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FROM CONSTITUTIONAL POLITICS TO CONSTITUTIONAL LAW: THE SUPREME COURT'S FIRST FIFTY YEARS

ALBERT BRODERICK†

INTRODUCTION

I have been attempting to revive an approach to the Constitution that was given considerable respectability by Justices Jackson and Cardozo—the notion that the Supreme Court in the portion of its work that we know as constitutional law is, and has been from the beginning, primarily a “political institution.”¹ This theme is dear to political scientists, I am told, but it is not popular with lawyers, who prefer to view a departure by the Court from traditional legal analysis (whatever that may be) as a deviation to be deplored rather than an optimum lawyers’ product.

The term “politics thesis” is proposed to identify the project I am encouraging. I shall briefly recap it here, but then hasten to develop my specific theme for today: the verification of the “politics thesis” in the first fifty years of the Supreme Court’s interpretation of the Constitution.

Justice Jackson referred to the Court “as a political institution arbitrating the allocation of powers between different branches of the Federal Government, between state and nation, between state and state, and between majority government and minority rights.”² He cited Cardozo’s concurrence: “ ‘It [the New York Court of Appeals] is a great common law court; its problems are lawyers’ problems. But the Supreme Court is occupied chiefly with statutory construction—which no man can make interesting—and with politics.’ ”³

In his still classic *The Supreme Court in United States History*,⁴ Charles Warren time and again repeats that from the beginning the Court has avoided partisanship in the Federalist-Republican or Republican-Democrat sense. But in the area of interpretation of the Constitution the Court has rarely made its basic constitutional choices from the text-legislative history-stare decisis tools of the workaday lawyer. Even H.L.A. Hart, who emancipated legal positivism with his secondary “rule of recognition,” exempted American constitutional decision-making from his prim methodology.⁵ I argue here that from the beginning the Supreme Court’s first consideration in interpreting the Constitution has

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1. R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 53-83 (1955).

2. *Id.* at 9.

3. *Id.* at 54 (quoting a personal statement made by Cardozo to Jackson).

4. 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922).

5. H.L.A. HART, *THE CONCEPT OF LAW* 199 (1961).

been constitutional politics. Only when the politics task has been completed does the Supreme Court utter constitutional law.

In using the term "politics" here I include the full gamut of "non-law" elements. One might say that various brands of politics enter into constitutional "interpretative" choices with one Justice (or Supreme Court) or another, at one time or another. These include considerations of federalism, of shared federal powers, of race, sex, fair trial (or fairness generally), of democracy (voting rights), consensus, stability, moderation or compromise, and a politics of institutional respectability (consistency and coherence). Some commentators (Ronald Dworkin, Harry Wellington) prefer to call all this "constitutional morality." But the term "morality" has been much muddied by the Reagan-Meese-Reynolds assault on affirmative action. Like Justices Jackson and Cardozo, I prefer the term "politics" for the *mélange* of non-law factors that the Supreme Court takes into consideration in guiding a contemporary constitutional polity.

Justice Jackson reminded us that the Supreme Court started its constitutional interpretation with a blank slate.⁶ There was a certain memory of the happenings at the 1787 Convention, but there was no legislative history, as such. Madison's Notes were not published until 1840, and even Elliott's Debates (concerning the state ratifying conventions) did not appear until 1835. When the Marshall Court made its first major political choice (for judicial review) in *Marbury v. Madison*⁷ in 1803, Marshall ignored the "Convention memory" of the many members of that first Congress which had drafted the memorable section 13 of the Judiciary Act. Marshall's Court simply held that section unconstitutional.

