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## Catching the Jurisprudential Wave: Bernard Schwartz's Main Currents in American Legal Thought

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# TULSA LAW JOURNAL

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## REVIEW ESSAY

### **CATCHING THE JURISPRUDENTIAL WAVE: BERNARD SCHWARTZ'S MAIN CURRENTS IN AMERICAN LEGAL THOUGHT**

The Honorable Robert H. Henry†

MAIN CURRENTS IN AMERICAN LEGAL THOUGHT. By Bernard Schwartz††. Durham, NC: Carolina Academic Press. 1993. 660pp.

*[Parrington] failed to see that the history of political ideas too, even when we look for its total pattern, is composed of particularities; that to discern its drift, no matter how broad, is a task which requires, as good criticism does, a certain delicacy of touch.<sup>1</sup>*

—Richard Hofstadter

*There are signs all about us, in both literary criticism and historical scholarship, of increasing dissatisfaction—with dry and lifeless monographs that cautiously explore narrower and even narrower topics; with cumbersome and too-careful prose that has no ring to it; with technically demanding and esoteric approaches that have created a divorce, in both disciplines, between practitioners and the intelligent reading public. Read-*

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1. RICHARD HOFSTADTER, *THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON* 315 (1968).

*ers and scholars of the rising generation may not follow Parrington's particular judgments or point of view, but it is hard to believe that they will not still be attracted, captivated, and inspired by his sparkle, his breadth, his daring, the ardor of his political commitment.<sup>2</sup>*

—David W. Levy

## I. INTRODUCTION

Several months ago as I was about to speak at the University of Tulsa College of Law Burger Court Symposium, a thought occurred as I looked out over an audience that included some of the great legal scholars of our era. Their presence and the conference's important topics caused me to term Tulsa the jurisprudential epicenter of America that day. I also noted—paraphrasing John F. Kennedy's famous remark about Jefferson,<sup>3</sup> made to the Nobel laureates assembled at the White House—that “Never has so much Supreme Court knowledge been gathered together at Tulsa since the last time Bernard Schwartz lectured alone.” I was thinking primarily, I admit, of what is, to me at least, Professor Schwartz's *magnum opus*, *Main Currents in American Legal Thought*. Despite its size, 660 pages, this hefty tome is a remarkably terse compendium of America's greatest gift to the world of ideas—her constitutional jurisprudence. After all, it was the great de Tocqueville who noted, in perhaps the kindest series of observations from a French source about anything non-French,<sup>4</sup> that

the principles on which the American constitutions rest, those principles of order, of balance of powers, of true liberty, of deep and sincere respect for right, are indispensable to all republics; they ought to be common to all; and it may be said beforehand that wherever they are not found, the republic will soon have ceased to exist.<sup>5</sup>

It was appropriate to recall the JFK quote. It is also in *Main Currents*, though I had forgotten that at the time. And a few other things are also in that book, which takes us from the Virginia Charter of 1606 to Centesimus Anus of 1991, from the Writs of Assistance Case of 1761<sup>6</sup> to *Texas v. Johnson*<sup>7</sup> of 1990, from the trial of Captain Thomas Preston of Boston Massacre fame in 1770 to the trials of Rumpole; from a fragmented union to a fragmented jurisprudence. Along the journey we hear from St. Thomas Aquinas and Hannah

2. David W. Levy, *Foreword* to 1 VERNON PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* at xii (1987).

3. “I think this is the most extraordinary collection of talent, of human knowledge, that has been gathered together at the White House, with the possible exception of when Thomas Jefferson dined alone.” JOHN BARTLETT, *FAMILIAR QUOTATIONS* 891 (15th ed. 1980).

4. If not the kindest French observation, “[i]t is perhaps, the greatest work ever written on one country by the citizen of another.” Harold J. Laski, *Quoted on the book cover* of 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed., 1985) (1835).

5. *Id.* at cvii.

6. The 1761 Writs of Assistance case in colonial Massachusetts was not reported. See M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* 231 (1978).

7. 491 U.S. 397 (1990).

Arendt; from Francis Bacon and Saint Benedict; from Heraclitus, Huxley, Queen Mary and Prophet Micah; from Richard the Lion-hearted, and Dick the Butcher. This fascinating *vade mecum*—to use one of the Professor's terms—is indeed that, a handbook for ready reference that would grace any working legal library at home or at the academy.

