9-1-1976

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BICENTENNIAL BENCHMARK: TWO CENTURIES OF EVOLUTION OF CONSTITUTIONAL PROCESSES*

FRANK R. STRONG†

RESOLVED, That we, the citizens of Mecklenburg county, do hereby dissolve the political bands which have connected us to the mother country, and hereby absolve ourselves from all allegiance to the British Crown, and abjure all political connection, contract, or association, with that nation, who have wantonly trampled on our rights and liberties, and inhumanly shed the blood of American patriots at Lexington.

RESOLVED, That we do hereby declare ourselves a free and independent people; are, and of right ought to be, a sovereign and self-governing Association, under the control of no power other than that of our God and the general government of the Congress; to the maintenance of which independence, we solemnly pledge to each other our mutual co-operation, our lives, our fortunes, and our most sacred honor.

These Resolves, numbers two and three, were the central two of the five in the Mecklenburg Declaration of Independence of May 20, 1775.1 Despite continuing question as to the authenticity of this action,2 North Carolina automobile license plates proclaim the state as "First in Freedom" on the basis of wishful acceptance of the May 20

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* The William T. Joyner Lecture on Constitutional Law, delivered at the University of North Carolina School of Law, April 9, 1976, revised to incorporate comment on major Supreme Court decisions handed down at the end of the 1975 Term. This Lecture Series was created by the Sarah Graham Kenan Foundation on December 11, 1971, to honor Colonel Joyner for his outstanding contributions to the legal profession and the citizenry of the State of North Carolina. Senator Sam J. Ervin, Jr., gave the initial Lecture on November 1, 1974.

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The author records with appreciation the assistance in research provided by Ms. Claire Bledsoe Pratt, M.S. in L.S., and Mr. Peter Shea, Ph.D. in English Literature. Ms. Pratt is Reference Librarian and Mr. Shea a student at the University of North Carolina School of Law.


2. The less drastic Mecklenburg Resolves of May 31, 1775, are viewed by some scholars as the "true 'Declaration.'" Id. at 22-31. Those later Resolves did not assert independence but only suspended English laws and provided substitutions therefor "until instructions from the Provincial Congress, regulating the jurisprudence of the province, shall provide otherwise, or the legislative body of Great-Britain, resign its unjust and arbitrary pretentions with respect to America." Id. at 25, quoting Resolve XVIII.
Resolves as genuine. In any event continuing scholarly debate over what did issue out of Mecklenburg County in May of 1775 need not detain us; what is significant is that developments in North Carolina reflected mounting tensions among the colonies with the mother country that were approaching the breaking point and threatening to spill over into open defiance and sovereignly separation.

A year later the chasm had deepened to the point that the Continental Congress on May 10 of 1776

Resolved, That it be recommended to the respective assemblies and conventions of the United Colonies where no government, sufficient to the exigencies of their affairs, hath been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.3

It has been said by one scholar that

this resolution was the turning-point in the Revolution, since it foreshadowed and necessitated that of July 4th, 1776, declaring the independence of the colonies. So well was this understood, that, in the debate upon it those delegates who opposed its passage did so on the ground that it was the first step, to which, if taken, independence must succeed.4

New Hampshire and South Carolina had already acted. The Constitution of New Hampshire, framed by a “congress” that assembled on December 21, 1775, and that completed its work on January 5, 1776, is said by Thorpe to have been “the first constitution framed by an American Commonwealth.”5 Requiring but two printed pages as preserved,6 it was hardly a constitution in any full sense; it only established “A FORM OF GOVERNMENT to continue during the present unhappy and unnatural contest with Great Britain”7 until, it was hoped, a reconciliation could be effected. With that hope dashed by subsequent events, a convention met in June of 1778 to draft a permanent constitution for the new State. Although the completed document employed the form that quickly became popular, that of a Declaration of Rights followed by a Plan of Government, the former was quite inadequate in coverage and the latter vested essentially complete power

3. 4 JOUR. OF THE CONTINENTAL CONG. 342 (1906 ed.).
4. J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS 116-17 (1887).
5. 4 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL ChARTERS, AND OTHER ORGANIC LAWS 2451 n.a (1909) [hereinafter cited as THORPE].
6. Id. at 2451-53.
7. Id. at 2452.
in a General Court with executive and judicial authority subordinated to it.\textsuperscript{8} This constitution, unlike the original document, was submitted to the people through their town meetings but rejected.\textsuperscript{9}

New Hampshire did not have an acceptable constitution until 1784 when the people ratified the work of a new convention that labored through much of 1783.\textsuperscript{10} The Bill of Rights of this document, containing thirty-eight articles, contrasted with the paucity of rights declared in the proposal of 1778; moreover, the failure to differentiate among governmental powers characteristic of the earlier submission was now met by the declaration of article XXXVII that

[In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from and independent of each other; as the nature of free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.\textsuperscript{11}]

The Form of Government specified in great detail respecting the legislative and executive branches; the much shorter subsection on judiciary power declared:

All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behaviour, excepting those concerning whom there is a different provision made in this constitution: \textit{Provided nevertheless}, the president, with consent of council, may remove them upon the address of both houses of the legislature.\textsuperscript{12}

The South Carolina action of March 26, 1776, was much like that taken two and one-half months earlier in New Hampshire.\textsuperscript{13} Although designated as a constitution, the instrument was limited to providing for transition of governmental authority to locally chosen officers should reconciliation with Britain fail. It was promulgated by the Provincial Congress; there was no submission to the people. However, it was much more detailed in its specifications than was New Hampshire’s first attempt at constitution making, employing thirty-four numbered resolves. No declaration of rights was set forth as such although many rights were implicit in the long opening paragraph justifying the taking

