orchestra. He guided discussion by opening up the lines for it to travel, focusing on essentials, evoking candid exchange on subtle and complex issues, and avoiding redundant talk. He never checked free debate, but the atmosphere which he created, the moral authority which he exerted, inhibited irrelevance, repetition, and fruitless discussion.²¹⁹

The Hughes conferences were military-like models of efficiency. According to Justice Brandeis these "lasted for six hours and the Chief Justice did virtually all the speaking."²²⁰ This was an exaggeration, but Hughes is still noted for his tight control over the conference discussion. "Rarely did anyone speak out of turn," and Hughes made sure that the discussion did not stray from the issues he had stated in his incisive presentation.²²¹ As Chief Justice Rehnquist puts it, "you did not speak up in that conference unless you were very certain that you knew what you were talking about. Discipline and restraint was the order of the day."²²² Seeing Hughes preside, Justice Frankfurter concludes, "was exciting, quietly exciting, just as every member of the orchestra, I'm sure was taut when Koussevitsky conducted and Toscanini conducted."²²³

The new Chief Justice's leadership abilities were precisely what the Court needed to enable it to confront its most serious crisis in almost a century. Some years earlier, Justice Holmes had written that, while things at the Court were quiet then, it was really only "the quiet of a storm centre."²²⁴ The same could be said of the Court when Hughes took its center chair.

218. FELIX FRANKFURTER, *OF LAW AND MEN* 149 (Philip Elman ed., 1956).

219. *Id.* at 141.

220. Paul A. Freund, Book Review, 65 *HARV. L. REV.* 370 (1951).

221. REHNQUIST, *supra* note 143, at 292.

222. *Id.*

223. FRANKFURTER, *supra* note 15, at 268.

224. HOLMES, *supra* note 154, at 292.

From outward appearances, the Hughes Court also seemed quiet — ready to continue along the conservative path taken by its predecessors. Yet from almost the beginning of the new Chief Justice's tenure, it was "enclosed in a tumultuous privacy of storm."²²⁵ In decisions like that in the *Adkins* case,²²⁶ the Court's conservative core had carried their laissez-faire interpretation of the Constitution to the point where there was, in the famous Holmes phrase, "hardly any limit but the sky to the invalidating of [laws] if they happen to strike a majority of this Court as for any reason undesirable."²²⁷ In *Planned Parenthood v. Casey*,²²⁸ the 1992 abortion case, the Court itself stated that the pre-Hughes decisions were "exemplified by" the 1923 decision in "*Adkins v. Children's Hospital* . . . in which this Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards."²²⁹

By the time of the Hughes Court, the *Planned Parenthood* opinion tells us, "the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."²³⁰ When Chief Justice Hughes ascended the bench early in 1930, the country was already deep in the most serious economic crisis in our history. The crisis only became worse as the Hughes term went on — putting the entire leadership of the country, and not least the Court itself, to perhaps its most severe test.

The new Chief Justice had to meet the test with a Court composed almost entirely of Justices who had served under his predecessor. Four of the five Justices who had made up the *Adkins* majority (Van Devanter, McReynolds, Sutherland, and Butler) were still on the bench, serving as the nucleus for decisions extending the Taft Court's jurisprudence. Despite this, the new Chief Justice was able to persuade a bare majority that the Constitution should no longer be treated as a legal sanction for laissez faire. Writing in 1941, Justice Jackson asserted, "The older world of *laissez faire* was recognized

225. Ralph Waldo Emerson, *The Snow-Storm*.

226. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

227. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

228. 112 S. Ct. 2791 (1992).

229. *Id.* at 2812.

230. *Id.*

everywhere outside the Court to be dead.”²³¹ It was Chief Justice Hughes who ensured that the same recognition penetrated the Marble Palace.

It is true that Chief Justice Hughes, like other Court heads who ultimately led important changes in Court jurisprudence (Chief Justice Warren, in particular, comes to mind), proceeded slowly during his first years in the Court’s center chair. In 1937, however, he was able to lead the Court to what amounted to a veritable revolution in the Court’s jurisprudence, which one commentator characterized as “Constitutional Revolution, Ltd.”²³²

Justice Frankfurter once said that Chief Justice Hughes “was, in fact, the head of two courts, so different . . . was the supreme bench in the two periods of the decade during which Hughes presided over it.”²³³ The first Hughes Court sat from the Chief Justice’s appointment in 1930 until 1937. This period was dominated by decisions which both nullified the most important New Deal legislation and restricted state regulatory power. In both respects, the Court confirmed the laissez-faire jurisprudence of its predecessors.

The grim economic background behind the New Deal measures, however, indicated how totally unrealistic was reliance on laissez faire. Giant industries prostrate, nationwide crises in production and consumption, the economy in a state of virtual collapse — if ever there was a need for exertion of federal power, it was after 1929. The market and the states found the crisis beyond their competence. The choice was between federal action and chaos. A system of constitutional law that required the latter could hardly endure. The New Deal decisions, the Supreme Court was later to concede, “produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal.”²³⁴

The national economy could be resuscitated only by extended federal intervention. For the Government in Washington to be able to exercise regulatory authority upon the necessary national scale, it was essential that the Supreme Court liberalize its construction of the Constitution. To quote Justice Roberts:

231. JACKSON, *supra* note 125, at 85.

232. CORWIN, *supra* note 63.

233. FRANKFURTER, *supra* note 218, at 148.

234. *Mandeville Island Farms v. American Coastal Sugar Co.*, 334 U.S. 219, 230 (1948).

An insistence by the court on holding federal power to what seemed its appropriate orbit when the Constitution was adopted might have resulted in even more radical changes in our dual structure than those which have been gradually accomplished through the extension of the limited jurisdiction conferred on the federal government.²³⁵

In the 1992 *Planned Parenthood* case, the Court itself referred to “the terrible price that would have been paid if the Court had not overruled as it did.”²³⁶

It was Chief Justice Hughes who was responsible for the reversal in jurisprudence that occurred in 1937 — a reversal so great that its effects justify the characterization of “constitutional revolution.”²³⁷ On March 29, 1937, Chief Justice Hughes announced a decision upholding a minimum wage law, basically similar to the one the *Adkins* Court had held to be beyond governmental power.²³⁸ There is no doubt that it was the Chief Justice himself who led the Court to repudiate cases such as *Adkins*. The Court to which Hughes came contained, we saw, four of the conservative Justices who had made up the *Adkins* majority. It also contained three liberal Justices (Brandeis, Stone, and Cardozo), who were strongly in favor of overruling the *Adkins* line of cases. The remaining members were the Chief Justice and Justice Roberts, who had taken his seat at the same time as Hughes.

Roberts himself was far from an outstanding Justice. “Who am I,” he wrote after leaving the bench, “to revile the good God that he did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis or a Cardozo.”²³⁹ He was nevertheless to play a crucial role as the “swing man” in the Hughes Court. It had been his key vote that enabled the conservative bloc to prevail in the decisions striking down the important New Deal measures during the first part of Chief Justice Hughes’ tenure. It was Justice Roberts’ vote as well that enabled the Chief Justice to bring about the great jurisprudential reversal that took place in 1937.

It was Chief Justice Hughes who persuaded Justice Roberts to vote with the new majority in the minimum wage case. The success of

235. OWEN J. ROBERTS, *THE COURT AND THE CONSTITUTION* 62 (1951).

236. 112 S. Ct. 2791, 2814 (1992).

237. CORWIN, *supra* note 63.

238. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

239. FRANKFURTER, *supra* note 78, at 517.

his efforts was, of course, crucial to the Court's acceptance of increased governmental power as the foundation of the new constitutional jurisprudence. Hughes himself fully realized the critical importance of Roberts' vote. He later told how, when the Justice told him that he would vote to sustain the minimum-wage law, he almost hugged him²⁴⁰ — which, coming from one with so great a reputation for icy demeanor, says a great deal.