## II. A COMPLETED OVAL

It is ironically appropriate that Professor Schwartz would come to Oklahoma to publish this book. *Main Currents* is, of course, admittedly based on another *Main Currents*, Vernon Parrington's Pulitzer Prize winning *Main Currents in American Thought*, published in 1927. Parrington's work achieved immediate and "very nearly unanimous acclaim"<sup>8</sup> upon its publication, and as late as 1952 a survey of one hundred prominent American historians revealed that *Main Currents* received more votes as a "preferred" work than any other publication, with only Frederick Jackson Turner's *The Frontier in American History*, in second place, being close.<sup>9</sup>

Although, at least in relatively modern times, American readers have gone for multi-volume books on weighty subjects (Will and Ariel Durant's contributions, Mortimer Adler's opera, Copleston's philosophic history, Barclay's theological commentaries) Parrington's contribution was to reduce to three volumes a summation of American thought. Inevitably, some eddies are lost in the channeling, but the wider access the work provides, coupled with the revelation of the relationship between the currents examined, compensates for the loss of detail. Parrington garnered a Pulitzer for his work, though he did not live long to enjoy it; Schwartz has more words in print and a more secure intellectual background than his predecessor, but he nevertheless may have a more limited audience for this work. A general approach, condensing a vast body of history into an imminently readable work may not be nuanced enough, or meta-theoretical enough, to please the Academy; rank and file members of the bar, who sometimes seem uninterested in modern legal theory, may have no interest at all in a chronicle of the past, even one as well written and important as this. I hope to encourage both audiences to give this work a closer look. But before I discuss Schwartz's *Currents*, irony and history suggest a bit of talk about Parrington.

## III. VERNON PARRINGTON

As one historian has observed of Vernon Parrington, there was "an unusually large gap between the prestige of the critics who welcomed [*Main Cur-*

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8. Levy, *supra* note 2, at vii.

9. John Walton Caughey, *Historian's Choice: Results of a Poll on Recently Published History and Biography*, THE MISSISSIPPI VALLEY HISTORICAL REVIEW, Sept. 1952, at 289, 299.

rents] and the obscurity of the author who had produced them.”<sup>10</sup> Educated first at the Presbyterian College of Emporia in Kansas, his father, a probate judge, sent him to Harvard where he spent largely unhappy days reading in the library. Graduating from the “college yard” he headed straight home to Emporia, teaching at his alma mater until President David Ross Boyd of the six year old University of Oklahoma hired him to teach at the new “campus”—one building on a treeless plain—in Norman.

Parrington was hired, in a convention not often seen those days, as a professor of English and as the football coach. “Always a masterful and popular instructor, Parrington taught a bewildering variety of courses—although, curiously, never a single one in American literature.”<sup>11</sup> Limited, as one scholar has somewhat unkindly observed, by the nearly impossible task of “talking of the Elizabethans to students whose mastery of English was but a generation,”<sup>12</sup> Parrington turned in “this cultural wasteland”<sup>13</sup> to putting prose on paper. The beginnings of *Main Currents* can be found among his later Norman papers.

Despite the fact that Parrington was a charming professor—gifted, capable, idolized by his students—he was caught in a political conflagration. He was fired in what Richard Hofstadter termed “one of the most scandalous episodes in American academic history.”<sup>14</sup> Possibly sparked by his occasional igniting of a cigarette,<sup>15</sup> Parrington was dismissed over a battle between Bryan Democrats who had just assumed command of the new state and their rabidly conservative Southern Methodist allies on one side and Republican college President David Ross Boyd and a few beleaguered voices of academic freedom on the other. Boyd, Parrington, and seven other faculty members were terminated in a 1909 puritanical purge.

Parrington’s elegant dress and comportment belied his progressive and populist leanings that the Bryan Democrats should have admired. (Indeed, he had once suggested that “the chief contribution of the Progressive movement to American political thought was its discovery of the essentially undemocratic nature of the federal constitution.”)<sup>16</sup> But it was his inspired teaching and immense popularity with the students that earned him the enmity of the Reverend Nathaniel Linebaugh, the Southern Methodist minister who was convinced that the University was “Godless,” with a faculty engaging in “public and indiscrim-

10. Levy, *supra* note 2, at vii.

11. *Id.* at viii.

12. H. LARK HALL, V.L. PARRINGTON: THROUGH THE AVENUE OF ART 140 (1994).

13. *Id.*

14. Levy, *supra* note 2, at viii.

15. Though HOFSTADTER, *supra* note 1, at 373, suggests that cigarette smoking might have been a contributing cause, Professory Levy tells me that other smokers were not discharged.

16. RICHARD HOFSTADTER, *THE AGE OF REFORM* 199 (1955). William Jennings Bryan, in many ways the architect of the state constitution of Oklahoma, had termed the ponderous document, loaded with direct democracy features, “better than the Constitution of the United States.” Bryan Democrats believed that the answer to the problems of democracy was more democracy. Their Oklahoma Constitution has been universally hailed as a bad example; it has been amended, in less than a century, over 190 times. *See generally*, Robert H. Henry, *The Oklahoma Constitutional Review Commission: A Call to Arms or the Sounding of Retreat?*, 17 OKLA. CITY U. L. REV. 177 (1992).

inate dance and card parties.”<sup>17</sup> In a letter to the good Reverend, Parrington had made his case:

[O]fficially I am a teacher of English literature, but in reality my business in life is to wage war on the crude and selfish materialism that is biting so deeply into our national life and character, and I do it by teaching whom-ever I can lay hands on that the worship of materialism can never make a people either noble or great, but that if we hope to become men we had better study to learn what things produce manhood. Whatever gifts are mine are devoted to teaching the need of a high civic and personal morality: and I mean by morality that integrity of purpose that keeps one upright and just and honorable, and that endeavors to enlarge the realm of sanity and justice and honor in this world.<sup>18</sup>

Despite his appeal to justice and honor, Parrington was dishonorably discharged. He retreated, or advanced, to the University of Washington, and rewarded his new academic home with the publication of his *Main Currents*. President Boyd's successor, the dignified Arthur Grant Evans, served with less controversy, if less distinction, than Boyd. As of this date, Boyd has been honored by having the University's most distinguished professorships named after him; Evans got the beautiful Administration Building, now Evans Hall. Parrington got an oval—but it is now a nice one, especially since it has been graced by an Alan Houser statue, as well as the seated figure of Oklahoma University President George Lynn Cross whose most important *bon mot* was his explanation to the legislature of his desire to build a university of which the football team could be proud.<sup>19</sup>

#### IV. BETTER DAYS

Now the cycle has perhaps been completed. While Parrington was exported for doing good work, Schwartz has been imported to do the same. Since 1992, when Professor Schwartz first came to the University of Tulsa, he has published about a dozen books, including, in a tribute perhaps to the times and to David Letterman, *A Book of Legal Lists*, and, in an acknowledgment of earlier times, an analysis of *Bolling v. Bolling*,<sup>20</sup> the important pre-revolutionary case that pitted a young but talented Thomas Jefferson, against his mentor, and the foremost lawyer of the day, George Wythe (Jefferson probably won).<sup>21</sup>

I use Professor Schwartz's work frequently. I have consulted his constitutional law books for quick reference, and his books about the Warren and Bur-

17. David W. Levy, *Combating the Image of "Godlessness" in 1909*, SOONER MAGAZINE, Spring 1986, at 28. Cigarette smoking, instead of the more dignified cigars, also evidently promoted the decline of civilization. See HALL, *supra* note 12, at 148.

18. HALL, *supra* note 12, at 149.

19. Perhaps Parrington was partially responsible for this legacy. During his tenure as football coach he introduced some innovations from the East, resulting in a four year record of 9 wins, 2 losses and one tie. See, GEORGE LYNN CROSS, PRESIDENTS CAN'T PUNT 3 (1977).

20. *Bolling v. Bolling* was not reported.

21. See generally BERNARD SCHWARTZ, THOMAS JEFFERSON AND BOLLING V. BOLLING (1997) (reprinting Jefferson's manuscripts detailing arguments made by counsel in *Bolling*).

ger Courts are responsible for any holistic understanding I might possess of those important Courts. But *Main Currents* is *sui juris* for me, and not because I have cited it in an opinion, but because it is the best terse summary of American Jurisprudence with which I am familiar. It is also—as we say these days—a good read.

It takes considerable verve to evaluate Professor Schwartz on his home grounds—particularly because he has so many of them (constitutional law, administrative law, American legal thought, the Academy in general and the University of Tulsa in particular). But I want to discuss some of the highlights of his book, and explain why I think it is so important. I will venture to make a few of the obligatory criticisms as well—although it is apparent that I am more an advocate than an adversary.

#### V. A LIBERAL APPROACH?

Herbert Mitgang, reviewing *Main Currents* for the *New York Times*, called it a

bracing work of scholarship that could inspire readers to think about the nature of the right-of-center decisions of the Supreme Court of the United States today compared with the rulings by the great liberal justices of the recent past. The author leaves the clear impression that the liberals on the bench were much closer to the hearts and minds of the framers of the Constitution than are Chief Justice William H. Rehnquist and the majority of his colleagues.<sup>22</sup>

Although I concur in Mr. Mitgang's *result*, agreeing with the favorable review, I disagree with the reasoning (thus I am compelled to write separately!). In fact, the review is at odds with itself, as a careful consideration of what is perhaps Schwartz's *main* current—that of instrumentalism—would reveal.

While Parrington described his own point of view as “liberal rather than conservative, Jeffersonian rather than Federalistic,”<sup>23</sup> and Mr. Mitgang describes Schwartz's approach as “an even more intense Jeffersonian approach,”<sup>24</sup> the appeal to Jefferson as an icon of liberalism breaks down—if by liberalism one means what Professor Schwartz describes—and favors—as Constitutional instrumentalism.