\textsuperscript{8} 9 Town Papers of N.H. 837-41 (1875).
\textsuperscript{9} Id. at 842.
\textsuperscript{10} 4 Thorpe, supra note 5, at 2453 n.b, 2453-70.
\textsuperscript{11} Id. at 2457.
\textsuperscript{12} Id. at 2466. The entire Constitution of 1784 requires eighteen pages in 4 Thorpe.
\textsuperscript{13} 6 id. at 3241-48.
of constitutional action, but an embryonic separation of powers manifested itself in some differentiation among legislative, executive, and judicial functions. Two years later the General Assembly, created under the earlier document, framed and passed as an act the Constitution of 1778.14 Of the provisions of this constitution, consisting of a total of forty-five articles, two toward the end specified liberty of the press15 and due process (expressed as law of the land),16 and earlier provisions effected greater separation of powers. Judicial officers, chosen by the General Assembly and commissioned by the Governor, were to serve during good behavior "but [were to] be removed on address of the senate and house of representatives."17 By article XLIV no part of the constitution could be changed "without the consent of a majority of the members of the senate and house of representatives."18

Between the May 10 Resolve of the Continental Congress and its Declaration of Independence on July 4, New Jersey and Virginia tried their respective hands at constitutional drafting. Of these two the New Jersey Constitution exhibited features present in the initial efforts in New Hampshire and South Carolina. Essentially, the New Jersey instrument19 created a structure of government to replace that formerly existing under British authority with the provision that "if a reconciliation between Great-Britain and these Colonies should take place . . . this Charter shall be null and void—otherwise to remain firm and inviolable."20 At the same time, however, some development in constitution making is discernible, anticipatory of improvements made in later drafting in New Hampshire and South Carolina. Rights of religious liberty and trial by jury were declared; there was more careful distinction between legislative and executive powers; annual elections were stipulated for members of the General Assembly; and the judges of the supreme and lower courts were to serve for a term of years while at the same time being forbidden to sit in the General Assembly during judicial tenure.21

Drafted in June of 1776 by forty-five members of the colonial House of Burgesses, the Virginia Constitution predated all others in

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14. Id. at 3248 & n.a.
15. Id. at 3257, art. XLIII.
16. Id. art. XLI.
17. Id. at 3254.
18. Id. at 3257.
19. 5 Id. at 2594-98.
20. Id. at 2598.
21. Id. at 2595-98, arts. XVIII & XIX (religious liberty); art. III (annual elections); arts. XII & XX (judges); arts. VI & VIII (separation of powers).
specificity of the framework and content achieved at first try. It must have been the pattern for the constitution making that followed; certainly it foreshadowed the unique contribution to American constitutional law that would be made by Virginians. The total instrument consisted of a Bill of Rights and a Form of Government. The former was not so inclusive as in some of the state constitutions to follow, such as the Bill of Rights of the New Hampshire Constitution of 1784, but that inclusive coverage was achieved only on third try. A feature of the sixteen sections of the Virginia Bill of Rights was "[t]hat the legislative and executive powers of the State should be separate and distinct from the judiciary." The importance of this political principle to the draftsmen is demonstrated by the even more specific declaration in the Form of Government to the effect that "[t]he legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other . . . ." It must be conceded that theory was somewhat ahead of practice; the Governor was to be chosen by the two houses, and, while the judges were to serve during good behavior, they were to be appointed (subsequent to an initial appointment by the Legislature) by the Governor with the advice of the Privy Council and subject to approval or displacement by both houses. Yet the seed of judicial independence had been planted in politically fertile soil, with immeasurable consequences for America's future.

During the second half of the year 1776, following upon the Declaration of Independence, four additional former colonies commenced and completed constitutional drafting. Two moved quickly to the task. The resulting document for Delaware consisted of thirty articles, the last of which made reference to a "declaration of rights and fundamental rules of this State, agreed to by this convention . . . ." Three departments of government were provided, but there was no formal articulation of a fractionalized structure of government. The declaration consisted of twenty-three sections, forming a fairly embracing enumeration of fundamental rights not to be violated.

22. 7 id. at 3812-19.
23. Id. at 3813, § 5.
24. Id. at 3815.
25. Id. at 3816-17.
26. 1 id. at 562-68.
27. Id. at 568, art. 30. Thorpe does not include the "declaration of rights"; it can be found in R. Perry, Sources of Our Liberties 338-40 (1959).
Pennsylvania's convention completed its labors on September 28, one week after Delaware. The instrument there resulting was divided into two parts, a Declaration of Rights and a Plan or Frame of Government. The sixteen articles in the former gave good coverage to individual rights, with "trial by jury as heretofore" added by section twenty-five of the Frame. Legislative power was vested in one house of representatives, to be known as the general assembly. Elections were to be annual. "The supreme executive power [was to] be vested in a president and council." Council members were to be elected as were the representatives, but separately and for three years. "The president and vice-president [were to] be chosen annually by the joint ballot of the general assembly and council, of the members of the council." The president was given power to "appoint and commisionate [sic]" the judges; a subsequent section specified that "[t]he judges of the supreme court of judicature [were to] have fixed salaries, be commissioned for seven years only, though capable of re-appointment at the end of that term, but removable for misbehaviour at any time by the general assembly . . . ."