It was because of Hughes' lead and his successful persuasion of Justice Roberts that the Chief Justice was able to announce the decision upholding the minimum wage law and overruling *Adkins*. And it was Hughes who wrote the landmark opinion in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*²⁴¹ — the seminal decision of the 1937 constitutional revolution. In it, the constitutionality of the National Labor Relations Act of 1935 was upheld.²⁴² Justice Jackson termed the decision there the most far-reaching victory ever won on behalf of labor in the Supreme Court.²⁴³ This was no overstatement, for the 1935 Act was the Magna Carta of the American labor movement. It guaranteed the right of employees to organize collectively in unions and made it an unfair labor practice prohibited by law for employers to interfere with that right or to refuse to bargain collectively with the representatives chosen by their employees.²⁴⁴

The Labor Act was intended to apply to industries throughout the Nation, to those engaged in production and manufacture as well as to those engaged in commerce, literally speaking. But this appeared to bring the Act directly in conflict with prior decisions drastically limiting the scope of the Federal Government's authority over interstate commerce, including some of the decisions of the 1934-1936 period on which the ink was scarcely dry. In the *Jones & Laughlin* case, these precedents were not followed. "These cases," laconically stated Chief Justice Hughes for the Court, "are not controlling here."²⁴⁵ Instead, the Hughes opinion gave the federal power over interstate commerce its maximum sweep. Mines, mills and factories, whose activities had formerly been decided to be "local," and hence immune from federal regulation, were now held to affect interstate commerce directly enough to justify Congressional control.

240. 2 PUSEY, *supra* note 214, at 757.

241. 301 U.S. 1 (1937).

242. *Id.* at 49.

243. JACKSON, *supra* note 125, at 214.

244. *Jones & Laughlin*, 301 U.S. at 23-24.

245. 301 U.S. at 41.

Once again, there is no doubt that the Chief Justice himself was primarily responsible for the *Jones & Laughlin* decision. In his Hughes biography, Merlo J. Pusey emphasizes the vigor and thoroughness with which the Chief Justice presented *Jones & Laughlin* at the conference. He also states that Hughes told him that he had not "pleaded with Roberts to save the NLRB."²⁴⁶ The Hughes disclaimer should be taken with a grain of salt. Strong Chief Justices, such as Hughes and Earl Warren, are noted for their success in persuading their colleagues to follow their views. Hughes never denied publicly that he had influenced Justice Roberts' vote. All he states in his *Autobiographical Notes* is, "I am able to say with definiteness that [Roberts'] view in favor of [*Jones & Laughlin*] would have been the same if the President's [Court-packing] bill had never been proposed."²⁴⁷ Of course, it would have, since it was the Chief Justice's persuasion, not the President's threat, that led to the Roberts vote.

8. Hugo Lafayette Black

During the second third of this century, two members of the highest Court were the paradigms of the new constitutional jurisprudence: Hugo Lafayette Black and Earl Warren. Neither had a defined philosophy of law; neither was a founder, a leader, or even a follower of any school of jurisprudence. Yet each had an influence upon twentieth-century legal thought greater than almost all of the acknowledged molders of jurisprudence. Their forte was one peculiar to the demands of the emerging twentieth-century society — not so much adaptation of the law to deal with changing conditions as a virtual transformation of the law to meet a quantum acceleration in the pace of societal change.

Chief Justice Rehnquist calls Justice Black the "most influential of the many strong figures who have sat during . . . his Justiceship."²⁴⁸ During much of the Black tenure, he and Justice Felix Frankfurter were polar opposites on the Court. A recent book about the two is titled *The Antagonists*.²⁴⁹ Yet the issue between them was more basic than the differences engendered by personal antipathies. At the core, there was a fundamental disagreement over the proper role of the law

246. 2 PUSEY, *supra* note 214, at 768.

247. THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 313 (Daniel J. Danelski & Joseph J. Tulchin eds., 1973).

248. REHNQUIST, *supra* note 143, at 73.

249. JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA (1989).

in a period of unprecedented development. Frankfurter on the Court remained true to the Holmes rule of restraint. For him, it was not for the jurist to mold the course of societal change, but only to defer to the course decreed by the political branches, who alone were given the function of deciding these issues in a representative democracy.

Justice Black considered the Frankfurter restraint approach a repudiation of the duty delegated to the judge. As Black saw it, abnegation in the end came down to abdication by the Court of its essential role. "If, as I think," he wrote in a 1962 letter, "the judiciary is vested with the supreme constitutional power and responsibility to pass on the validity of legislation, then I think it cannot 'defer' to the legislative judgment 'without abdicating its own responsibility . . .'"²⁵⁰ The decision had to be made on the judge's independent judgment; to "defer" to others meant a passing of the buck that had been placed squarely on the judge. To Black the judicial function meant that the judge was to remain true to his own conception of law however much it differed from that of the legislature or the prior law on the matter.

In a 1942 article, Justice Black characterized the changing jurisprudence: "[L]egal realism replaces legal fictionalism."²⁵¹ Black himself was the prime example of the new approach in operation. The law, said the Realists, is what the judges do in fact.²⁵² Black carried this one step further — what the judge does should be based upon his own conception, without deference to the view of others or even the fact that there is established law the other way.

Black's approach in this respect was the basis for the two positions he most forcefully advocated on the Court: (1) the absolutist view of the First Amendment, and (2) the incorporation of the Bill of Rights in the Due Process Clause of the Fourteenth Amendment.

Without a doubt, in the popular mind Justice Black stands primarily for the absolutist literal interpretation of the First Amendment. The Black position meant, "without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech" was protected from *any and all* governmental infringements.²⁵³ When the amendment says that no laws abridging speech or press shall be made,

250. Hugo Black to Fred Rodell, Sept. 5, 1962, Black Papers, Library of Congress, *quoted in* BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* 41 (1983).

251. GERALD T. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* 184 (1977).

252. *See* JEROME FRANK, *LAW AND THE MODERN MIND* 125-137 (1930) (stating that the law is made by judicial decisions).

253. Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 559 (1962).

it means flatly that *no* such laws shall, under any circumstances, be made.

Justice Black's absolutist view has never been accepted by the Court. Countless cases hold that, while speech is protected by the First Amendment, that does not necessarily mean that it is wholly immune from governmental regulation. Such rulings did not, however, deter Black from following the view of law that he deemed correct. The same was true of the Black assertion that the framers of the Fourteenth Amendment sought to overrule the decision in *Barron v. Mayor of Baltimore*,²⁵⁴ which limited application of the Federal Bill of Rights to federal action. The Bill of Rights, Black urged, was incorporated in the Due Process Clause of the Fourteenth Amendment.²⁵⁵ This meant that all the Bill of Rights guarantees were binding upon the states as well as the Federal Government.

Once again, the established law was clearly the other way. Since 1884,²⁵⁶ the Court had rejected the view that the Fourteenth Amendment absorbed all the provisions of the Bill of Rights and hence placed upon the states the limitations which the specific articles of the first eight amendments had theretofore placed upon the Federal Government. Against the more than half century of uniform precedents, Justice Black set only his own view of what the law should be, based upon *his* reading of the relevant constitutional provision, that led him to reject all the weighty precedents the other way and take issue with what seemed so settled in Supreme Court doctrine.²⁵⁷

As a Justice, Black used the law to reach the results that he believed would best serve the interests of the American society that he saw developing. He had been a populist Senator and now he employed judicial power to make social policy that would favor the individual and protect him against the governmental and corporate interests that the law had fostered. From this point of view, Justice Frankfurter's satiric portrayal of Justice Black acting as though he were "back in the Senate"²⁵⁸ contained some truth. Black, however, did not have any overriding social vision. His jurisprudence was instead, like that of many of his judicial confreres, illustrative of the pragmatic instrumentalism that had come to be dominant in American law.

254. 32 U.S. (7 Pet.) 243 (1833).

255. *Adamson v. California*, 332 U.S. 46, 68 (1947).

256. *Hurtado v. California*, 110 U.S. 516 (1884).

257. See *Adamson*, 332 U.S. at 71-72 (Black, J., dissenting).

258. See SCHWARTZ, *supra* note 250, at 45-46.

In the end, however, it was Justice Black, not his great rival, who ranks as a prime molder of twentieth-century legal thought. Black, more than Frankfurter, was more in tune with contemporary constitutional needs. History has vindicated the Black approach, for it has helped protect personal liberties in an era of encroaching public power.

That Black's absolutist advocacy was a prime mover in the First Amendment jurisprudence of the past half century cannot be denied. The absolutist view may not have been accepted, but the "firstness" of the first Amendment has been firmly established. If, as he stated in an opinion, "[f]reedom to speak and write about public questions . . . is the heart"²⁵⁹ of today's constitutional scheme, it is in large part due to Black's consistent evangelism on the matter.