The politics thesis suggests that there is more value in examining what the Court has done across constitutional history than in crediting everything it has said. From John Marshall in *Marbury* to Owen Roberts in *United States v. Butler*,⁸ Justices have professed that the great power of judicial review is tested simply by putting the words of the Constitution side by side with the words of a statute and concluding "fit" or "no fit." Justice Black on national television, waving his pocket copy of the Constitution, perpetuated the folklore to our day of "no politics—it's all right here." There is value in recognizing that high court decisions are the resultant of political choices, good and bad, by different Supreme Courts, and sometimes even by different members of the same Court (sometimes 5-4). The Justices know it; constitutional lawyers know it. The media experts know it. One senses that, by now, a good portion of the public knows it (with a certain embarrassment). Why should not all the public be taken into our confidence? Especially when publicists such as Attorney General Meese would celebrate the Bicentennial by dividing the Constitution's history into two periods: (1) the glorious period of "Framers' intent," from the beginning down to 1954; and (2) post-1954, when the Warren Court started us down

6. R. JACKSON, *supra* note 1, at 57.

7. 5 (1 Cranch) U.S. 137 (1803).

8. 297 U.S. 1 (1936).

the slippery slope of "judicial political activism." In this very connection it is instructive to examine how it was "in the beginning."

Professor Rotunda has just reviewed for us the relative inertia of the Supreme Court from 1790, when it first met in New York, to 1801 when Chief Justice Marshall became the fourth Chief Justice. So I shall start discussion of the "First Fifty Years" with John Marshall's Court, and continue through the transition to the early years of Chief Justice Taney. My approach in preparing this survey has been first to read seriatim the Supreme Court reports down to 1842, and then to supplement this official evidence with the classic accounts of Charles Warren,⁹ Albert Beveridge,¹⁰ and Carl Swisher,¹¹ and the parallel published volumes of the Holmes Devise.

In a recent article relaunching this Jackson-Cardozo theme of constitutional politics,¹² I focused on some major examples in our early, and our more recent, history in which political changes were obviously brought about by Supreme Court decisions, and in which political designs (in the broad sense of "politics" discussed above) were obvious. Two of these were in the forefront of the work of the Marshall Court: The doctrine of judicial review from *Marbury* (which placed the Supreme Court in a promising, but not yet commanding vantage point), and the flexible national power decisions (at the expense of the states) that were launched by the Marshall Court in its heyday. These are discussed in the following section. Other developments of constitutional politics that I stressed in the above article are obviously products of later periods—race, sex, defendants' rights, voting rights. For there was small concern for rights of liberty, or due process, or any individual rights other than property, in this first half century. But this very inattention of the Supreme Court in this early period was itself the product of the Court's deliberate political choices to attend to some matters and not to attend to others.

THE MARSHALL YEARS

In view of the large shadow cast by John Marshall over the present day constitutional law one forgets that the cases before the Court over Marshall's thirty-four years dealt overwhelmingly with non-constitutional concerns. The thrust of some of his few constitutional cases had already been curbed before Marshall departed. The ink was hardly dry on Chief Justice Taney's appointment before three of Marshall's key cases had been blunted, if not turned around, as foretastes of the Court's new political direction.

The Marshall years (1801-1835) can be plausibly divided into three periods. In the first, 1801 to 1818, the Court was occupied with its own survival, and with gradually acquiring considerable respect as a common-law court. The constitutional cases were few. The well-known titan cases—such as *Marbury v.*

9. 2 C. WARREN, *supra* note 4.

10. IV A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1919).

11. C. SWISHER, *ROGER B. TANEY* (1961).

12. Broderick, *Constitutional Politics: Affirmative Action and Supreme Process*, 16 N.C. CENT. L.J. 85 (1987).

Madison,¹³ *Fletcher v. Peck*,¹⁴ and *Martin v. Hunter's Lessee*¹⁵—were, of course, political blockbusters. Beyond these, a review of decided cases in this period yields few surprises. Perhaps we forget that Marshall gave an early hint in *United States v. Fisher*¹⁶ of *McCulloch v. Maryland*'s¹⁷ boost to implied national powers. And Justice Jackson remarked¹⁸ on the Court's adroitness in heeding public opposition to federal common-law crimes by renouncing them outright in *United States v. Hudson & Goodwin*.¹⁹