Instrumentalism sees the law as “a tool to further ambition and energy; its job to furnish the legal tools needed for effective mobilization of society's resources.”<sup>25</sup> To Alexander Hamilton, the key Federalist and a dedicated political opponent of Thomas Jefferson, the law was a means to an end; Hamilton rejected strict construction of even the Constitution when it got in the way of desired practical results. Jefferson, though also an instrumentalist in many ways,

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22. Herbert Mitgang, *The Constitution: Is It Organic or Cast in Stone?*, N.Y. TIMES, July 7, 1993, at C1.

23. *Id.*

24. *Id.*

25. BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 31 (1993).

did not agree with such "liberal" constructions of the Constitution. This constitutional instrumentalism was the subject of the last great battle between these two American titans.

The legally self-educated Hamilton was one of the leading attorneys of the New York Bar (indeed, his bar study notes served as the first treatise on procedure in New York). But his brilliant career as a practicing attorney was eclipsed by his career as a legal statesman. And although Hamilton's initial desire to create something approaching a monarchy<sup>26</sup> with his close friend General Washington crowned as "his high Mightiness," failed, his contribution to American Law was regal in its own right.

Hamilton's two great judicial successes, in which he played, shall we say, an instrumental role, were the doctrine of *judicial review*, established by *Marbury v. Madison*,<sup>27</sup> and the doctrine of *implied powers*, established by *McCulloch v. Maryland*.<sup>28</sup> As the leading Federalist of his day, Hamilton's strong efforts on behalf of the Constitution are well known. A co-author of the enormously influential *Federalist Papers* (he wrote about two-thirds of them), he might have been expected to seek a political career and further advance his goals of a strong central government in the legislative or executive branch. But it was Hamilton the author, not the statesman, who first made an effective case for judicial review. His essay, *The Federalist No. 78*, virtually created the doctrine and, as Schwartz says, "stands, indeed, as the classic pre-John Marshall statement on the subject. American constitutional law has never been the same since it was published."<sup>29</sup>

Hamilton's argument for giving this power to the judiciary for the first time in history was theoretically brilliant and tactically sound. He based the concept on this foundation: the grant of power to the Constitution from the people was limited. The people retained most of the powers of government, especially with respect to the legislature. The colonists had seen what Parliament, the British legislature, could do to them. They enshrined in the Constitution several things that Congress, the American legislature, could not do—bills of attainder, ex post facto laws—more would come later in the Bill of Rights. The only way, Hamilton argued, to control the legislative branch—to prevent the parliamentary evils the colonists had just freed themselves from—was to

26. Perhaps Hamilton is unduly criticized for his June 18th speech at the Constitutional Convention. Catherine Drinker Bowen gives a balanced view in her classic, *Miracle at Philadelphia*. She summarizes: Alexander Hamilton was to pay a price for his speech of June eighteenth; for the rest of his life it would rise to harass him. When the moment came his enemies made much of it. They said the Constitution had "an awful squinting towards monarchy," and that Hamilton wanted an American king. Hamilton denied it, declared that what he said that day had been compounded of "propositions made without due reflection," then denied even that he had advocated a President with life tenure. Such a denial, Madison wrote blandly from Virginia, was due "to a want of recollection."

CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 115 (1986). Although some have suggested that Hamilton's speech was merely a tactic to move the convention toward a more powerful centralized government and away from the splintered confederation that existed, it seems that his want of recollection confirms that he did indeed go too far.

27. 5 U.S. (1 Cranch) 137 (1803).

28. 17 U.S. (4 Wheat.) 316 (1819).

29. SCHWARTZ, *supra* note 25, at 27.



give the courts of justice the power to declare as *void* acts that conflicted with these express limitations.

Not until 1803 did Jefferson's distant kinsman and arch political foe John Marshall translate Hamilton's essay into judicial prose. The victory came at a relatively small price—a Federalist spear-carrier did not get a patronage position. But the Federalists' idea of a strong central government was advanced by the only branch of government they controlled—the Supreme Court—getting to say what the law finally was. The victory was clearly Hamilton's. As Professor Schwartz concludes, "The *Marbury* opinion can, indeed, be read as more or less a gloss upon *The Federalist*, No. 78."<sup>30</sup>

The Sage of Monticello had actually once supported judicial review: Recall that Jefferson's distrust of centralized power had led him to oppose the Constitution as drafted because it did not adequately protect individual rights. While in France as the American ambassador succeeding Benjamin Franklin,<sup>31</sup> he began his advocacy for a bill of rights. His close friend, James Madison, had suggested that such a document would merely be a "parchment barrier" that could protect no one.<sup>32</sup> Jefferson replied that Madison had failed to consider one argument "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and *kept strictly to their own department* merits great confidence for their learning and integrity."<sup>33</sup>

Perhaps the emphasized language in the preceding quotation provided Jefferson some wiggle room, for he would later reject and disavow his support for judicial review. "I have long wished," he afterwards wrote, "for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public [and] denounced as not law."<sup>34</sup> Schwartz recalls many Jeffersonian diatribes against judicial review: it was "a very dangerous doctrine indeed," making the Constitution "a mere thing of wax in the hands of the judiciary."<sup>35</sup> It gives the right to prescribe rules for the other branches by a branch which "is unelected by, and independent of the nation."<sup>36</sup> The judiciary "like gravity, . . . with noiseless foot, and unalarming advance, gaining ground step by step; and holding what it gains, is ingulphing insidiously the special governments into the jaws of that which *feeds them*."<sup>37</sup>

Professor Schwartz also details the Hamiltonian/Jeffersonian battle over the

30. *Id.* at 28.