Similarly, Justice Black's position on incorporation may never have been able to command a Court majority. However, under Black's prodding, the Justices increasingly expanded the scope of the Fourteenth Amendment's Due Process Clause. Though the Court continued to hold that only those rights deemed "fundamental" are included in due process, the meaning of "fundamental" became flexible enough to accomplish virtually the result Black had urged. One by one almost all the individual guarantees of the Bill of Rights were absorbed into the Due Process Clause.²⁶⁰ By the end of Black's judicial tenure, the rights which had been held binding on the states under the Fourteenth Amendment included all the rights guaranteed by the Bill of Rights except the right to a grand jury indictment and that to a jury trial in civil cases involving over twenty dollars.²⁶¹ Justice Black may have appeared to lose the Bill of Rights incorporation battle, but he won the due process war.

Justice Black, as much as anyone, changed the very way we think about public law. If the focus of juristic inquiry has shifted from duties to rights and personal rights have been elevated to the preferred plane — it has in large part been the result of Black's jurisprudence. If impact on legal thought is a hallmark of the outstanding judge, few occupants of the bench have been more outstanding than Black. Justice Black led the Court to tilt the law in favor of individual rights and

259. *Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, 301-02 (1941) (Black, J., dissenting).

260. *Williams v. Florida*, 399 U.S. 78, 130-32 (1970).

261. BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 217-21 (Madison House, expanded ed. 1992) (1977). See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Benton v. Maryland*, 395 U.S. 784 (1969); *Malloy v. Hogan*, 378 U.S. 1 (1964).

liberties and was, before Chief Justice Warren, the intellectual leader in what Justice Abe Fortas once termed "the most profound and pervasive revolution ever achieved by substantially peaceful means."²⁶² Even where Black's views have not been adopted literally, they have tended to prevail in a more general, modified form. Nor has his impact been limited to his positions which the Court has accepted. It is found in the totality of today's judicial awareness of the Bill of Rights and the law's new-found sensitivity to liberty and equality.

9. Earl Warren

The period during which Earl Warren served as Chief Justice was, in many ways, a second formative era in our legal history, a period in which the law underwent changes as profound as those occurring in the nation at large. The Warren Court led the movement to remake the law in the image of the evolving society. Such change required the Justices to perform the originative role that the jurist is not normally called upon to exercise in more stable times — a role usually considered more appropriate for the legislator than for the judge. In terms of creative impact on the law, the Warren tenure can be compared only with that of Marshall himself.

Even today, many assume that Warren was only the titular chief of his Court — that while Warren may have been the nominal head of the Court that bears his name, other Justices furnished the actual leadership. My own biography of Warren, on the contrary, portrays him as a strong Chief Justice whose leadership of the Court is best characterized by the book's title, *Super Chief* — the title used by Justice Brennan after Warren's retirement and adopted by members of the Court who looked back upon the Warren years with nostalgia.²⁶³

Warren's leadership abilities and skill as a statesman enabled him to be one of the most effective Chief Justices. Those Justices who served with Warren stressed his leadership abilities, particularly his skill in conducting the conference. At conference, Warren may have stated the issues in a deceptively simple way; but he had the knack of reaching the heart of the matter while stripping it of legal technicalities. As a newspaper noted, "Warren helped to steer cases from the

262. THE FOURTEENTH AMENDMENT CENTENNIAL VOLUME 34 (Bernard Schwartz ed., 1970).

263. SCHWARTZ, *supra* note 250, at 771.

moment they were first discussed simply by the way he framed the issues.”²⁶⁴

In his first conference on *Brown v. Board of Education*,²⁶⁵ Warren presented the question before the Court in terms of racial inferiority. He told the Justices that segregation could be justified only by belief in the inherent inferiority of blacks and, if *Plessy v. Ferguson*²⁶⁶ (which upheld segregation) was followed, it would have to be upon that basis. A scholar such as Justice Frankfurter would certainly not have presented the case that way. But Warren’s “simplistic” words went straight to the ultimate human values involved. In the face of such an approach, arguments based on legal scholarship would have seemed inappropriate, almost pettifoggery.

Warren, like Marshall, had primarily a political, rather than a legal background. In 1920, shortly after he had obtained his law degree, Warren began his legal career in the office of the District Attorney of Alameda County, across the Bay from San Francisco. He was elected District Attorney five years later and served in that position until 1938.²⁶⁷ Raymond Moley, who conducted a 1931 survey of American district attorneys, declared without hesitation that Warren was “the best district attorney in the United States.”²⁶⁸

In 1938, Warren was elected Attorney General of California, and in 1942, Governor. Warren proved an able administrator and was the only Governor of his state to be elected to three terms. President Eisenhower appointed Warren to head the Supreme Court, and Warren resigned as Governor so that he could take up his new duties as Chief Justice.²⁶⁹

There is an antinomy inherent in every system of law: “[T]he law must be stable and yet it cannot stand still.”²⁷⁰ It is the task of the judge to reconcile these two conflicting elements. In doing so, jurists tend to stress one principle over the other. Stability and change may be the twin sisters of the law, but few judges can keep an equipoise between the two. Chief Justice Warren never pretended to try to maintain a balance.

264. Fred Barbash, *New Book Offers Inside Look at Earl Warren’s Supreme Court*, WASH. POST, June 15, 1983, at A16.

265. 347 U.S. 483 (1954).

266. 163 U.S. 537 (1896).

267. SCHWARTZ, *supra* note 250, at 9.

268. RAYMOND MOLEY, 27 MASTERS OF POLITICS — IN A PERSONAL PERSPECTIVE 89 (1949), *quoted in* LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 63 (1967).

269. SCHWARTZ, *supra* note 250, at 7.

270. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

He came down firmly on the side of change, leading the effort to enable the law to cope with a rapidly changing society. Warren rejected the philosophy of judicial restraint because he believed that it thwarted effective performance of the Court's constitutional role. Judicial restraint, in the Chief Justice's view, all too often meant judicial abdication of the duty to enforce constitutional guarantees. Judicial restraint meant that, "for a long, long time we have been sweeping under the rug a great many problems basic to American life. We have failed to face them squarely, and they have piled up on us, and now they are causing a great deal of dissension and controversy of all kinds."²⁷¹ To Warren, it was the Court's job "to remedy those things eventually," regardless of the controversy involved.²⁷²

The Warren approach, like that of Justice Black, never considered cases in light of any desired deference to the legislature. Instead, Warren relied upon his own independent judgment, normally giving little weight to the fact that a reasonable legislator might have voted for the challenged law.

To Chief Justice Warren, the Court functioned to ensure fairness and equity, particularly in cases where other governmental processes had not secured such results. When a constitutional requirement remained unenforced due to governmental default, the Court had to act. The alternative, as Warren saw it, was an empty Constitution, with essential provisions rendered nugatory because they could not be enforced.

Legislative inaction in enforcing legal rights led to the most important Warren decisions. The Chief Justice felt that he had to intervene when the political branches had not acted to vindicate certain rights and governmental correction seemed unlikely. From this point of view, Warren and his Court acted not so much out of an activist desire to remake the law and society, but rather out of the need to remedy the effects of governmental paralysis. The principal decisions of the Warren Court, including *Brown v. Board of Education*,²⁷³ the Warren Court's most important decision and in many ways the watershed case of the century, sustain this thesis.

The *Brown* decision striking down school segregation and signaling the beginning of effective civil-rights enforcement in American

271. *Earl Warren Talks about the Warren Court*, U.S. NEWS & WORLD REP., July 15, 1968, at 64.

272. *Id.*

273. 347 U.S. 483 (1954).

law, was a direct consequence of the political processes' failure to enforce the Fourteenth Amendment's guaranty of racial equality. Before *Brown*, it had become a constitutional cliché that the amendment had not succeeded in securing equality for blacks; that situation largely resulted from governmental default. Government had not acted to eliminate the almost patent violation of equal protection; instead, both state and federal laws perpetuated the segregation that existed in much of the country, including the nation's capital.

For Chief Justice Warren, the years of legislative inaction, coupled with the unlikelihood that Congress would correct the situation in the foreseeable future, made it imperative for the Court to intervene. The alternative would leave untouched a practice that flagrantly violated both the Constitution and the ultimate human values involved. The Chief Justice found that alternative unpalatable. Since the other branches had defaulted in their responsibility, the Court had to ensure enforcement of the prohibition against racial discrimination.

Second only to *Brown*, the most significant Warren Court case was *Baker v. Carr*.²⁷⁴ The decision there led to a drastic shift in political power throughout the nation. Through *Baker v. Carr* and its progeny, the Warren Court ultimately worked an electoral reform comparable to that achieved by the British Parliament when it incorporated the program of the English Reform Movement into the statute book.