The Maryland convention, consisting of "Delegates of the freemen of Maryland," is recorded as having labored almost three months in framing the first constitution for that State. This fact may explain the length of the resulting document. The Declaration of Rights consisted of forty-two articles, the "Constitution, or Form of Government" of sixty divisions; the document was by far the most extended of all the earliest constitutions. The bulk was found in the provisions concerning the form, organization and operation of government, with specificity often amounting to great detail. The listing of fundamental rights was the most inclusive of the original constitutions. Included were the declarations "[t]hat the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other" and that commissions of the judges ought to be held during good behavior because "the independency and uprightness of Judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people . . . ."
North Carolina was the last state to complete a constitution before the close of the fateful year of 1776. A congress, elected for the purpose of constitutional drafting, assembled at Halifax only on November 12 and completed its work December 18. As in the case of Maryland, the instrument was divided into two grand parts: "A Declaration of Rights, &c" and "The Constitution, or Form of Government, &c." Also similar to the Maryland document's language was the early provision in the declaration of rights "that the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other." At the same time, however, the theory of separation of powers was not well implemented in the frame of government. The Governor and the judges were to be named by the General Assembly and there was no tenure provision for the latter. Neither the Declaration nor the Form of Government was so embrace as those of the first constitution of Maryland. But religious liberty was deemed so fundamental that facets of its full protection appear in both of the instrument's grand divisions, and annual elections were stipulated for both houses of the legislative branch.

A constitutional convention had assembled in Savannah, Georgia, before the North Carolina Congress commenced its work, but completion and promulgation went over until February 5, 1777. Despite the greater elapsed time, the product was inferior by comparison with earlier constitution making by other states. The document started out well by declaring in article I that "[t]he legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." But in the total of sixty-three articles there was no differentiation between declared rights and decreed frame of government; the legislature was unicameral; the Governor was chosen by this "house of assembly" and shared his executive powers with an executive council drawn by ballot by and from the elected representatives; there was no provision for selection or tenure of the judiciary; and the fundamental rights recognized were but four—non-excessive fines and bail, habeas corpus, jury trial, and freedom of the press. Much attention was given to selection of the state legisla-

36. Id. at 2787-94.
37. Id. at 2787, art. IV.
38. Id. at 2788, art. XIX of the Declaration; id. at 2793, no. XXXIV of the Form of Government.
39. Id. at 2790, nos. II & III.
40. 2 id. at 777-85.
41. Id. at 778.
ture, including the franchise and the specifics of oaths required of representatives, the Governor and the executive council. An unusual provision in connection with the annual elections commonly specified in the initial constitutions was one penalizing, in an amount not to exceed five pounds, the qualified voter who failed to cast his ballot.\(^\text{42}\)

New York also made the initial move for constitutional drafting in 1776. However, completion of the task was delayed until April 20 of 1777 by repeated adjournments and changes of location. The resulting document bore resemblances to that of Georgia.\(^\text{43}\) Following a long opening justification for the break with Britain, it consisted of forty-two numbered sections. There was no formal differentiation between declaration of rights and provision of governmental framework; much attention was given to representation in the bicameral legislature and to voter qualifications; and recognition of rights deemed fundamental was limited to religious liberty\(^\text{44}\) and trial by jury.\(^\text{45}\) On the other hand, the Governor was to be elected for a three-year term,\(^\text{46}\) and the members of the judiciary, appointive by a council consisting of senators and the Governor, were to “hold their offices during good behavior or until they [had] respectively attained the age of sixty years.”\(^\text{47}\)

It has been said that “[a]lthough the Revolutionary troubles began in Massachusetts with the Boston Tea Party, the Bay Colony was more deliberate than any other in institutionalizing the constitutional change from colony to commonwealth.”\(^\text{48}\) This fact does not mean, however, that Massachusetts was slow in starting the process. As with other former colonies, interest in constitution making in the Bay State dated from the Year of Independence, when the General Court, elected under the direction of the Provincial Congress, sought by Resolution of September 17, 1776, the consent of the “Male Inhabitants of each Town in this State” to the drafting of a constitution.\(^\text{49}\) Response of the Towns was generally favorable to the establishment of a “good constitution” but there were strong differences as to whether the drafting should be by the legislative body or by the people more directly. After political skirmishing that ran through the first half of

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\(^{42}\) Id. art. XII.

\(^{43}\) 5 Id. at 2623-38.

\(^{44}\) Id. at 2636-37, art. XXXVIII.

\(^{45}\) Id. at 2637, art. XLI.

\(^{46}\) Id. at 2632, arts. XVII & XVIII.

\(^{47}\) Id. at 2634, art. XXIV.

\(^{48}\) MASSACHUSETTS, COLONY TO COMMONWEALTH 3 (R. Taylor ed. 1961) [hereinafter cited as Taylor].

\(^{49}\) Id. at 41.
1777 the former method prevailed. The actual drafting was done by a working committee, whose report was tendered on December 11, 1777. Acceptance was voted February 28, 1778, and the constitution thus produced was submitted to universal suffrage on March 4 of 1778. Rejection was by a one-sided vote of about 5 to 1. Examination of the proposed constitution of 1778 explains this overwhelming reaction. The proffered instrument was largely concerned with the mode of selection and the powers of the General Court; it contained no bill of rights, and "forever allowed" religious liberty only for Protestants; the only indications of fractionalization of governmental powers lay in popular election of the Governor, who however was to be President of the Senate, and in the "good behavior" guarantee for Justices and judges.

Despite the overwhelming rejection of the proposed constitution of 1778, sentiment continued for a constitution to replace the provisional government; what was desired was a document emanating from the people themselves. "The story of the struggle for a constitution in Massachusetts exemplifies that cardinal principle of the American Revolution, that government shall be by consent of the governed." In early 1779 the General Court called for an expression from the people as to their wishes, and the response was two to one in favor of the calling of a convention for the express purpose of framing a constitution. Election of delegates was called in June and those elected convened on September 1. The completed instrument was referred to the people in early 1780; was declared on June 16 of that year, by a ratifying convention, to have received the mandated two-thirds vote; and went into effect October 25. The Constitution of 1780 was a vast improvement over that of 1778. Part the First was the Declaration of Rights, quite inclusive in the rights deemed fundamental, including "the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will permit." This last right was to be implemented by providing that "[t]he judges of the supreme judicial court should hold their offices as long as they behave themselves well.