31. Jefferson himself answered a lady of the French Court who asked if he had come to take Dr. Franklin's "place." "The Virginian replied that he was Dr. Franklin's successor, but that no one could take his place." LEON A. HARRIS, *THE FINE ART OF POLITICAL WIT* 45 (1964).

32. SCHWARTZ, *supra* note 25, at 68 (citing 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 616 (1971) [hereinafter *BILL OF RIGHTS*]).

33. *Id.* (citing 1 *BILL OF RIGHTS*, *supra* note 32, at 620) (emphasis added).

34. *Id.* (citing 9 *THE WRITINGS OF THOMAS JEFFERSON* 54 (Paul L. Ford ed., 1898) [hereinafter *JEFFERSON*]).

35. *Id.* at 69 (citing 10 *JEFFERSON*, *supra* note 34, at 160).

36. *Id.* (citing 10 *JEFFERSON*, *supra* note 34, at 140-41).

37. *Id.* (citing 10 *JEFFERSON*, *supra* note 34, at 189).

doctrine of implied powers that culminated in *McCulloch v. Maryland*.<sup>38</sup> When Congress passed a bill providing for the creation of the Bank of the United States, President Washington received conflicting advice from his key advisors as to its constitutionality. Attorney General Randolph and Secretary of State Jefferson, fellow old Dominioners with the President, advised that the act was unconstitutional as Congress had limited powers in the first place, and further, that the power to grant a charter of incorporation had not been delegated to Congress.<sup>39</sup>

As Schwartz explains,

Hamilton took an entirely different approach. He was one of those 'men . . . disposed to do the essential business of the Nation by a liberal construction of the powers of the Government.' Hence, his basic rule of constitutional interpretation was 'the necessity [and] propriety of exercising the authorities intrusted to a government on principles of liberal construction.'<sup>40</sup>

Jefferson would counter with the argument that "[t]o take a single step beyond the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition."<sup>41</sup> Hamilton would respond that "an adherence to the letter of [the Constitution's] powers would at once arrest the motions of the government."<sup>42</sup> He continued, "such is the plain import of the declaration, that [Congress] may pass *all laws* necessary [and] proper to carry into execution those powers."<sup>43</sup> Again, the words of the New York lawyer:

*[N]ecessary* often means no more than *needful, requisite, incidental, useful, or conducive to*. It is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted, by the doing of this or that thing.<sup>44</sup>

Hamilton's reading would again prevail. Chief Justice John Marshall's opinion in *McCulloch* noted: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."<sup>45</sup> Schwartz concludes with a thought well-known by many constitutional scholars but perhaps not so well-known among the populace at large:

It was thus Hamilton who laid the foundation on which the Marshall

38. 17 U.S. (4 Wheat.) 316 (1819).

39. See SCHWARTZ, *supra* note 25, at 29.

40. *Id.* (citing 12 THE PAPERS OF ALEXANDER HAMILTON 251 (1961) [hereinafter PAPERS OF HAMILTON]; and 8 *id.* at 105).

41. *Id.* (citing SAMUEL J. KONEFSKY, JOHN MARSHALL AND ALEXANDER HAMILTON 67 (1964)).

42. *Id.*

43. *Id.* at 30 (citing 8 PAPERS OF HAMILTON, *supra* note 40, at 106).

44. *Id.* (citing 8 PAPERS OF HAMILTON, *supra* note 40, at 102).

45. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

Court built the two essential doctrines of judicial review and implied powers. Hamilton also enunciated the interpretation of the General Welfare Clause which the Supreme Court has come to accept, as well as the broad concept of presidential power that has come to prevail during the present century. *Indeed, it may be said that the current interpretation of the Constitution is essentially Hamiltonian in character.* The important issues of public law, on which Hamilton differed with those who favored the canons of strict construction, *have ultimately been resolved in favor of Hamilton's view.*<sup>46</sup>

Noting Schwartz's admiration of Hamilton's constitutional theories, we can perhaps better understand Schwartz's fealty to the idea that the law should be interpreted according to our *current* needs. Our jurisprudence, he would argue, bears out the truth of Paul's second Letter to the Corinthians, that the letter kills but the spirit gives life.<sup>47</sup> It is not surprising that young lawyer Alexander Hamilton used that very allusion in his argument in 1784 in the important New York case *Rutgers v. Waddington*,<sup>48</sup> which is often referred to as a forerunner of *Marbury*.