Even more than *Brown*, *Baker v. Carr* may be explained as a judicial response to the default of the political branches. By the time of the case, the 1901 statute that apportioned seats in the state legislature was completely out of line with the state's population distribution.²⁷⁵ To correct this situation by a nonjudicial remedy, the very legislature whose existence depended upon the malapportionment under the 1901 statute would have had to pass a new reapportionment law. To expect such an action would have been quixotic.

To remedy this problem, the Supreme Court finally had "to enter this political thicket."²⁷⁶ The lack of any other remedy was the key factor behind the Court's decision. As Justice Clark put it in a note jotted down while he was considering the case, "Here a minority by [sic] representatives ignores the needs and desires of the majority — and for their own selfish purpose hamper and oppress them — debar

274. 369 U.S. 186 (1962).

275. *Id.* at 187-89.

276. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

them from equal privileges and equal rights — that means the failure of our constitutional system”²⁷⁷ The Chief Justice and his colleagues decided that only a judicial remedy could redress that failure. Warren’s own extrajudicial statement regarding his Court’s reapportionment decisions bears quoting: “Most of these problems could have been solved through the political processes rather than through the courts. But as it was, the Court had to decide.”²⁷⁸ The decision in *Baker v. Carr* was made because “the political processes” had failed to remedy the constitutional violation that deprived Baker of an equal vote.

The bases of the landmark Warren decisions were fairness and equality. For the Chief Justice, the technical issues traditionally fought over in constitutional cases always seemed to merge into the larger question of fairness.²⁷⁹ His great concern was expressed in the question he so often asked at argument: “But was it fair?”²⁸⁰ His conception of fairness was the key to most of the Warren Court’s criminal-law decisions. When government lawyers tried to justify decisions below by traditional legal arguments, Warren would interject, “Why did you treat him this way?”²⁸¹ When the Chief Justice concluded that an individual had been treated in an unfair manner, he would not let legal rules or precedents stand in the way of his effort to remedy the situation.

Even more important than fairness was the notion of equality in the Warren jurisprudence. The Warren concept of law was one that applied equally to all components of an increasingly pluralistic society. It is true that, ever since de Tocqueville, observers have emphasized equality as the overriding American passion.²⁸² But it was not until the decisions of the Warren Court that our law really developed the concept of equality. If one great theme recurred in Warren’s jurisprudence, it was that of equality before the law — equality of races, of citizens, of rich and poor, of prosecutor and defendant. The result was that seeming oxymoron: A revolution made by judges. Without the

277. SCHWARTZ, *supra* note 250, at 422.

278. JACK W. POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 209 (1979).

279. 4 FRIEDMAN & ISRAEL, *supra* note 215, at 2725.

280. *Id.*

281. *Id.*

282. See 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 94 (Phillips Bradley ed. & Henry Reeve trans., 1956) (“The first and foremost intense passion that is produced by equality of condition is, I need hardly say, the love of that equality.”).

Warren Court decisions giving ever-wider effect to the right to equality before the law, most of the movements for equality that have permeated American society might never have started.

Equality was the great Warren theme in the *Brown* school segregation case, as well as the decisions enshrining the “one person, one vote” principle in the law. In addition to racial and political equality, Chief Justice Warren moved to ensure equality in criminal justice. The landmark case was *Griffin v. Illinois*.²⁸³ Griffin had been convicted of armed robbery in a state court. He filed a motion requesting a free transcript of the trial record, alleging that he was indigent and could not get adequate appellate review without the transcript. The motion was denied. In the *Griffin* conference, Warren pointed out that the state had provided for full appellate review in such cases. A defendant who could pay for a transcript should not be given an advantage over one who could not. “We cannot,” declared the Chief Justice, “have one rule for the rich and one for the poor.”²⁸⁴ Hence, he would require the state to furnish the transcript. The Court followed the Warren lead and held that it violates the Constitution for a state to deny free transcripts of trial proceedings to defendants alleging poverty.

As it turned out, *Griffin* was a watershed in Warren’s jurisprudence. In it the Court made its first broad pronouncement of equality in the criminal process. After *Griffin*, Warren and his colleagues appeared to agree with Bernard Shaw that “the worst of crimes is poverty,”²⁸⁵ as they tried to equalize criminal law between those possessed of means and the less affluent.

Perhaps Warren as a judge will never rank with the consummate legal craftsmen who have fashioned the structure of Anglo-American law over the generations — “each professing to be a pupil, yet each a builder who has contributed his few bricks.”²⁸⁶ But Warren was never content to deem himself a mere vicar of the common-law tradition. Instead, he was the epitome of the “result-oriented” judge, who used his power to secure the result he deemed right. Employing the authority of the ermine to the utmost, he never hesitated to do whatever he thought necessary to translate his conceptions of fairness and justice into the law of the land.

283. 351 U.S. 12 (1956).

284. Harold H. Burton Papers, Library of Congress, *quoted in* SCHWARTZ, *supra* note 250, at 193.

285. George B. Shaw, *Preface of MAJOR BARBARA* (1905).

286. Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361 (1939).

In reaching what he considered the just result, the Chief Justice was not deterred by the demands of *stare decisis*. For Warren, principle was more compelling than precedent. The key decisions of the Warren Court overruled decisions of earlier Courts. Those precedents had left the enforcement of constitutional rights to the political branches. Yet, the latter had failed to act. In Warren's view, this situation left the Court with the choice either to follow the precedent or to vindicate the right. For the Chief Justice, there was never any question as to which was the correct alternative.

Warren can neither be deemed a great technical jurist, nor one noted for his mastery of the common law. But he never pretended to be a legal scholar or professed interest in legal philosophy or reasoning. To him, the outcome of a case mattered more than the reasoning behind the decision.

When all is said and done, Warren's place in the legal pantheon rests, not upon his opinions, but upon his decisions. In terms of impact on the law, few occupants of the bench have been more outstanding than Earl Warren. In this respect, indeed, he must be placed second only to Marshall in the list of outstanding Chief Justices.

Justice Fortas once told me that in conference presentations, Chief Justice Warren normally went straight to the ultimate moral values involved — just as he did in his first *Brown* conference. Faced with that approach, traditional legal arguments seemed inappropriate. As Fortas put it, "opposition based on the hemstitching and embroidery of the law appeared petty in terms of Warren's basic value approach."²⁸⁷ The same appears true when we consider Warren's performance as a judge. To criticize him for his lack of scholarship or judicial craftsmanship seems petty when we weigh these deficiencies against the contributions he made as leader in the greatest judicial transformation of the law since the days of John Marshall.

10. William J. Brennan, Jr.

If we look at Justices in terms of their role in the decision process, William J. Brennan, Jr., was actually the most influential Associate Justice in Supreme Court history.²⁸⁸ "[M]ore than any justice in

287. SCHWARTZ, *supra* note 250, at 87.

288. Oliver Wendell Holmes is usually considered the most influential Associate Justice ever to sit on the Supreme Court. It was Holmes, more than any other legal thinker, who set the agenda for modern constitutional jurisprudence. Nevertheless, as Judge Posner points out, "the primary vehicles of Holmes's innovations were dissenting opinions that, often after his death, became and have remained the majority position." Posner, *supra* note 141, at xiii. At the time

United States history Brennan would change the way Americans live.”²⁸⁹ Justice Brennan served as the catalyst for some of the most significant decisions during his tenure. He was the leader of the Court’s liberal wing under Chief Justices Warren, Burger, and Rehnquist. More important, the Brennan jurisprudence set the pattern for much of American legal thought toward the end of this century. So pervasive was the Brennan influence that the English periodical *The Economist* headed its story on his retirement, *A Lawgiver Goes*.²⁹⁰

The Economist characterization is not an exaggeration. So consequential was the Brennan role, in fact, that Dennis J. Hutchinson, an editor of the *Supreme Court Review* declared that to call it the “Warren Court” is a misnomer: “it was ‘the Brennan Court.’”²⁹¹ As shown by my analysis of Chief Justice Warren, this assertion unduly denigrates Warren’s leadership. Still, it is hard to argue with Hutchinson’s conclusion, in another portion of his review: “When the public record is added to Schwartz’s numerous behind-the-scenes examples, . . . Brennan emerges clearly as the single most important justice of the period.”²⁹² If the Warren Court era saw the most important period of constitutional development since Chief Justice Marshall’s day, with so much of the corpus of our public law remade in the process, Justice Brennan was a leader in this development.