50. Detail on these developments is provided by Taylor, id. at 50-89.
51. The document is not available in Thorpe's work but can be found in Taylor at 51-58, and in A. BRADFORD, HISTORY OF MASSACHUSETTS 349-62 (1825).
52. Taylor at 58, art. XXXIV.
53. Taylor at 59-89 records the opposition in detail.
54. Id. at 114. J. JAMESON, supra note 4, at 143, is specific on the point that constitutional drafting by the General Court was anomalous.
55. 3 THORPE, supra note 5, at 1888-911; Taylor, supra note 48, at 127-46.
56. 3 THORPE at 1893, Part the First, art. XXIX; Taylor at 131.
Then followed the last article, number XXX, celebrated for its concise acceptance of Montesquieuian philosophy:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.  

Part the Second, on The Frame of Government, was neatly divided into a total of six chapters. By far the longest were the initial two chapters treating first The Legislative Power and then The Executive Power. Chapter III on Judiciary Power, while short, provided that all judicial officers should serve during good behavior and contained provision for rendition of advisory opinions. Chapter IV concerned Delegates to Congress; Chapter V treated in two sections of the University at Cambridge, and the Encouragement of Literature, Etc.; and Chapter VI embraced a number of matters, one of which is discussed below.

Vermont, the only State to act wholly within the year of 1777, had not been one of the original colonies. Portions of the lands constituting Vermont were claimed by Massachusetts, New Hampshire and New York. Vermont’s constitution consequently opened with an assertion of independence not alone from Great Britain but also from New York, which appears to have been most persistent in its claim. Massachusetts and New Hampshire released their respective claims in the early 1780’s but New York did not do so until 1790, upon which event Vermont became the fourteenth State of the United States. Another unusual feature of the first Vermont Constitution was the rapidity with which the constitutional convention acted to produce an instrument of design and content equal to that of the best of the original round of constitution making. The explanation appears to lie in Thorpe’s statement that “[t]he groundwork of the constitution of 1777 was the Pennsylvania constitution of 1776, which had been recommended to the inhabitants of Vermont, as a model, by Dr. Thomas Young.” In his editorial note, Thorpe demonstrated the many similarities between the two documents, nevertheless noting that “the Vermont constitution of 1777 was not a mere copy of the Pennsylvania model.”

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Declaration of the Rights of the Inhabitants of the State of Vermont" specified nineteen fundamental rights, with three more included in Chapter II, "Plan or Frame of Government." The Frame had several features in common with the Pennsylvania Constitution on which there will be comment later.

From this account it is apparent that constitution making was coterminal with political severance from England. Save for Connecticut and Rhode Island, which resolved to continue under their royal Charters, all of the thirteen colonies had, during 1776, taken at least preliminary steps toward provision of a written constitutional foundation for their new independent governments. Eight States, among them North Carolina, were operating under constitutions by the close of the year of independence. With some, joined by Vermont, completion carried over until the next year. By 1778 constitutions had been drafted in all the twelve jurisdictions, with ten in force and two to be further perfected as a consequence of initial rejection on submission to the people.

Failure in ten States to provide a ratification process may have been in part the consequence of a sense of pressure to provide, with the least possible delay, organic governments in substitution for those of the colonial period. Yet this absence of ratification in most of the states, the failure of a number of the new instruments, especially the earliest, to provide for amendment, and the very concern of the peoples of Massachusetts and New Hampshire that their constitutions be fully satisfactory before acceptance suggest the presence of a view that under divine guidance it was possible at a given time to set out in written form the full parameters of governmental power and limitation when sovereignty resides in the governed. As an able scholar has observed:

Such popular attachment to a free constitution as higher and controlling law was justified by one, two, or all, of three assumptions:

62. Id. at 3746, §§ XXII, XXV, & XXVI.
63. The number not providing for amendment depends on which constitutions are considered (for in some states it required two or more sessions to come up with an acceptable version), and how they are interpreted. One authority counts five. J. Dealey, GROWTH OF AMERICAN STATE CONSTITUTIONS 32 (1915). Not counting the skeletal instruments designed only for the transition period from colonial status to full statehood, the number of constitutions making no provision for full amendatory powers at the hands of the people appears to be six.

By contrast the Maryland Constitution incorporated a provision unusual even by modern conventions for liberal amendability. Neither the Declaration of Rights nor the Form of Government was to be altered unless a bill therefor passed an assembly, was published for three months, and then was confirmed by legislative action after a new election of delegates. 3 Thorpe, supra note 5, at 1701, Form of Government no. LIX.
that the constitution was the command of the people, an original compact expressing their unalienable sovereignty; that it was the handiwork of the wisest men in the body politic; and that it was an earthly expression of the eternal principles of the law of nature.  

Belief in the capacity of fallible humans to articulate political fundamentals by a formal enactment process continued as an article of faith in the nineteenth century only to become a casualty of the relativism of the twentieth, with major implications for the judicial function in the interpretation of written constitutions.

Concern for adherence to the fundamentals of the new constitutionalism is reflected in the constitutions whose bicentennial is now at hand. Five patterns are discernible. One is that of annual elections of the legislative branch.

Frequent elections, which in fact and principle meant annual elections, were the one sure way to secure almost continuous accountability. Not only was a short term the best possible guarantee that the legislature would remain 'in miniature an exact portrait of the people at large'; it was a major bulwark against abuse and usurpation of power.