Period two, which constitutes the heyday of Marshall's Court, fairly extends from 1819 through 1828. By 1819 the Court had acquired sufficient self-confidence to take on state legislatures' claim to amend corporate charters at the expense of "vested rights,"²⁰ and to throw the Court's increased prestige behind the corrupt and unpopular Bank of the United States in the name of implied federal constitutional powers.²¹ If this were not sufficient support for property rights for one year, the Court also hinted there was a dormant power in the Constitution's assignment of bankruptcy legislation to Congress, when Congress had not yet acted.²²

By 1824 Marshall was ready to pronounce expansively on Congress' power over interstate commerce. This time he was on a popular side—against the steamboat monopoly—and he cautiously stopped short of pronouncing Congress' power over commerce as exclusive.²³ In 1827 the Marshall Court launched its last bold political strike, this time in support of national control over foreign commerce and of limiting state taxation of imports until they had left the "original package" in which they arrived.²⁴ The hint that the Marshall political magic was waning came in two other cases in 1827 and 1829. In one the Court backed away from its earlier suggestion in *Sturges v. Crowninshield*, that states are without power over bankruptcies.²⁵ In the other case Marshall himself conceded that there was indeed some state power over interstate commerce, and furnished the Court's first suggestion that states had a certain "police power" which the Constitution did not abrogate even in legislative areas it specifically assigned to Congress.²⁶

Period three—from 1829 to 1835 (when Marshall died)—might fairly be called one of "brake and decline." In 1830 Marshall's views won a minor victory, when the Court held unconstitutional Missouri's issuance of a specie of

13. 5 (1 Cranch) U.S. 137 (1803).

14. 10 (6 Cranch) U.S. 87 (1810).

15. 14 (1 Wheat.) U.S. 304 (1816).

16. 6 (2 Cranch) U.S. 358 (1805).

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

18. R. JACKSON, *supra* note 1, at 31.

19. 11 U.S. (7 Cranch) 32 (1812).

20. *Dartmouth College v. Woodward*, 17 (4 Wheat.) U.S. 518 (1819).

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

22. *Sturges v. Crowninshield*, 17 (4 Wheat.) U.S. 122 (1819).

23. *Gibbons v. Ogden*, 22 (9 Wheat.) U.S. 1 (1824).

24. *Brown v. Maryland*, 25 (12 Wheat.) U.S. 419 (1827).

25. *See Ogden v. Saunders*, 25 (12 Wheat.) U.S. 213 (1827).

26. *See Willson v. Blackbird Creek Marsh Co.*, 27 (2 Pet.) U.S. 245 (1829).

banknote.²⁷ But already Jackson appointees were making their presence felt in dissents. In 1833 Marshall wrote for a unanimous Court that the Bill of Rights limited only the federal government, and not the states. Opponents of the Court—except for anti-slavery forces pressing for relief through fifth amendment “due process”—could hardly find fault with such a non-assertive conclusion.²⁸ In three significant cases in this period the Marshall forces could no longer sustain a majority. However, the Court was so closely divided that a majority could not be mustered by the opposing side. Two of these cases were argued in the 1834 Term. One of them, *Briscoe v. Bank of Kentucky*,²⁹ concerned small denomination bills issued by the Bank of Kentucky. Marshall, Story, Duvall, and Johnson seem to have thought the case covered by the *Craig v. Missouri*³⁰ case of 1830 as a “bill of credit.” When voting time came Justice Johnson was absent because of a serious illness, and three Justices opposed the Marshall triumverate. In the same 1834 Term the Court heard argument in *Mayor of New York v. Miln*,³¹ which involved a New York statute restricting access of passengers entering the country from abroad. The same voting alignment prevailed after argument as in *Briscoe*. Chief Justice Marshall’s statement indicated that a distinctly different Court practice governed constitutional cases than nonconstitutional cases:

The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment where constitutional cases are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases [*Briscoe* and *Miln*] four judges do not concur in opinion as to the constitutional questions which have been argued. The Court therefore directs these cases to be reargued at the next Term.³²