It is true that, after Chief Justice Warren’s retirement, Justice Brennan was no longer the trusted insider. Yet, even under Chief Justice Burger, Brennan was able to secure the votes for his position in many important cases. In his last years on the bench, the Court, under Chief Justice Rehnquist, moved more toward the right and Brennan spoke increasingly in dissent. Nevertheless, in the Rehnquist Court, too, Justice Brennan secured notable victories, particularly in the areas of abortion, separation of church and state, freedom of expression, and affirmative action. He was primarily responsible for the decisions

they were delivered, Holmes’ dissents spoke only for their author’s conception of the proper legal doctrine. While Justice Holmes was on the Court, its jurisprudence remained dominated by the concepts that he was ultimately to relegate to legal limbo. The Justice’s dissents may have sounded the clarion of the coming constitutional era. But they did not greatly influence our law until after his death. However crucial may have been the role that Holmes played in American jurisprudence, it cannot be said that, as a Justice, he played a dominant part in the Supreme Court decision process.

289. KIM I. EISLER, *A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA* 13 (1993).

290. *A Lawgiver Goes*, *THE ECONOMIST*, July 28, 1990, at 20. Compare EISLER, *supra* note 289 (“Brennan [was] the most influential justice of the twentieth century.”).

291. Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 *MICH. L. REV.* 922, 923 (1983).

292. *Id.* at 929.

toward the end of his tenure that the First Amendment protected flag burning²⁹³ and that broad Congressional authority in the field of affirmative action ought to be upheld.²⁹⁴

Before his 1956 appointment by President Eisenhower, Brennan served as a judge in New Jersey for seven years, rising from the state trial court to its highest bench. "One of the things," Justice Felix Frankfurter once wrote, "that laymen, even lawyers, do not always understand is indicated by the question you hear so often: 'Does a man become any different when he puts on a gown?' I say, 'If he is any good, he does.'"²⁹⁵ Certainly Justice Brennan on the highest bench proved a complete surprise to those who saw him as a middle-of-the-road moderate. He quickly became a firm adherent of the activist philosophy and a principal architect of the Warren Court's jurisprudence. Brennan had been Frankfurter's student at Harvard Law School; yet if Frankfurter expected the new Justice to continue his pupilage, he was soon disillusioned. After Brennan had joined the Warren Court's activist wing, Frankfurter supposedly quipped, "that while he had always encouraged his students to think for themselves, Brennan goes too far"²⁹⁶

A judge's decisions and opinions reveal his jurisprudence. Brennan's concept of law can be derived from his important opinions. These will be summarized here.

Chief Justice Warren wrote in his *Memoirs* that *Baker v. Carr*²⁹⁷ "was the most important case of my tenure on the Court."²⁹⁸ It ruled the federal courts competent to entertain an action challenging legislative apportionments as contrary to equal protection. Before *Baker*, the Court had held that legislative apportionment presented a "political question" beyond judicial competence.²⁹⁹ In *Baker*, the Brennan opinion overruled the earlier cases and held that attacks on legislative apportionments could be heard and decided by the federal courts.

The *Baker* opinion was the foundation for the principle that the Constitution lays down an "equal population" principle for legislative

293. *Texas v. Johnson*, 491 U.S. 397 (1989).

294. *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

295. FRANKFURTER, *supra* note 218, at 133.

296. William J. Brennan, Jr., *The Warren Court: A Personal Remembrance*, SUP. CT. HIST. Soc'y Q., Vol. XV, No. 4, 1994, at 6.

297. 369 U.S. 186 (1962).

298. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 306 (1977).

299. *Colegrove v. Green*, 328 U.S. 549 (1946).

apportionment. Under this principle, substantially equal representation is demanded for all citizens. Just as important is the *Baker* illustration of the Brennan juristic approach. Justice Frankfurter, Brennan's old teacher, had warned against courts entering "this political thicket."³⁰⁰ Brennan replied, "The mere fact that a suit seeks protection of a political right does not mean that it presents a political question."³⁰¹ That, says an English commentator, was the Brennan watchword.³⁰²

In *New York Times Co. v. Sullivan*,³⁰³ Justice Brennan gave a new perspective to freedom of expression by ruling that governmental power to fix the bounds of libelous speech is confined by the Constitution. A public official had recovered substantial libel damages against a newspaper. The Brennan opinion reversed, holding that the newspaper publication was protected by the First Amendment, which required, "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or reckless disregard of whether it was false or not."³⁰⁴

Justice Brennan's opinion was based upon "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment."³⁰⁵ It gave effect, Brennan said, to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."³⁰⁶

In terms of legal impact, no Brennan opinion was more far-reaching than *Shapiro v. Thompson*.³⁰⁷ The Justices originally voted to uphold a state law requiring a year's residence for welfare assistance on the ground that it had a rational basis in the state's desire to use its resources for its own residents. Justice Brennan persuaded a majority to reject this approach and strike down the residence requirement.

300. *Id.* at 556.

301. 369 U.S. at 209.

302. *A Lawgiver Goes*, *supra* note 290, at 20.

303. 376 U.S. 254 (1964).

304. *Id.* at 279-80.

305. *Id.* at 269.

306. *Id.* at 270.

307. 394 U.S. 618 (1969).

Brennan's opinion ruled that since the requirement restricted the fundamental right to travel, it had to be supported by a *compelling* governmental interest and none was present.³⁰⁸

Under Justice Brennan's *Shapiro* opinion, the test of mere rationality gives way, in cases involving fundamental rights, to one of strict scrutiny under which a challenged law will be ruled invalid unless justified by a "compelling" government interest. Since *Shapiro*, judicial review has taken place within a two-tier framework, with two principal modes of analysis: strict scrutiny and mere rationality. The tier in which legislation is placed all but determines the outcome of constitutional challenges. Legislation is virtually always upheld under the rationality test, since a law is almost never passed without any rational basis. The converse is true under the compelling-interest test; if a statute is subject to strict scrutiny, it is nearly always struck down.³⁰⁹

Justice Brennan's *Shapiro* approach has become established doctrine. It has been applied to a wide range of rights deemed fundamental: the rights guaranteed by the First Amendment,³¹⁰ the right to vote,³¹¹ the right to marry,³¹² and the right of women to control their own bodies, including the right to terminate pregnancies.³¹³

Roe v. Wade,³¹⁴ which upheld the last of these rights, was based directly upon Brennan's *Shapiro* approach. In striking down state abortion laws, the Court applied the compelling-interest test. "Where certain 'fundamental rights' are involved . . .," states the *Roe* opinion, "regulation limiting these rights may be justified only by a 'compelling state interest.'"³¹⁵ The state's determination to recognize prenatal life was held not to constitute a compelling state interest, at least during the first trimester of pregnancy.

One may doubt that *Roe v. Wade* would have been decided this way if the Brennan *Shapiro* opinion had not laid the doctrinal foundation. Had *Shapiro* confirmed the rational-basis test as the review standard even in cases involving fundamental rights, *Roe v. Wade* would have been deprived of its juristic base. One of the most controversial Court decisions might never have been made.

308. *Id.* at 634.

309. *See* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 319 (1976).

310. *See* Buckley v. Valeo, 424 U.S. 1, 93-94 (1976).

311. Bullock v. Carter, 405 U.S. 134 (1972).

312. Zablocki v. Redhail, 434 U.S. 374 (1978).

313. *Roe v. Wade*, 410 U.S. 113 (1973).

314. *Id.*

315. *Id.* at 155 (citations omitted).

One has only to list Justice Brennan's other important opinions³¹⁶ to realize his crucial role in recent constitutional jurisprudence. But the Brennan influence on our constitutional corpus extends far beyond his own opinions. His forte was leading the Justices to the decisions he favored, even at the cost of compromising his own position, as in the adoption of the intermediate-review standard in sex discrimination cases.³¹⁷ More than any Justice, Brennan was the strategist behind Supreme Court jurisprudence — the most active lobbyist (in the nonpejorative sense) in the Court, always willing to take the lead in trying to mold a majority for the decisions that he favored. "In case after case," Hutchinson writes about my Warren biography, "Schwartz documents . . . how Brennan would accommodate his own drafts and views in order to preserve an opinion of the Court that was tumbling toward a plurality or worse."³¹⁸

In particular, Hutchinson cites Justice Brennan's behind-the-scenes influence in securing constitutional recognition for the right of privacy in *Griswold v. Connecticut*:³¹⁹ "The most startling fact about the genesis of opinions that Schwartz catalogues is that Brennan, not Douglas, designed the spectral theory of *Griswold*, which Douglas, in a first draft, had tried to dispose of on the basis of freedom of association under the first amendment"³²⁰ Brennan wrote to Justice Douglas suggesting the privacy rationale, urging that a right of privacy would be inferred from the Bill of Rights' specific guarantees. Douglas followed the Brennan suggestion and the final *Griswold* opinion ruled that there is a constitutionally protected right of privacy.³²¹ Justice Brennan was also responsible for upholding affirmative-action programs in *Regents v. Bakke*,³²² the leading case on the subject. Justice Powell, whose vote provided the 5-4 majority, had decided to vote against affirmative-action programs. However, Brennan persuaded him to rule in his crucial opinion that, although the quota provisions in

316. See generally *Jencks v. United States*, 353 U.S. 657 (1957); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Fay v. Noia*, 371 U.S. 391 (1963); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Keyes v. Denver Sch. Dist.*, 413 U.S. 189 (1973); *Craig v. Boren*, 429 U.S. 190 (1976); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

317. *Craig v. Boren*, 429 U.S. 190 (1976). See BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* 67 (1988).