Judge Posner, who himself occupies a deservedly significant place in *Main Currents*, would today describe the Hamiltonian view as "pragmatic." In his captivating book *Overcoming Law* he uses these adjectives to characterize the pragmatic outlook: "practical, *instrumental*, forward-looking, activist, empirical, skeptical, antidogmatic, experimental."<sup>49</sup> Hamilton's pragmatism, his instrumentalism, permitted America to create the strong economy that allowed the nation to succeed internationally, and indeed to survive the Civil War.

Thus, to the extent that this instrumentalism has been vindicated, it is Hamilton who deserves the credit, and not the equally proficient lawyer with the "peculiar felicity of expression," Thomas Jefferson. The question of whether the Constitution, as the Mitgang review asked, is "Organic or Cast in Stone?" indeed dominates the pages of *Main Currents*. And, yes, I agree that Schwartz favors the instrumentalist or pragmatic outlook.

## VI. MORE CURRENTS

Schwartz takes us through more currents in "The Golden Age" where instrumentalism under the first "Superchief," John Marshall, and his young intellectual Patroclus, Justice Story, reigned triumphant. As James Garfield said, "Marshall found the Constitution paper; and he made it power. He found a

46. SCHWARTZ, *supra* note 25, at 31 (emphasis added) (footnotes omitted).

47. See 2 *Corinthians* 3:6; 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 359 (Julius Goebel, Jr., ed., 1964) [hereinafter PRACTICE OF HAMILTON] (Hamilton's notes from argument in *Rutgers v. Waddington* that "in law as in religion letter kills"). See also Morton J. Horowitz, *The Constitution of Change: Legal Foundationalism*, 107 HARV. L. REV. 32, 48-51 (1993) (suggesting that differences in constitutional ideas of Jefferson and Marshall may relate to their differing religious backgrounds).

48. N.Y. City Mayor's Ct., 1784 (unreported), reprinted in 1 PRACTICE OF HAMILTON, *supra* note 47, at 393-419.

49. RICHARD A. POSNER, *OVERCOMING LAW* 11 (1995) (emphasis added).

skeleton, and he clothed it with flesh and blood.”<sup>50</sup> Schwartz concludes that

[e]arly American instrumentalist jurisprudence reached its climax in Marshall. More 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. More than that, the law which he thus used was, in major part, molded as well as utilized by him. That is all but self-evident as far as Marshall’s public-law decisions are concerned: ‘he hit the Constitution much as the Lord hit the chaos, at a time when everything needed creating.’ The constitutional principles which Marshall proclaimed in his cathedral tones were, in large part, principles of his own creation.<sup>51</sup>

But Marshall’s instrumentalism, based on his common law background, was not to prevail unchallenged. Schwartz explains how positivism supplanted the instrumentalism of Marshall, Hamilton, and even Jefferson (who was instrumentalist in areas of law other than constitutional law; indeed, he could make use of implied powers too—for example, by purchasing Louisiana). Positivism, a more negative and restraintist concept of law, was described by a Kentucky court in a slavery case: “the law as it is, and not as it ought to be.”<sup>52</sup> Slavery so conspired with positivism that the old law of the grand manner came to be replaced by the beginning of the Civil War with law as a narrower, blackletter, more party-centered, technical science. Indeed, the law as a creative and innovative endeavor had so declined, as Schwartz relates, that when the young Oliver Wendell Holmes, Jr., told his father that he was going to Harvard Law School, Dr. Holmes inquired: “What is the use of that? A lawyer can’t be a great man.”<sup>53</sup>

Schwartz continues through “The Crucible” of the Civil War, as Abraham Lincoln sought to deal with “Law in Emergency,” and the second American Revolution occurred, that brought with it an almost new Constitution with the Civil War amendments.<sup>54</sup> We travel through “The Gilded Age” where the modern Justinians sought to establish the laws in codes, but were repelled by common law lawyers. The Code of David Field was repulsed by the unwritten law of life and society advocated by James C. Carter. In actuality, it was a

50. SCHWARTZ, *supra* note 25, at 112 (citing CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 402 (1913)).

51. *Id.* at 125 (quoting JOHN PAUL FRANK, MARBLE PALACE 62 (1972)) (footnote omitted).

52. Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467, 470 (1820).

53. SCHWARTZ, *supra* note 25, at 196 (citing CATHERINE DRINKER BOWEN, YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY 201 (1944)).