Things were still more unsettled at the start of the 1835 Term. Justice Johnson had died, and President Jackson had appointed Justice Wayne in his place. Justice Duvall (who had been aligned with the Marshall bloc in the two cases) had resigned. Marshall announced: “The Court cannot know whether there will be a full Court during the Term; but as the Court is now composed the constitutional cases will not be taken up.”³³ Marshall died on July 6, 1835, and the cases were not heard until the 1837 Term, by which time Chief Justice Roger B. Taney was presiding over the Supreme Court. A third holdover case was heard with *Briscoe* and *Miln* at the 1837 Term. This was the longstanding *Charles River Bridge v. Warren Bridge*.³⁴ Considered together the three cases may be considered the “transition trilogy,” as they give a graphic picture of the change of political direction that showed itself at the very outset of the Taney Court.

27. *Craig v. Missouri*, 29 (4 Pet.) U.S. 410 (1830).

28. See *Barron v. Baltimore*, 32 (7 Pet.) U.S. 243 (1833).

29. 36 (11 Pet.) U.S. 257 (1837).

30. 29 (4 Pet.) U.S. 410 (1830).

31. 36 (11 Pet.) U.S. 102 (1837).

32. *Briscoe v. Bank of Kentucky*, 33 U.S. (8 Pet.) 118, 122 (1834).

33. *Mayor of New York v. Miln*, 34 U.S. (9 Pet.) 85, 85 (1835).

34. 36 (11 Pet.) U.S. 420 (1837).

TRANSITION TO TANEY

The *Charles River Bridge* Case had been first argued in 1831, and not decided. At the end of the 1832 Term it was again continued. According to Warren,

It seems that, as the Court stood in 1832, Story, Marshall and Thompson were in favor of reversing the decree of the Massachusetts Court, McLean was doubtful as to jurisdiction, Baldwin dissented, and Johnson and Duvall had been absent. When the case was finally decided in 1837, seven Judges took the contrary view [there were now nine members of the Court], and Story and Thompson dissented.³⁵

When the *Charles River Bridge* Case was first argued, the Marshall-Story-Thompson bloc had viewed the case as in line with the Court's earlier "obligation of contract" cases (*Fletcher v. Peck*, and *Dartmouth College v. Woodward*). As decided by the Taney Court, *Charles River Bridge* left considerably more latitude to a state legislature to modify ancient grants. The earlier rigor of the Marshall Court with respect to "vested rights" was softened, but not repudiated. The Taney Court's decision sustaining the Kentucky law in *Briscoe*, was an evident departure from *Craig v. Missouri* of only seven years before. The third 1837 "transition" case, *Miln*, was a commerce clause case. Again the Taney Court voted differently than Chief Justice Marshall had in 1834. Story was alone in dissent. He claimed that the Court's decision repudiated *Gibbons v. Ogden* since it renounced Congress' exclusive power over interstate and foreign commerce. Story's word is not doubted that Marshall had been on the other side when *Miln* had been first argued. But Marshall had not opted for congressional exclusivity over commerce in *Gibbons*, still less so in *Willson v. Blackbird Creek*. Still, the Taney Court in *Miln* gave a distinct new twist to the state's "police power" in relation to interstate and foreign commerce that foreshadowed more play in the joints for the states in the decades ahead.

In this transition trilogy is the plainest evidence of a nation's new politics being converted into new constitutional law through the vehicle of presidential appointments to the Court. Warren's commentary on this "constitutional politics" situation as of January 1841 is so much to the point it is almost embarrassing: "[S]o fully had Jackson's appointees on the Court satisfied the country, that political criticism of its decisions had almost entirely disappeared."³⁶

FORMS OF POLITICS IN THE SUPREME COURT'S FIRST FIFTY YEARS

At the outset I identified various forms of "politics" that I considered within the scope of a "politics thesis." What particular forms of politics were most evident in the first fifty years? Both Charles Warren and Albert Beveridge stress that partisan (Federalist-Republican or Whig-Democrat) politics did not reach within the Supreme Court itself, however powerfully partisan politics pressed on the Court from outside throughout the Marshall years. Beveridge

35. 2 C. WARREN, *supra* note 4, at 233 n.2.