318. Hutchinson, *supra* note 291, at 929.

319. 381 U.S. 479 (1965).

320. Hutchinson, *supra* note 291, at 929.

321. See BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 237-38 (1985).

322. 458 U.S. 265 (1978).

the medical school admissions program before the Court were invalid, race could be considered as a factor in determining which students to admit.³²³ That ruling has enabled almost all affirmative-action programs to continue in operation.

Brennan's approach to law has been pervasively influential during the latter part of this century. Indeed, Brennan's jurisprudence helped make activism the dominant legal approach — both in the forum and the academy — during his judicial tenure. With Chief Justice Warren's retirement, many expected the Court to tilt away from its activist posture. If the Warren Court had made a legal revolution, a counter-revolution was seemingly at hand. It did not, however, turn out that way. If anything, the intended counter-revolution served only as a confirmation of most of the Warren Court jurisprudence.³²⁴ As one commentator puts it, "[T]he entire record of the [post-Warren] Court . . . is one of activism."³²⁵ The Warren concept of the Court as Platonic philosopher-king continued unabated under Brennan's leadership. Indeed, as Anthony Lewis summed it up, "We are all activists now."³²⁶

In the end, of course, the underlying question in jurisprudence comes down to how we resolve the antinomy in the already-stated aphorism: "[L]aw must be stable and yet it cannot stand still."³²⁷

During his confirmation hearings, Chief Justice Rehnquist was asked, "how can you not acknowledge that the Constitution is a living, breathing document?"³²⁸ Some years earlier, then-Justice Rehnquist delivered a lecture entitled *The Notion of a Living Constitution*.³²⁹ In it he indicated that the question of "whether he believed in a living Constitution" was similar to asking whether he was in favor of any

323. BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 96 (1988).

324. See BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* 401-04 (1990).

325. HERMAN SCHWARTZ, *Introduction to THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986*, at xx (H. Schwartz ed., 1987).

326. Anthony Lewis, *Foreward to THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* at ix (Vincent Blasi ed. 1983).

327. POUND, *supra* note 270.

328. *Nomination of Justice William H. Rehnquist to be Chief Justice of the United States: Report from the Committee on the Judiciary, United States Senate*, 99th Cong., 2d Sess. 354 (1986).

329. William J. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693 (1976) ("[R]evised text of the ninth annual Will E. Orgain Lecture, delivered at the University of Texas School of Law on March 12, 1976.").

other desirable thing. "At first blush," Rehnquist said, "it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution. It would seem that only a necrophile could disagree."³³⁰

Despite his flippant response, the question put to Rehnquist is a crucial one. Justice Brennan never had any doubt about the proper answer. A legal system created in an age of knee breeches and three-cornered hats can serve the needs of an entirely different day only because our law has recognized that it could not endure through the ages if its provisions were fixed as irrevocably as the laws of the Medes and Persians. The constantly evolving nature of constitutional jurisprudence has alone enabled our system to make the transition from the eighteenth to the twentieth century.

Justice Brennan is the outstanding example of a judge who has not taken stability alone as his legal polestar. Thus, he has been the leading opponent of the view that constitutional construction must be governed only by the original intention of the Framers. As explained by Brennan himself, "this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow their intention in resolving the case before them."³³¹ Throughout his tenure, Brennan rejected this "original intention" jurisprudence; to him, the meaning of the Constitution is to be found in today's needs, not in a search for what was intended by its eighteenth-century draftsmen.

To Justice Brennan, then, the outstanding feature of the Constitution is its plastic nature. The same is true of his general conception of law. Its rules and doctrines are also malleable and must be construed to meet the changing needs of different periods. The opinions already discussed show that he has succeeded in elevating his view to the level of accepted doctrine. They bear ample witness to his success in giving effect to the concept of a flexible law which is constantly being adapted to meet contemporary needs. Above all, the Brennan jurisprudence was based upon what he termed "the constitutional ideal of human dignity."³³² This ideal led him to his constant battle against the death penalty, which he considered a violation of the ban against cruel and unusual punishment. His battle to outlaw capital punishment was

330. *Id.*

331. WILLIAM J. BRENNAN, JR., in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 14 (1986).

332. *Id.* at 25.

a losing one for Brennan but it was the only major battle he lost in his effort to ensure what he said was "the ceaseless pursuit of the constitutional ideal."³³³ The ultimate Brennan legacy was that no important decision of the Warren Court was overruled while the Justice sat on the Burger and Rehnquist Courts.

B. *The Also-Rans — Justices on Other Lists*

I am, of course, not alone in my attempt to draw up a list of the greatest Justices. The most recent effort of this type is contained in *Great Justices of the U.S. Supreme Court*, published in 1993 by two political scientists.³³⁴ Their work was based upon a survey sent to scholars, lawyers, judges, and students. The list of great Justices, according to a combined list of all the respondents surveyed, contains four names not included in my list: Benjamin N. Cardozo, Felix Frankfurter, William O. Douglas, and William H. Rehnquist.³³⁵

Why were these four not included in my list of Supreme Court all-stars?

1. Benjamin N. Cardozo

Cardozo was on my earlier list of the ten greatest American judges and well deserved his place there.³³⁶ Indeed, Cardozo's is one of the truly great names in our law. He was the outstanding common-law jurist of the twentieth century; according to Arthur Goodhart, he will always "be regarded as the great interpreter of the common law."³³⁷ Cardozo led the way in adapting the common law to the requirements of the post-industrial society. Cardozo showed how the common law could be freed to serve present needs — how the judge could be truly innovative while remaining true to the experience of the past. By doing so, he moved the law closer to the goal of making the law an effective instrument of social welfare.

333. *Id.*

334. PEDERSON & PROVIZER, *supra* note 2.

335. *Id.* at 18. For an earlier list based upon a poll of professors, see ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 37 (1978). Professor Mersky has brought this list up to date with a more recent poll. His new list of Supreme Court greats: John Marshall; Oliver W. Holmes; Louis D. Brandeis; Joseph Story; Earl Warren; Hugo L. Black; William J. Brennan; John M. Harlan I; Charles E. Hughes. Letter from Roy M. Mersky to author, April 20, 1995 (with enclosed list).

336. Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 S. ILL. U. L.J. 405, 407 (1979).

337. ARTHUR L. GOODHART, *FIVE JEWISH LAWYERS OF THE COMMON LAW* 55 (1949).

All the same, the Cardozo place in American jurisprudence is not based upon his service on the Supreme Court. Cardozo's judicial contribution was made on the New York court, where he spent fifteen years, most of his judicial career. During the Cardozo years, that court was recognized as the strongest in the country, and its judgments had a decisive influence on American law. Cardozo was then, as Laski wrote to Holmes, "quite *hors concours* among state judges — the best, I should guess since you were on the Massachusetts Court."³³⁸ Cardozo, however, was able to serve on the U.S. Supreme Court only six years — scarcely long enough for him to make the substantial contribution to its jurisprudence that his judicial ability warranted.

2. Felix Frankfurter

Few members of the Supreme Court have been of greater interest both to the public and to Court specialists than Felix Frankfurter. In large measure, that has been true because his career has posed something of a puzzle. Before his appointment to the bench, he was known for his interest in libertarian causes and it was generally expected that, once on the Court, he would continue along a liberal path. Yet, if one thing is certain, it is that it is risky to try to predict how new appointees will behave after they don the robe. Frankfurter seemed an altogether different man as a Justice than he had been before taking his seat on the bench. From academic eminence behind the New Deal to leader of the conservative Court cabal — that was the way press and public tended to tag Justice Frankfurter.