The original instrument of North Carolina provides an excellent illustration of another of these patterns. Article XLIV of "The Constitution or Form of Government, &c" specified "[t]hat the Declaration of Rights is hereby declared to be part of the Constitution of this State, and ought never to be violated, on any pretence whatsoever." Reliance upon admonishment was also found in the Delaware Constitution of 1776, where it was provided in the last article (30) that

[n]o article of the declaration of rights and fundamental rules of this State, agreed to by this convention, nor the first (Statehood), second (bicameralism), fifth (suffrage and rules of the legislative chambers) (except that part thereof that relates to the right of suffrage), twenty-sixth (prohibition of importation of slaves), and twenty-ninth (non-establishment) articles of this constitution, ought ever to be violated on any pretence whatever.

Other parts of the constitution could be altered but only by five-sevenths of the assembly, together with seven members of the legislative council.

66. C. ROSSITER, supra note 64, at 133.
67. 5 THORPE, supra note 5, at 2794.
68. 1 id. at 568.
The New Jersey Constitution sought from every member of the House of Assembly and the Legislative Council a solemn declaration that he would not assent "to any law, vote or proceeding" that would "annul or repeal" constitutional provisions establishing annual elections of Assembly or Council, guaranteeing jury trial and religious liberty, or forbidding religious establishment. For double assurance Pennsylvania and Vermont included both oath and admonishment provisions; yet dissatisfied even then, they resorted as well to the device of a Council of Censors. In each instance the provision for such a Council constituted the last section in the Frame of Government and the wording was largely identical, indicative of the assertion earlier noted that Vermont copied extensively from Pennsylvania.

The Councils of Censors were to meet every seven years. Members were to be elected by the people, Vermont taking the precaution to disqualify anyone then a member of the legislative branch of government. Their chief duty

it shall be to enquire whether the constitution has been preserved inviolate, in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people; or assumed to themselves, or exercised, other or greater powers, than they are entitled to by the constitution. . . . For these purposes they shall have power to send for persons, papers and records; they shall have authority to pass public censures—to order impeachments, and to recommend to the legislature the repealing such laws as appear to them to have been enacted contrary to the principles of the constitution.

In further support of this supervisory function the Councils were empowered to call a Convention when there was felt "an absolute necessity" of amending any constitutional article thought defective in expression or of "adding such as are necessary for the preservation of the rights and happiness of the people . . . ."

The constitutions finally approved in Massachusetts and New Hampshire made no use of the pattern of admonition but did employ oaths and mechanisms for periodic review akin to those of Pennsylvania and Vermont. Yet the oaths were not so specific in exacting

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69. 5 id. at 2598, art. XXIII.
70. For Pennsylvania, 5 id. at 3085, § 10 (oath); id. at 3091, § 46 (admonition).
For Vermont, 6 id. at 3743, § IX (oath); id. at 3748, § XLIII (admonition).
71. For Pennsylvania, 5 id. at 3091-92, § 47. For Vermont, 6 id. at 3748-49, § XLIV.
72. 6 id. at 3748-49, § XLIV.
73. Id.
pledges of adherence to the constitutions,\textsuperscript{74} and the review devices, while designed to effect such adherence, looked to periodic calling of conventions by the legislative branches without employment of an intervening body of censors.\textsuperscript{75} New Hampshire used the seven-year period of Pennsylvania and Vermont, whereas Massachusetts set the first year at 1795, fifteen years from the Constitution of 1780.

Alone among the states New York sought to achieve adherence to its constitution by providing for a council of revision. Because “laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed,” provision was made in an early section of the instrument for “a council . . . to revise all bills about to be passed into laws by the legislature” and to review for “revisal and consideration” before they became laws “all bills which have passed the senate and assembly.”\textsuperscript{76} With respect to the latter class of review the council was to exercise what amounted to a qualified veto power, setting forth its reasons why a bill was deemed improper to become a law but yielding should each house of the legislature, after reconsideration, approve it by two-thirds vote of the members present. The council was to be constituted of “the chancellor, the judges of the supreme court, or any two of them, together with the governor. . . .”\textsuperscript{77} The composition was significant; with notions of legislative supremacy still appealing to some, the greatest threat to limited government was to the provinces of the executive and judiciary if by separation of the three political freedom was to be realized.

Of these five patterns devised to enforce the basic provisions of the first state constitutions, little need be said concerning the efficacy of the first three. Annual election of legislators might be effective, yet it had obvious defects of discontinuity and impracticality. If elections were not held annually, then as later observed by a Maryland judge in the course of justifying reliance upon the judiciary as the enforcement agency:

The interference of the people by elections cannot be considered as the proper and only check and a suitable remedy, because in the interval of time, between the elections of the members who

\textsuperscript{74} For Massachusetts, 3 id. at 1908-09 (ch. VI, art. I of the Frame). For New Hampshire, 4 id. at 2468 (last division of the Form).
\textsuperscript{75} For Massachusetts, 3 id. at 1911 (ch. VI, art. X of the Frame). For New Hampshire, 4 id. at 2470 (last paragraph of the Form).
\textsuperscript{76} 5 id. at 2628-29, no. III.
\textsuperscript{77} Id. Both provisions on the Council of Revision appear in no. III of the constitution.
compose the different legislatures, the law may have had its full
operation, and the evil arising from it become irremediable; nor is
it probable that the elections will be made with the view to afford
redress in such particular case, and if they were, and the law should
be repealed, it would not be an adequate remedy.78

Only if men were angels could mere admonition or even the moral com-
punction of an oath prevent unconstitutional action.