36. 2 C. WARREN, *supra* note 4, at 341.

makes this point in his biography of Marshall to stress how successfully Marshall, the Hamiltonian Federalist par excellence, had coralled the appointees of Jefferson and his successors, at least until the period of decline after 1828. Warren is making a more controversial point: that Supreme Court Justices have never been chargeable with political partisanship.

But neither Warren nor Beveridge challenge the evidence that individual Justices, and ultimately the Court as a whole, in this first fifty years (as later) were guided in their constitutional interpretation by their private hierarchy of political preferences. After the election of Andrew Jackson as president in 1828 the political temper of the country towards a more popular democracy began to be reflected in new Supreme Court appointments, and in the "transition" (to Taney) decisions I have just discussed. Prior to this time the two dominant political themes of John Marshall—the nationalizing "union" theme, and the ultra-conservative "vested rights" of property theme—had effectively programmed the constitutional choices of the Supreme Court.

Union politics: The price of union in the Convention of 1787 had been "compromise," and the "compromise" had been at the core the perpetuation of slavery. But the anti-Union pressures on the Marshall Court had been from the North as well as the South. Clearly Marshall's program was to strengthen the national government. This entailed the judicial review power of the Supreme Court (*Marbury*), particularly over the states (*Hunter's Lessee*), perhaps a constitutional handle over state action (the "obligation of contracts" clause in *Dartmouth College*), and certainly a flexible doctrine interpreting congressional power (*McCulloch*). But by 1830 Marshall was despondent that his efforts had failed: "The crisis of our Constitution is now upon us," he wrote Story. A few months later, after reading three dissenting opinions in *Craig v. Missouri*, he wrote Story again:

[I]t requires no prophet to predict that the 25th Section [the clause of the Judiciary Act of 1789 permitting Supreme Court review of state judgments] is to be . . . nullified by the Supreme Court of the United States. I hope the case in which this is to be accomplished will not occur in my time, but accomplished it will be at no very distant period.³⁷

Economic politics: The Union was saved (for the moment) not by Marshall (as Beveridge would have us believe), but by President Jackson's strong repudiation of Nullification after his reelection in 1832. But Marshall's second string to his bow—"vested rights"—was not so fortunate. The "obligation of contract" decisions had been "economic politics" more than "union politics," and of *McCulloch* (which upheld the hated Bank of the United States) the same point could be argued. Beveridge, almost an idolator of Marshall, refers to Marshall's "unyielding conservatism" and "rock-like conservatism."³⁸ The turnaround against Marshall economic conservatism was indicated as early as 1827, in *Ogden v. Saunders*, when "[f]or the first time in twenty-seven years the majority

37. 2 C. WARREN, *supra* note 4, at 187.

38. See IV A. BEVERIDGE, *supra* note 10, at 480, 482.

of the court opposed Marshall on a question of Constitutional law."³⁹ The die was finally cast in the "transition" decisions I have discussed, the 1837 trilogy of the Taney Court.

Slavery politics: Any slavery politics that can be identified in the Supreme Court in its first fifty years might be called the politics of avoidance. Only by the end of the fifty-year period did cases involving slavery issues commence to arrive at the Supreme Court. In 1841-42 three such cases were decided. In two of them the Court (to Warren's great satisfaction) managed to avoid reaching the slavery issues. In the third, *Prigg v. Pennsylvania*,⁴⁰ Justice Story muffled his avowed anti-slavery voice in deciding that a Pennsylvania law which withheld local cooperation in returning fugitive slaves was unconstitutional as in conflict with the exclusive power of Congress over the subject of fugitive slaves. It seems that here, as elsewhere, Story mirrored Marshall. Beveridge wrote that "Marshall held the opinion on slavery generally prevailing at that time. He was far more concerned that the Union should be strengthened . . . than he was over the problem of human bondage, of which he saw no solution."⁴¹ Making allowances for Marshall's "union at all costs" priority, and the express concessions to slavery made in the text of the Constitution, there is room to fault Marshall here. His contemporary was Chancellor George Wythe of Virginia, of whom Justice Powell spoke last night (and writes in this issue). In 1806, Wythe interpreted Virginia's Bill of Rights: "[F]reedom is the birth-right of every human being, which sentiment is strongly inculcated by the very first article of our 'political catechism,' the bill of rights." He was reversed on appeal.⁴² Marshall's colleague, Justice William Johnson, a South Carolinian, while sitting on circuit in Charleston, held unconstitutional a South Carolina statute that required free black seamen debarking in that state to be jailed immediately. Marshall wrote Story:

Our brother Johnson, I perceive, has hung himself on a democratic snag. . . . You have, it is said, some laws in Massachusetts, not very unlike in principles to that which our brother has declared unconstitutional. We have its twin brother in Virginia; a case has been brought before me in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act.⁴³

This example of Marshall's "temperance" (or insensitivity) leads easily to our next category.

Institutional politics: This label requires some explanation. There is clearly politics within the Court itself in its internal functioning. The need to secure the swing vote was as obvious in Marshall's day as in our own. Compare Marshall's inability to secure that vital vote in the transition trilogy with Justice Black-

39. IV A. BEVERIDGE, *supra* note 10, at 481.

40. 41 (16 Pet.) U.S. 539 (1842).

41. IV A. BEVERIDGE, *supra* note 10, at 479.

42. *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134 (1806).

43. 2 C. WARREN, *supra* note 4, at 86.

mun's recent avowal in his Moyers television interview (April 26, 1987) that "compromise" is the rule within the Court. But there is another sense of institutional politics—concern with matters outside the Court, concern that the Court not be disadvantaged as an institution by an improvident judicial intervention (the notion that Chief Justice Hughes referred to as the Court's "self-inflicted wounds").⁴⁴ Marshall was ready to risk much for union, to risk a great deal for property (and "vested rights"), but not much at all for "liberty." Neither Warren nor Beveridge seem to think Marshall tarnished by this judicial "temperance." But authors of our great contemporary historical studies of slavery and the Supreme Court covering this period quite naturally think otherwise.⁴⁵ Small wonder that they question whether Marshall's unanimous decision for the Court in *Barron v. Baltimore* that the first eight amendments containing the Bill of Rights did not limit the states was all that obvious, or necessary. For the due process clause of the fifth amendment was one rare hope (slender perhaps) for a constitutional challenge to slavery, the paradigm deprivation of liberty.

THE POLITICS THESIS AND PREVIOUS SPEAKERS

Several of the earlier speakers at this forum furnished a needed contrast to the limited objective of the politics thesis I have been developing. For the politics thesis has value only as a first step: to make clear the wide range of political choices the Supreme Court has made in two centuries. The task that remains to the constitutional law profession was well exemplified here: suggesting to the Justices (who hold the "office") the varying views of particular individuals (without "office") as to how the Constitution *should* be interpreted.

For example, Michael Curtis insisted that a more faithful attention by the Supreme Court to the "framers intent" of the fourteenth amendment would have spared the nation the long-postponed application of the first eight amendments to the states. This point is carefully developed by him in his excellent book.⁴⁶ However, the conclusiveness of the historical evidence has been continuously disputed—as Mr. Curtis is well aware. More important, without accepting the Curtis version of the "framers history" the Court first rejected and finally adopted most of the conclusions Mr. Curtis favors. The politics thesis hardly makes a bold claim in suggesting that both the initial rejection, and the later partial acceptance, by the Court represented political choices. While the initial choice of total rejection was unfortunate—in both Mr. Curtis' opinion and mine—it is difficult to support the position that this would be a better nation if the Supreme Court had interpreted the fourteenth amendment to require civil juries (seventh amendment) and indictment only by grand jury (fifth amendment) of the states. This last suggestion is not entailed by the politics thesis, which is purely descriptive. But it does suggest doubt as to the wisdom of seiz-

44. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 50-54 (1928).