News of the Frankfurter Court appointment led to a champagne celebration in Harold Ickes' Department of the Interior office, attended by leading New Deal liberals. "We were all very happy," Ickes wrote, "there will be on the bench of the Supreme Court a group of liberals under aggressive, forthright, and intelligent leadership."³³⁹

It did not turn out that way. There would be a cohesive liberal majority on the Court, but it would not be led by Justice Frankfurter.³⁴⁰ Instead, Frankfurter's judicial rivals, Justice Black and later Chief Justice Warren, assumed the liberal leadership. Frankfurter became the leader of the Court's conservative core, particularly during the Vinson and early Warren years.

338. 2 HOLMES-LASKI LETTERS, *supra* note 153, at 1202-03.

339. SIMON, *supra* note 249, at 64.

340. *Id.* at 64-65.

On the Court, Justice Frankfurter's unfailing adherence to judicial restraint appeared increasingly anomalous. In an era of encroaching public power, the deference doctrine did not provide enough protection for personal liberties. What George Orwell called the "[m]achine, the genie that man has thoughtlessly let out of its bottle and cannot put back again,"³⁴¹ had created new concentrations of power, particularly in government, which dwarfed the individual and threatened individuality as never before. Judicial restraint no longer appeared adequate to ensure the "Blessings of Liberty" in a world that had seen so clearly the consequences of their denial. It had become a brake upon the judicial ability to protect personal rights.

No matter how Justice Frankfurter tried to clothe his opinions with the Holmes mantle, there was an element of shabbiness in his results in too many cases. For example, after Frankfurter delivered his opinion upholding a compulsory flag salute,³⁴² he was talking about the opinion over cocktails at the Roosevelt home in Hyde Park. In her impulsive way, Mrs. Eleanor Roosevelt declared that, notwithstanding the Justice's learning and legal skills, there was "something wrong with an opinion . . . that forced little children to salute a flag when such a ceremony was repugnant to their conscience."³⁴³ To critics, there was only hypocrisy in Frankfurter's constant insistence that he could not reach judgments on the bench which he would readily have favored as a private citizen.

With all his intellect and legal talents, Frankfurter's judicial career remained a lost opportunity. As far as the law was concerned, he may well have had more influence as a professor than as a Supreme Court Justice.³⁴⁴ There is no doubt that Frankfurter expected to be the intellectual leader of the Court, as he had been of the Harvard law faculty. As it happened, that leadership role was performed first by Justice Black, and then by Chief Justice Warren.

341. THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 75 (1968).

342. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *rev'd*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

343. MAX FREEDMAN, *ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945*, at 701 (1967).

344. See JOSEPH P. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 87 (1975) ("[T]here are Frankfurter admirers who believe that Frankfurter's influence on constitutional law was greater before he went onto the bench than after . . .").

3. William O. Douglas

Justice Douglas' place on other lists is a reflection less of his contribution as a member of the Court than of his public image as a potential President and world traveler. To outside observers, Douglas seemed to personify the last frontier — the down-to-earth Westerner whose granite-hewed physique always seemed out of place in Parnassus. Moreover, Douglas was the Court's Horatio Alger, whose early life was a struggle against polio and poverty. Told that he would never walk, he became a noted sportsman. After riding east on a freight car to enroll at Columbia Law School, with six cents in his pocket, he became an eminent law professor, chairman of the Securities and Exchange Commission, and at the age of forty a Supreme Court Justice.³⁴⁵

However, the real Douglas was different from his public image. Douglas was the quintessential loner, and he personified the lover of humanity who did not like people. Throughout his tenure on the Supreme Court, no one among the Justices or the law clerks was really close to the strapping Westerner. On the bench, as in his personal life, Justice Douglas was a maverick, who went his own way regardless of how others felt. Douglas would stick to his own views, quick to state his own way of deciding in concurrence or dissent. It made little difference whether he carried a majority or stood alone. He would rarely stoop to lobbying for his position and seemed more interested in making his own stand public than in working to get it accepted. As one law clerk put it, "Douglas was just as happy signing a one-man dissent as picking up four more votes."³⁴⁶

There is no doubt that Justice Douglas had a brilliant mind, but he was erratic. He could whip up opinions faster than any of the others. In fact, he wrote both the majority and dissenting opinions in one case. (Justice Whittaker, who had been assigned the Court opinion, was unable to write it; Douglas sent him a draft within an hour after learning this).³⁴⁷ But his opinions were too often unpolished, as though he lacked interest in the sustained work required to transform first drafts into finished products. Lack of interest in the Court's work was, indeed, apparent in Douglas' very attitude as a judge. Though

345. For a detailed biography of Justice Douglas, see generally JAMES F. SIMON, *INDEPENDENT JOURNEY* (1980).

346. SCHWARTZ, *supra* note 250, at 51.

347. WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975*, at 173-74 (1980). The case was *Meyer v. United States*, 364 U.S. 410 (1960).

Chief Justice Warren came to appreciate Douglas' supporting votes for his own positions, he always felt that the peripatetic Justice spent too much time writing books and doing other things that were unrelated to his Court duties.

As it turned out, one commentator concludes, "Douglas's many publicized outside activities . . . overshadowed his judicial work."³⁴⁸ His most important opinions followed Justice Black's lead.³⁴⁹ With all his potential, he made little significant contribution to jurisprudence; in Supreme Court history, he is now remembered primarily as the Black auxiliary among the Justices.

4. William H. Rehnquist

As mentioned above, Chief Justice Rehnquist also appears on the Pederson and Provizer list of great Justices that was created by combining the 1990 survey results from all four groups of participants. In addition, he is included in the lists compiled from the responses of the attorneys and students surveyed.³⁵⁰ The "inclusion of Chief Justice Rehnquist," says the introductory commentary of the 1993 book in which the list is published, "marks the first appearance of one of the current members of the Supreme Court on a list of great justices."³⁵¹

It is true that Chief Justice Rehnquist has been a more effective Court head than his predecessor. Nevertheless, elevation of the present Chief Justice to the list of Supreme Court greats appears unwarranted. That is true not because of disagreement with his extreme conservative posture (after all, Justice Field's even more conservative views did not bar him), but because the Rehnquist contribution to constitutional jurisprudence does not begin to bear comparison with those of the Justices on my list.

To be sure, Chief Justice Rehnquist has led the Court's recent tilt toward the right. He has not, all the same, been able to carry out the goals he had at the time of his appointment. There is no doubt that Rehnquist came to the Court with an agenda that included some dismantling of the jurisprudential structure erected by the Warren Court. Justice Rehnquist took his seat with a "desire to correct some of the 'excesses' of the . . . Warren Court"³⁵² — to see, as he put it, that the

348. SIMON, *supra* note 249, at 191.

349. *Id.*

350. PEDERSON & PROVIZER, *supra* note 2, at 16-17.

351. *Id.* at 17.

352. Stuart Taylor, Jr., *A Pair of Rehnquist Opinions Set Legal Experts Buzzing*, N.Y. TIMES, Feb. 28, 1988, §4, at 1.

“Court has called a halt to a number of the sweeping rulings that were made in the days of the Warren Court.”³⁵³

Rehnquist’s agenda was not carried out either in the Burger or Rehnquist years. Instead, the intended counter-revolution served only as a confirmation of most of the Warren Court jurisprudence. Indeed, as already noted, no important Warren Court decision was overruled during the Burger and Rehnquist tenures.

We can see this even in the field of criminal justice, where Rehnquist was most eager to disown the Warren heritage — in Rehnquist’s phrase, to make “the law dealing with the constitutional rights of accused criminal defendants . . . more even-handed now than it was when I came on the Court.”³⁵⁴ The celebrated Warren trilogy — *Gideon*, *Mapp*, and *Miranda*³⁵⁵ — has been consistently followed by both the Burger and Rehnquist Courts.

When he was elevated to the Court’s center chair, Chief Justice Rehnquist indicated that he had even more ambitious goals. As a law clerk, Rehnquist had written a memo on the *Brown* case³⁵⁶ urging that the separate-but-equal doctrine was “right and should be affirmed.”³⁵⁷ Just before he became Court head, Justice Rehnquist stated in a *New York Times* interview that his views had changed and that he accepted *Brown* as the law of the land.³⁵⁸ His votes in cases involving civil rights, however, clearly place him in the right wing of the Court on civil rights issues.