Periodic review by a Council of Censors or an equivalent offered
a more promising pattern for enforced adherence. In Pennsylvania the
first Council met in the year prescribed (1783) and at that and at an
adjourned session the next year did report on a number of instances
of violation of the constitution, including denial of trial by jury and
usurpation of executive and judicial authority. Its conclusion was that
the Constitution of 1776, if properly administered, would continue to
give the State excellent government.79 But political conflict that
engulfed the Council, in part over the issue of uni- or bi-cameralism,
and the lack of power of enforcement of its conclusions on constitu-
tional violation rather quickly led to a decline in its popularity. Before
a second Council was scheduled to meet, the legislature resolved to call
a convention for constitutional amendment rather than wait for another
Council, which was heavily criticized as a body "not only unequal and
unnecessarily expensive but too dilatory to produce the speedy and
necessary alterations."80 The convention that met in response to the
legislative call produced the Constitution of 1790 in which the Council
feature was dropped.81 The Pennsylvania setup thereby became
essentially like that in Massachusetts and in New Hampshire.

Borrowed from Pennsylvania, the concept of a Council of Censors
enjoyed a longer life in Vermont. Assembling first in 1785, one year
beyond the seven stipulated in the Constitution of 1777, the Vermont
Council found numerous infractions of the State's basic instrument,
many of them involving legislative vacation of judicial judgments and
grants of new trials: "The council prepared an address in which the
legislature was severely criticized, and in which there was recom-
manded the calling of a convention to amend the constitution."82 The

78. Whittington v. Polk, 1 Har. & John. 236, 243-44 (Md. 1802) (Chase, C.J.).
79. C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 77 (1959)
    [hereinafter cited as HAINES].
80. Id. at 78. Haines based his appraisal on PROCEEDINGS RELATIVE TO THE
    CONSTITUTIONS OF 1776 AND 1790 AND THE COUNCIL OF CENSORS (1825).
81. 5 Thorpe, supra note 5, at 3092-103.
82. Haines, supra note 79, at 79.
convention that convened in response to this recommendation ratified a provision declaring that "[t]he legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." This appears as Section VI of Chapter II of the Vermont Constitution of 1786.83 The Council of Censors provision of the earlier constitution was preserved, presumably in substitution for a Council of Revision on the New York model, as recommended by the Council of Censors itself.85 A second Council of Censors, meeting on schedule seven years later, was happy to report the finding of no acts "unconstitutional or deserving of censure."86 But it did propose alterations in the constitutional structure, and henceforth until ultimately abolished in 1869 on its own recommendation it appears to have made this its function.87 The function of reviewing for unconstitutionality had long since passed to the judiciary.88

How effective as constitutional enforcement mechanisms were conventions in Massachusetts and New Hampshire, and in Pennsylvania after 1790, is difficult to judge in the absence of historical evaluations that have not been uncovered. The number of constitutional revisions after the original instruments varied with the states, yet it would be hazardous to judge convention effectiveness in this regard on any such criterion. With New York, on the other hand, there is much known of the operation of the Council of Revision that types as the fifth pattern of enforcement device. Before it was dropped by the New York Constitution of 1821,89 the Council, which unlike the Councils of Censors could meet uninterruptedly, had returned 169 bills with objections.90 "Among the vetoes of the council many were based on the ground that the acts were contrary to the constitution";91 however, it is not possible

83. 6 THORPE, supra note 5, at 3755.
84. Id. at 3760-61, VT. CONST. ch. II, § XL (1786).
85. HAINES, supra note 79, at 78. Haines relied on a journal kept by the Council.
86. HAINES, supra note 79, at 80.
87. A chronicle of actions of the Councils of Censors sitting from 1785 to 1836 is found in PROCEEDINGS OF THE VERMONT HISTORICAL SOCIETY 114 (1898-1902).
88. No effort is here made to date this transition. It took place between 1787 and 1814. See text accompanying note 118 infra to the effect that legislative supremacy was accepted in the early years. In the year 1814, on the other hand, the Supreme Court of Vermont held void, as a violation of separation of powers, a legislative direction that a deposition be read in a trial. Dupy, qui tam v. Wickwire, 2 Vt. 237, 238 (1814).
89. 5 THORPE, supra note 5, at 2639-51.
91. HAINES, supra note 79, at 84. The figure by Thorpe on the number of sustained vetoes is 111. 5 THORPE, supra note 5, at 2629 n.a.
to determine how many of these vetoes were among the 118 the legislature did not override by two-thirds vote, although Haines asserts by negative implication that there were not many in this category.

In a possibly biased summarization Haines concludes that "effort to limit legislative power . . . by means of a separately constituted body" failed completely in Pennsylvania, did little better in Vermont, and was not a successful check in New York.\footnote{92. Haines, supra note 79, at 86-87.} To him

[t]he one device to protect the fundamental law, other than the doctrine of judicial supremacy, to which men turned in the days of the American Revolution, was such a conspicuous failure that it merely tended to strengthen the cause of those who favored judicial guardianship of constitutions. It was the council of revision which was proposed for the federal government in the convention at Philadelphia and which led to most of the discussion in that body relative to the function of the judiciary in relation to the review of legislation.\footnote{93. Id. at 87.}

Disappointment with the five types of device for implementation of limitations in the first constitutions of the Republic\footnote{94. Madison found none satisfactory in his survey of them. The Federalist Nos. 48-50 (R. Fairfield ed. 1966). In No. 51 Madison placed reliance on internal structural relationships, primarily federalism and separation of powers.} undoubtedly encouraged thought of employment of the courts. On the face of things there appeared to be abundant precedent since for centuries courts had been the agency for interpretation of all manner of legal documents, public as well as private. On analysis, however, it is clear that this familiar action of judges was that of courts functioning as the evolving third branch of government consistent with Montesquieuan theory of separated powers. The review of the first state constitutions has disclosed how widely this theory, although not always clearly articulated, became basic to the structure of those fundamental instruments.