45. See R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977).

46. M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

ing "framers intent" as the automatic and exclusive paradigm for interpretation of general constitutional language—even when the historical morsels are favorable to the conclusion we would reach. In this connection one must deal with the "framers intent" notion as to "discrimination" on the basis of sex, coming to terms with museum pieces like *Bradwell v. Illinois*⁴⁷ (a difficult, but not impossible task).

Senator Biden and Stanley Brand celebrated that most "political" of constitutional doctrines, the separation of powers, or as political flexibilists prefer to style it, the doctrine of shared powers. By whatever name, both reaffirmed that the Supreme Court in recent years had thrown its considerable political weight on the side of rigidity rather than flexibility in this area. In true advocate style, Biden on behalf of the Senate, and Brand on the parallel side of the House of Representatives, entered the lists of current controversy on the side of their constituency, the Congress. Even as they did so they highlighted that in this clash of the behemoths among adversaries (the President and the Congress), resolution of a controversy was often achieved by the contestants themselves without judicial intervention—often by a pure political standoff. However, the Burger Court, at least, showed a taste for entering this "thicket," resolving two major "shared powers" conflicts on the side of rigid separation.⁴⁸ Again constitutional politics, of a particular brand.

The next three speakers, all law professors, exhibited the variety of roles that the constitutional academy assumes as contributions to constitutional development. Professor Dick Howard presented the Supreme Court's most recent adventure in "federalism"⁴⁹ less as a political choice with which he disagreed than as an obvious error to be corrected. This role, no less than Biden's and Brand's, is that of an advocate for one political position within a constitutional area. Such an advocate may, though he need not, present in support of his position a sample of what has been called "law office history"—"the selection of data favorable to the position being advanced without regard to or concern for contradictory data."⁵⁰ But then so, many times, have the Justices.

A quite different, but no less typical, product of the constitutional academy was Professor Van Alstyne's study of the varieties of "establishment" that existed at the time of the adoption of the first amendment religion clauses. Bringing such a historical nugget to the attention of the Court may serve as a corrective of certain "law office history" that buttressed earlier Supreme Court opinions. In an area of constitutional interpretation where the Court has been closely divided, such a corrective may give impetus to a political tilt by one or more Justices—enough to give a new direction to the Court. Or it may have no effect at all.

Still another style of academic contribution to the development of constitutional law was exhibited by Professor Ronald Rotunda. Selecting two recent

47. 83 (16 Wall.) U.S. 130 (1873).

48. *Cf. INS v. Chadha*, 462 U.S. 919 (1983).

49. *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528 (1985).

50. Kelly, *Clio and the Court*, 1965 SUP. CT. REV. 119, 122.

clusters of Supreme Court cases as exhibits, he decried the lack of coherence and consistency in some recent products of the Justices.

Professor John Conley cautioned against undue reliance on science and technology in expectation of passionless—or nonpolitical, if you like—decision-making. His warning was “Beware, science is often pseudo, or otherwise wrong.” As to “pseudo” he gave testimony on the pitiful saga of *Buck v. Bell*⁵¹ in which a Justice as astute as Oliver Wendell Holmes allowed hereditary nonsense to justify state castration of recidivist criminals. His example of “otherwise wrong” was the use of psychological evidence (this time for a “good” result) in the famous footnote eleven of *Brown v. Board of Education*.⁵²

CONCLUSION: FROM CONSTITUTIONAL POLITICS TO CONSTITUTIONAL LAW

I have been discussing particularly the first fifty years of the Supreme Court, affirming that the “politics thesis” (in the broad sense of “politics” described here) is verified from the Court’s beginning. Recalling Justice Jackson, I have argued that this was inevitable given the blank page on which the Court wrote, the open-textured constitutional text, and the Convention’s withholding of legislative history (until the 1840 publication of Madison’s Notes). The scene changes when the Taney Court, after decades of “temperance,” moved into the teeth of the anti-slavery whirlwind.⁵³ It changes again when the post-Civil War Congress not only tellingly expands the constitutional text (1865-1870), but expands the federal judicial agenda by finally giving the federal courts general jurisdiction over all federal questions (1875). My earlier article dwelt on the “constitutional politics” of these more modern developments. But, a question arises. What value is there in stressing that *the fact* of “constitutional politics” is established by such self-evident history? Consider the following:

1. The politics thesis serves as a corrective to the double misinformation disseminated by the Meese-Reynolds Department of Justice:⁵⁴ (1) that “framers intent,” if intelligently pursued, will cure the distorted products of “judicial activism.” As already noted, by withholding the legislative history of the 1787 Convention the framers identified their basic intent: to launch a charter sufficiently flexible to house conflicting interpretations in what Marshall would call “ages to come.” (2) that Marshall’s claim of the Court’s finality in constitutional interpretation, as reaffirmed in more recent days,⁵⁵ created no constitutional law beyond the case at hand. If this were presented as a political position that Meese-Reynolds would like to establish, this lonely view would be eligible as a proposal to be fought for. But in view of the general public acceptance of the Marshall position over 184 years, this Meese-Reynolds contention, made as a statement of fact, is plain misinformation.

51. 274 U.S. 200 (1927).

52. 347 U.S. 483, 494-95 n.11 (1954).

53. See *Dred Scott v. Sandford*, 60 (19 How.) U.S. 393 (1857).

54. The pertinent Meese Tulane speech of Oct. 21, 1986, and the Reynolds Chicago speech of Nov. 15, 1986, are quoted and discussed in Broderick, *supra* note 12, at 146 n.404, 148 n.409.

55. See *United States v. Nixon*, 418 U.S. 683 (1974); *Cooper v. Aaron*, 358 U.S. 1 (1958).

2. The "politics thesis" documents how the system has actually operated. It is only a first step, a preliminary to the vigorous current debate on how the constitutional system *should* work. But, as far as it goes, it represents "truth" to say the Supreme Court has acted "politically" in pronouncing "constitutional law." The process is constitutional politics; the product is constitutional law. It *has* happened this way across two centuries—with results that have been sometimes good, and sometimes horrible.

3. The Supreme Court has recognized from the beginning that there is an almost generic difference between general law and constitutional law. Again, the first fifty years supplies the keys: no citations of precedents in Marshall's major decisions; Marshall's announcement of special ground rules for constitutional adjudication in the Supreme Court; the readiness of Taney's Court to depart from recent precedent for political reasons in constitutional cases gave early indication of the well-recognized weakness of *stare decisis* as a ground of decision when constitutional issues are at stake. As early as 1833 Justice Story produced his *Commentaries on the Constitution of the United States*, which sought to "legalize" the process of constitutional decision-making. Although Marshall applauded,⁵⁶ within four years, as we have seen, Story was relegated to dissent. And Jackson's appointee, Justice Baldwin, produced his "doctrines" of constitutional decision-making, which conflicted with Story at almost every turn.⁵⁷ Surely John Marshall's most enduring insight was his *McCulloch v. Maryland* suggestion that the framers were not common legislators, but had created a charter "intended to endure for ages to come."

4. The breadth of possibilities within reach under the Constitution poses to each Justice, and to each Supreme Court, the question "What kind of country do I want this to be?" There is little room to hide. Political choices have often predictable political consequences.

5. As early as these first fifty years we see space for nonjudicial input into constitutional decision-making: presidential nomination of Justices, senatorial examination and approval of nominees, congressional control of federal court jurisdiction, sometimes just plain noisy public dissatisfaction. Still the power of Justices, once seated, is enormous—for good and for ill. That is the fact—our system of constitutional politics. We need broader public recognition of this fact, and perhaps early education as to the citizen's role, or input, with respect to the Supreme Court. Only when we have assured such public understanding does the crucial question make sense: Do we wish to change a system that gives such lifetime power to nine unelected men and women? Proposals for change were persistent in the first fifty years, and since. Dissatisfaction with the politics of the Court has been chronic. But to date no agreement has been reached on how to change the judicial arrangements that were put in place in 1789—which speaks for a measure of satisfaction as well.

56. 2 C. WARREN, *supra* note 4, at 239.

57. See H. BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES (1837).