54. See JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION at vii-viii (1990).

Yet the Civil War changed the United States as thoroughly as the French Revolution changed that country. The liberation of four million slaves, along with destruction of the South’s political domination of national affairs and of the social order on which that domination was founded, metamorphosed as region (the former slave states) more than three times as large as France. The future of America after 1865 belonged to a system of democratic free-labor capitalism, not one of slave-labor plantation agriculture. The House Divided of 1858 was no longer divided. Liberty took on new meanings for Americans. The old decentralized federal republic became a new national polity that taxed the people directly, created an internal revenue bureau to collect these taxes, expanded the jurisdiction of federal courts, established a national currency and a national banking structure.” *Id.*

defeat for instrumentalism, for Field argued for the pragmatic use of the law, a recasting of the positive law "to fit the needs of the new society and its burgeoning economy."<sup>55</sup>

As "The New Century" began, judge-made common law reigned supreme. But the acknowledged master of that law, Holmes, delivered his lectures on the common law that presaged the "legal limbo"<sup>56</sup> to which Holmes himself would later relegate the common law. As Schwartz describes it, "[t]hrough Holmes was eminently a legal historian, whose greatest work was an historical analysis of common law doctrine, he rejected the negative attitude of the then-prevailing historical school of jurisprudence. To him there was no inevitability in either history or law, except as men made it."<sup>57</sup>

Though Holmes admired John Marshall above all legal others, ("If American law were to be represented by a single figure, skeptic and worshipper alike would agree that the figure could be one alone, and that one, John Marshall"),<sup>58</sup> his own concept of law was essentially positivist. Although Holmes' concept of the law is difficult to completely fit into any category (made even more so by his sometimes selective practice of say, his rule of restraint), he was clearly a positivist. The goal for the judge was "that men should know the rules by which the game will be played. Doubt as to the value of some of those rules is no sufficient reason why they should not be followed by the courts."<sup>59</sup>

Yet Holmes' positivism "opened the door," Schwartz shows us, for the twentieth century conception of law, even though "he himself did not enter fully into the legal edifice that lay beyond."<sup>60</sup> "[T]he judges themselves [had] their duty of weighing considerations of social advantage."<sup>61</sup> It was not *logic* but, as everyone recalls the aphorism, *experience* that was the life of the law. The "felt necessities of the time" have been the primary force.

It is in describing these great figures of the law that Schwartz is at his best. In remarkably brief chapters he catches the wave, blending the words of his subjects with his own. Of Holmes:

His own economic views did not lead Holmes to try to use the law to further them. The Sherman Act, he wrote, "I loathe and despise." However, "I don't mean to let my disbelief in the act affect my application of it." As he once put it, "I am so skeptical as to our knowledge of the goodness or badness of laws that I have no practical criterion except what the crowd wants." He may have disagreed with the crowd in the given case, "but that is immaterial." The law may have been an instrument to meet the society's needs; yet Holmes never thought it his function to oppose what he saw as expressions of society's will even when those expressions were, in his opinion, based upon "economic delusion." The

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55. SCHWARTZ, *supra* note 25, at 361.

56. *Id.* at 373.

57. *Id.* at 380.

58. *Id.* at 112 (citing THE MIND AND FAITH OF JUSTICE HOLMES 385 (1943)).

59. *Id.* at 390 (citing OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 289 (1920) [hereinafter HOLMES]).

60. *Id.* at 392.

61. *Id.* at 392-93 (citing HOLMES, *supra* note 59, at 184).

Holmesian posture was pithily expressed in a comment he once made to Justice Stone: "Young man [Stone was sixty-one years old at the time], about seventy-five years ago I learnt that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'Goddamit, let 'em do it!'"<sup>62</sup>

Schwartz points out that Holmes' restraint led to his reluctance to invalidate regulatory legislation such as that contemplated in *Lochner v. New York*.<sup>63</sup> Thus he was lionized as the great "liberal" of the bench. But he was "liberal only in the nineteenth century use of the term," Schwartz reminds us.<sup>64</sup> Perhaps "libertarian" might be more descriptive, although that term leaves something to be desired. (Maybe "libertine" would be helpful as well: I have always assumed the quotation attributed to Holmes in his nineties upon observing the passing of an attractive young woman, "Oh, to be seventy again!"<sup>65</sup> to be accurate.)

Although Holmes' views were not accepted by the majority of judges of his time, Schwartz contends with Marc Antony by observing that the good that men do *does* live after them: "If the nineteenth century was dominated by the passive jurisprudence [of positivism], the twentieth was, ultimately, to be that of Mr. Justice Holmes."<sup>66</sup>

Chapter Six discovers the second great creative period in American law—a period in which many of us have lived. Schwartz is captivating in treating this time of "Pragmatic Instrumentalism" that he has observed and catalogued for almost fifty years. Chapter Seven intriguingly discusses the "Fragmented Jurisprudence" of our own day which encompasses Nobel Laureate Alexander Solzhenitsyn's view "that there are no stable and universal concepts of justice . . . that all of them are fluid."<sup>67</sup> In this time we have witnessed jurisprudence from the "dignity vs. deference"<sup>68</sup> debate of Justices Brennan and Rehnquist, to feminist jurisprudence, law and economics, critical race theory, critical legal studies, and "Pomobabble."<sup>69</sup>

With respect to the "New Century," are we now seeing a rebirth of those views *a la* Richard Epstein and others, that were thoroughly repudiated by Holmes? Has our limitation of "contract" stifled innovation and creativity just as unbridled *laissez faire* stifled the growth of a middle class by concentrating wealth? To read Schwartz here is to be forewarned about the next possible paradigm shift of jurisprudential science.