What is not known generally outside the Marble Palace is that Chief Justice Rehnquist has urged even more extreme views on civil rights than have appeared in his published opinions. In *Patterson v. McLean Credit Union*,³⁵⁹ the Court heard argument on “[w]hether or not the interpretation of 42 U.S.C § 1981 adopted by this Court in *Runyon v. McCrary*³⁶⁰ . . . should be reconsidered.”³⁶¹ At the post-argument conference, Chief Justice Rehnquist declared that *Runyon*

353. John A. Jenkins, *The Partisan*, N.Y. TIMES, March 3, 1985, §6 (magazine), at 28, 35.

354. *Id.* at 34, 35.

355. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966).

356. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

357. SCHWARTZ, *supra* note 321, at 29.

358. Jenkins, *supra* note 353, at 32.

359. 491 U.S. 164 (1989).

360. 427 U.S. 160 (1976).

361. *Patterson*, 491 U.S. at 171 (quoting *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988)).

was wrong and that Justice White was correct in his dissent in that case. Therefore, he urged, the Court should overrule *Runyon*.

The Chief Justice did not, however, stop with his recommendation to overrule *Runyon*. He also told the *Patterson* conference that the Court should overrule *Jones v. Alfred H. Mayer Co.*³⁶² as well.³⁶³ Rehnquist's position in this respect was not a new one, though it was unknown outside the Court. The Chief Justice had written an April 7, 1987, letter to Justice White on a 1987 case involving section 1981 in which he stated, "I once again question the soundness of our opinion in *Jones v. Alfred H. Mayer Co.*, . . . which held that this class was protected not merely against state action but against action by other private individuals."³⁶⁴

The Rehnquist attempt to overrule the two leading civil-rights decisions failed. *Jones v. Alfred H. Mayer Co.* was not questioned in any published opinion and, in *Patterson v. McLean Credit Union*, the Court expressly refused to overrule *Runyon v. McCrary*. In *Patterson*, even the Justices who agreed with Rehnquist's view that *Runyon* had been wrongly decided refused to go along with the Chief Justice and overrule that case.

Another Rehnquist *bête noire* has been *Roe v. Wade*,³⁶⁵ where he was one of the two dissenters. In *Webster v. Reproductive Health Services*,³⁶⁶ the Chief Justice actually circulated a draft opinion of the Court that would have relegated *Roe* to virtual constitutional limbo.³⁶⁷ However, the Rehnquist *Webster* opinion lost its majority when Justice O'Connor refused to join and the Chief Justice had to issue it only as a plurality opinion. Since then, though the Chief Justice has dissented in cases following *Roe*, he has not succeeded in securing a Court to follow him in overruling *Roe*. At present writing, indeed, that case remains as secure in Supreme Court jurisprudence as it has ever been.

A Chief Justice who cannot persuade a Court to give effect to his judicial agenda can scarcely be considered a great Chief Justice. For, as we shall now see, influence upon the law is perhaps the primary criterion that elevates a Justice to the judicial pantheon.

362. 392 U.S. 409 (1968).

363. BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE REHNQUIST COURT* 198 (1996).

364. Letter from Chief Justice William H. Rehnquist to Justice Byron White, United States Supreme Court (Apr. 7, 1987) (on file with the *Tulsa Law Journal*).

365. 410 U.S. 113 (1973).

366. 492 U.S. 490 (1989).

367. Reprinted in SCHWARTZ, *supra* note 363, at 266-88.

III. GREATNESS AND INFLUENCE

The Pederson and Provizer survey of Great Justices also lists the criteria used by those responding to the survey to establish a Justice as "great." These are summarized as follows:

While writing and intellectual ability seem to be common criteria for the different groups, protection of individual rights is a criterion used frequently by only two of the groups, attorneys and students. Similarly, leadership appears to be a concern for two of the groups, judges and scholars, while not getting much attention from either attorneys or students.³⁶⁸

To me, however, Supreme Court greatness is virtually synonymous with influence on the law. This results in the virtual elimination of Justices, outstanding though they may have been as judges, who did not serve long enough on the Court to have a substantial impact on its jurisprudence. I have already given the example of Justice Cardozo, who was one of the greatest judges in our history, but whose high-bench tenure was too brief for him to make the contribution on the Court that his ability warranted.

An equally pertinent example is to be found in Justice Benjamin R. Curtis' Court career. Curtis served only six years as a Justice; yet, even in that brief period, he made major contributions to both the law and the country. It was Justice Curtis who wrote the now-classic dissent in the *Dred Scott* case,³⁶⁹ showing definitively the errors in that baneful decision. To the Court specialist, the Curtis opinion in the *Cooley* case³⁷⁰ was just as important. It not only resolved one of the most important issues presented to the early Court (that of the proper scope of concurrent state power over commerce); it also first stated a new balancing approach that foreshadowed modern constitutional jurisprudence. "No one," says Justice Frankfurter, "can have seriously studied the United States Reports and not have felt the impact of Curtis' qualities — short as was the term of his office."³⁷¹ Yet the fact remains that Curtis' tenure was too brief to enable him to realize his full potential as an outstanding Supreme Court Justice.

All the Justices on my list served on the Court long enough to enable them to make their major contributions. The shortest term among them was that of Chief Justice Hughes. Yet even he served for

368. PEDERSON & PROVIZER, *supra* note 2, at 22.

369. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

370. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

371. 2 FRIEDMAN & ISRAEL, *supra* note 215, at 905.

eleven years (almost twice the tenures of Justices Curtis and Cardozo) and, more important, he led the Court during the crucial 1937 revolution in constitutional law.

There is truth in Holmes' observation that Marshall's "greatness consists in his being there"³⁷² — that he sat in the Court's center chair when our public law was being formed. Certainly, Chief Justice Hughes, too, was *there* at a crucial juncture in Supreme Court history. But the greatness of a Chief Justice such as Hughes consists in more than his being *there*. If Chief Justice Taft, Hughes' predecessor, had continued to preside over the Court, it is doubtful that the 1937 constitutional revolution would have occurred. Hughes was not only *there*, but he also seized the opportunity to lead the Court to its recognition that the pre-1937 jurisprudence "rested on fundamentally false . . . assumptions" and that that recognition "warranted the repudiation of the old law."³⁷³

The same is true of Chief Justice Warren's great accomplishment in securing the *Brown* decision. Chief Justice Vinson, Warren's predecessor, was also *there* for *Brown*,³⁷⁴ for he was the Court head when *Brown* came to the Court. However, had he been able to preside during the entire *Brown* decision process, the result would have been a fragmented decision and one that might well have reaffirmed *Plessy v. Ferguson*.³⁷⁵ It was Chief Justice Warren's leadership that produced the unanimous decision striking down segregation. And it was also Warren who was the catalyst for this century's second revolution in constitutional jurisprudence. If Vinson or one of the other candidates considered by President Eisenhower had headed the Court during the Warren years, that person would have been *there*, but the constitutional corpus would have been very different from that produced during Warren's tenure.

In my view, then, it all comes down to influence upon the law. The Justices on my list are there because each changed the course of Supreme Court jurisprudence. Marshall laid the foundation for both our public law and the Supreme Court's role as the fulcrum of the constitutional system. Story led the early movement to adjust the common law to the needs of the new nation. Taney led his Court in molding the Marshall constitutional edifice to recognize both public

372. LERNER, *supra* note 146, at 385.

373. *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2812 (1992).

374. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

375. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

power and burgeoning corporate expansion. Field shifted the emphasis to private rights and in the process shielded business from regulatory power. Holmes set the theme for twentieth-century law and recognized the need to adapt it to the "felt necessities of the time."³⁷⁶ Brandeis laid the juristic foundation for the Welfare State and in the process developed a new method for deciding cases. Hughes led the Court in repudiating Field's jurisprudence and upholding broad governmental power. Black tilted the constitutional balance toward protection of personal rights. Warren led a new activism that has made the Court the vital center of the constitutional system. Finally, Brennan ensured that "[w]e are all activists now"³⁷⁷ and that his concept of a "living Constitution" would dominate contemporary jurisprudence.

No other Justices in Court history have had an influence upon the law comparable to these ten. All of them employed their authority to mold constitutional jurisprudence to meet what they deemed the needs of the nation during their judicial tenure. All were activists who did not hesitate to use the power of the highest bench to adapt the law to the time's necessities. Not all of them were masters of the common law or consummate judicial craftsmen. But all employed the authority of the ermine to the utmost. This, in the end, is what made them great. More than any other Justices, they seized the occasion to alter constitutional jurisprudence with their transforming touch.

376. HOLMES, *supra* note 23.

377. Lewis, *supra* note 326, at ix.