This function of courts can very aptly be dubbed that of judicial review, for its central features are those of interpretation of legislative acts and determination of the rationality of executive discretion in the application of that legislative will. Far different in theory and ramifications is authority of the judicial branch to exercise power to determine the consistency of executive and legislative action with constitutional limitations, for here the court is not an equal, co-ordinate division of the framework of government but one that is "more than equal." The
nature of the judicial function in such circumstances is appropriately described as constitutional review.96

It is true that by the late eighteenth century there was some pseudomorphic precedent for this latter type of review. Yet correctly understood, Dr. Bonham's Case98 furnishes no technical support; it was an instance of judicial review in the form of interpretation of the jurisdiction of the Royal College of Physicians under letters patent from Henry VIII. Coke's language was, however, suggestive of a claim to judicial authority to determine constitutionality97 and was so construed by a number of leading colonial lawyers. James Otis relied upon this construction in Paxton's Case98 and George Mason in Robin v. Hardaway.99 More in point were the English decisions in Cavendish's Case100 and the Case of Monopolies,101 but these do not appear to have received much attention in the New World.

Some further precedent arose as a product of the principle that Charters of the American colonies forbade local legislation repugnant to the laws of Great Britain. From most of the colonies, acts of the colonial legislatures were transmitted directly to King and Council for approval or rejection, in what had the earmarks of a legislative review. However, the Charter of Connecticut of 1662102 and that of Rhode Island and Providence Plantations of 1663103 were so drafted that a private party attacking the validity of a colonial act in the court of the colony could on proper motion seek review by the English Privy Council in a proceeding that looked quite judicial in character. Winthrop v. Lechmere104 was a celebrated case involving adverse claims of son and daughter to real property, situate in Connecticut, left them by

95. An appreciation of the distinction between the two types of court review, framed in modern context, can be found in Strong, President, Congress, Judiciary: One is More Equal than the Others, 60 A.B.A.J. 1050, 1203 (1974); Strong, Three Little Words and What They Didn't Seem to Mean, 59 A.B.A.J. 29 (1973).
97. The familiar passage is that "it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void." Id. at 652.
98. Quincy 50, 52 & n.5 (Mass. 1761).
99. Jeff. 109, 114 (Va. 1772).
102. 1 Thorpe, supra note 5, at 529-36.
103. 6 id. at 3211-22.
104. 1 J. THAYER, CASES ON CONSTITUTIONAL LAW 34 (1895) [hereinafter cited as THAYER]. The case was heard by the Privy Council in 1727 and 1728.
intestacy. John Winthrop claimed full title to this property of his father whereas daughter Ann, wife of Thomas Lechmere, laid claim to one-half. In the course of the litigious conflict the General Assembly of the Colony of Connecticut passed an Act for the Settlement of Estates’ Estates, whereunder children were to take of both real and personal property in equal portions save that the portion of the eldest son was to be double that of any other child. Winthrop successfully challenged this Act in the Privy Council as null and void under the Connecticut Charter which was construed to embrace the common law of England.

After independence but while Connecticut and Rhode Island yet continued under their respective Charters, a case in each of the two jurisdictions carried intimations that the new state courts would succeed to the authority of the Privy Council in judging the consistency of legislative acts with superior law. However, the Charters necessarily being of little relevance as a source of fundamental limitations, the two courts were at sea for appropriate criteria. In the Symsbury Case the Connecticut colonial legislature had in 1670 granted a tract of land to proprietors of the town of Symsbury, only later to grant to the proprietors of Hartford and Windsor portions of the Symsbury lands. The action over one hundred years later was by the proprietors of Symsbury for surrender to them of this overlapping acreage. Affirming the judgment of the superior court, the Connecticut Supreme Court of Errors held for plaintiffs on the ground that they had not given consent to the attempted transfer of the disputed land, but gave no reason rising anywhere near a constitutional level.

The Rhode Island case of Trevett v. Wheeden grew out of a conflict between hard money and soft money advocates. The legislature had by special acts of 1786 required of merchants acceptance of paper bills issued by the State as equivalent for silver or gold. Trial was to be without a jury and without opportunity for appeal should decision go against the defendant. Under these acts one John Wheeden was indicted for refusal to accept paper money in payment for meat sold in his market. The superior court of judicature held the issue to be non-cognizable. Only one of the judges gave reasons for his conclusion; these were, as defendant’s counsel had contended in his lengthy argument, the repugnancy of the denial of jury trial to traditional

English liberties of which the colonists had arguably been invested by the Rhode Island Charter and which as a free people after independence they continued to possess. Greatly offended, the General Assembly called the legislatively appointed judges on the carpet, requiring them to appear before the two houses in an attempt to justify their defiance of legislative prerogative. Their response was cast in terms of separation-of-powers theory, one of the judges quoting directly from Montesquieu. This defense was found wanting by the Assembly, whereupon a motion was made to dismiss the judges from office. At this point the threatened judges memorialized the General Assembly for a hearing at which they would be represented by counsel. Chosen by the judges was James Varnum, said to be the State's ablest lawyer, who had defended Wheeden.