62. *Id.* at 393 (footnotes omitted).

63. 98 U.S. 45 (1905).

64. SCHWARTZ, *supra* note 25, at 394.

65. BARTLETT, *supra* note 3, at 645.

66. SCHWARTZ, *supra* note 25, at 394.

67. *Id.* at 553.

68. This dichotomy is the theme of Peter Iron's book, *Brennan v. Rehnquist: The Battle for the Constitution*. See, e.g., PETER IRON, *BRENNAN V. REHNQUIST: THE BATTLE FOR THE CONSTITUTION* at xi (1994).

69. Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 95 MICH. L. REV. (forthcoming 1997).

Indeed, science's influence on jurisprudence is hinted at throughout the book. Despite Holmes' rejection of Herbert Spencer's social Darwinism (by the way, have you noted that modern social Darwinists are seldom Darwinists?) perhaps a principal question rejected by Holmes remains: *can* (and/or *ought*) the law to be reduced to scientific principles—to the “axioms and corollaries of a book of mathematics?”<sup>70</sup> Can all observations, objects, and even experiences be defined in the language of mathematics and/or science, or is such a unified theory the result of a modernist scientism that can never address the formation and allocation of legal values? Will the fragments finally coalesce into a couple of competing theories, or has some sort of big-bang shattered jurisprudence forever, ending it as Fukuyama suggests of history and James Horgan suggests of science?<sup>71</sup>

Before I close, it is essential, especially when you are as complimentary as I have tried to be, to mention some criticisms. Here goes.

First, the book is long. At 644 pages of text, it is not airplane reading. Indeed, most practitioners are not going to think they have time to read such a weighty volume. This is unfortunate, because the volume is immensely readable, and the chapters are organized in such a way that the reading can be broken up. Further, the book is really more of a handbook or reference volume anyway, though eminently readable. Not much criticism here.

Second, the book is an admitted imitation of Parrington. That too, is not much of a fault, but it may cause some hoity-toity reviewers to ignore the work. I recall a story that Ben Franklin recounted in his *Autobiography*. He described a Presbyterian minister whose sermons were extremely popular until Philadelphians, perhaps not always known for brotherly love, found out that many of his oral messages were borrowed. Somewhat oddly, the patron saint of printers was not in the least offended. What difference should it make who wrote the words of an oral sermon that was excellent? There was no direct claim of authorship. Franklin stood by the minister noting, “I rather approved of his giving us good sermons composed by others than bad ones of his own manufacture, though the latter was the practice of our common teachers.”<sup>72</sup>

Here the fault is not really analogous: Professor Schwartz, an uncommon teacher, adapts Parrington's method of historical criticism to analyze of American jurisprudential history. It is not imitation of the work, but application of the form.

Third, the book is written in the grand manner. It generalizes; it has cryptic footnotes at times (but praise God they are not lengthy, and they are not law review style); and it repeats. The book might have profited from another editor. But again, my criticisms fail. Who could easily edit Bernard Schwartz's work?

70. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (1963).

71. See Francis Fukuyama, *The End of History?*, NAT'L INTEREST, Summer 1989, at 3; and JOHN HORGAN, *THE END OF SCIENCE* 242-43 (1996) (citing FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 204-06 (1992)).

72. *THE AUTOBIOGRAPHY AND OTHER WRITINGS BY BENJAMIN FRANKLIN* 92 (Peter Shaw ed., 1982).

Eschewing the turgid, law review style that has beaten the life out of modern academic legal prose, Schwartz has summarized the great themes of American law in a way that only an observer with his season (should I say seisin?) could properly do. In fact, I believe Schwartz has through his observations given us a summary of much of his life as well. At its absolute worst, this tome is a reflection of a classic. At its best, it is a classic, revealing as does Parrington, how a scholar like Schwartz views American legal thought across the disciplines.

## VII. CONCLUSION

Schwartz decries the mediocrity of fragmented jurisprudence. He longs for, and claims the eventual return of, the days when the gods walked among us. If that day comes, will it be Eden or Gotterdamerung? Until we find out, the words of this Homeric Epic will guide us in thinking about the currents and eddies that flow as does Marcus Aurelius' river of time: "Time is a sort of river of passing events, and strong is its current; no sooner is a thing brought to sight than it is swept by and another takes its place, and this too will be swept away."<sup>73</sup> For those who long for the past, surely Schwartz holds out the hope that we will see it again.

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73. BARTLETT, *supra* note 3, at 124.