Varnum's argument was bottomed on the contention that the judges possessed independence of the legislative power at least to the extent of entitlement to all the protections of any accused, whether the accusation be grounded in impeachment or common criminality. Requested by the Assembly to speak after Varnum closed, the Attorney General gave it as "his private opinion" that the judges' "determination was conformable to the principles of Constitutional law." Although never convinced that the judges had rendered satisfactory reasons for their judgment, the General Assembly in the end discharged the judges from further attendance and later repealed the laws that had given rise to the controversy.¹⁰⁶

_Trevett v. Wheeden_ reflected the uncertainty attending the thrust of the earliest judicial involvements under the new state constitutions, involvements that commenced almost immediately. For while the substantive action of the Rhode Island court, as with the _Symsbury_ court in Connecticut, concerned a law not directed at the judiciary, the procedural restrictions of no jury and no appeal combined with the aftermath of legislative hostility to threaten seriously the superior court's status as a fully co-ordinate branch of government. In toto the episode involved not only a judicial claim of power to pass on constitutionality, but also its less projective authority to function effectively in the role for which Montesquieu had pressed.

¹⁰⁶. The above account is taken from 2 P. CHANDLER, AMERICAN CRIMINAL TRIALS 269-350 (1970 reprint). This is the fullest account of the total controversy comprehending the originating laws, the decision of the court on challenge of those laws, the subsequent proceedings before the General Assembly, and the final outcome.
What is thought to be the first constitutional case to arise in any of the states newly operating under independently drafted constitutions exhibits this interface. The Case of Josiah Philips is thus summarized by Judge Tucker, who was a member of the court:

In May, 1778, an act passed in Virginia, to attain one Josiah Philips, unless he should render himself to justice, within a limited time: he was taken, after the time had expired, and was brought before the general court to receive sentence of execution pursuant to the directions of the act. But the court refused to pass the sentence, and he was put upon his trial, according to the ordinary course of law. . . . This is a decisive proof of the importance of the separation of the powers of government, and of the independence of the judiciary; a dependent judiciary might have executed the law, whilst they executed the principles upon which it was founded.107

For the court to have ordered execution of Philips on the strength of the General Assembly's bill of attainder would have been to deny its own place in the governmental framework, for a bill of attainder not only declares a policy of attainder but determines those who are to suffer its consequences. By placing Philips "upon his trial" the court insisted that it itself perform the judicial function of judgmental application of the policy in individual situations. Thus the court maintained against attempted legislative inroad the separation of powers as mandated in the Virginia Constitution of two years before. The fact that that constitution did not include a prohibition against bills of attainder offered no obstacle; as Chief Justice Warren was to observe nearly two centuries later, such a prohibition is but a specialized articulation of the general principle of separation of powers.108

A leading analyst of early judicial precedents maintains that:

The courts of New Jersey were pioneers in asserting the principle of judicial control over legislation. *Holmes v. Walton* appears to be the first recorded case where a court definitely invalidated an act because it was deemed to be in conflict with a provision of the written constitution of the state.109

The case arose out of a New Jersey act of 1778 providing that if any person suspected another of trading with the British he was empowered

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107. 1 St. G. Tucker, Blackstone's Commentaries 293 (1803).
to seize the goods and if judicially found to be contraband to retain them. Either party might demand a trial before a jury of six, from whose decision there was to be no appeal. Because the Constitution of 1776 included among its guarantees the right of trial by jury, presumably of twelve persons, the supreme court refused recognition to the act. Louis Boudin, whose two-volume work challenges the institution of constitutional review as it has developed in this country, insists that, properly analyzed, *Holmes v. Walton* was an instance of judicial review. Yet even if Professor Haines is correct that this decision was one of constitutional review, it is to be noted that the constitutional provision offended is one closely related to traditional judicial process. There is thus a certain amount of defensiveness in the employment of constitutional review by the New Jersey court.

This factor of defensiveness in the exercise of constitutional review reappears in a case from New Hampshire, decided in 1785 or 1786. There is again no opinion extant. Report of the case comes from William Meigs, writing in the *American Law Review*, who in turn relies upon a passage in *The Life of William Plumer*. In that passage, Mr. Plumer, a member of the New Hampshire legislature in 1785, remarks that

"I entered my protest singly and alone, against the bill for the recovery of small debts in an expeditious way and manner; principally on the ground that it was unconstitutional. The courts so pronounced it, and the succeeding legislature repealed the law."

The objective of the law must have been to by-pass the judiciary, or at least trial by jury, in its enforcement; as clearly, the basis of judicial invalidation must have been that in so attempting there had occurred a violation of the principle of separation of powers that assigns to the judicial branch the resolution of controversies.

In May of 1787 came the celebrated North Carolina decision in *Bayard v. Singleton*, generally agreed to be the strongest case for constitutional review during the period from Independence to the Federal Convention for revision of the Articles of Confederation. It was a suit in ejectment brought by one sympathizing with the Revolution.

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112.  Id. at 684, quoting W. Plumer, *The Life of William Plumer* 59. See also Haines, *supra* note 79, at 149 n.4.
113.  1 N.C. 5 (1787).
Defendant, on the other hand, claimed title to the house and lot through a district commissioner of estates confiscated from a Loyalist. Defendant’s counsel, one Nash, cited a North Carolina law of 1785 requiring the courts to dismiss such suits on motion when, as Nash had done here, defendant filed an affidavit that he held the disputed property under a sale from a commissioner of confiscated estates. One of plaintiff’s counsel, James Iredell, known from his letters and papers to be favorable to judicial power to determine constitutionality, countered, whereupon long arguments of Nash and Iredell ensued. The court added “a few observations on our constitution and system of government,” stressing the division of “the powers of government into separate and distinct branches . . . and assigning to each, several and distinct powers, and prescribing their several limits and boundaries; . . . .”

All this occurred at the May term of 1786. At May term, 1787, Nash again moved for dismissal, producing further extended debate by counsel. It is clear that the court was anxious to avoid a clash with the legislature, yet determined to safeguard what it conceived to be its function of determining by traditional judicial process title to property. Suggested from the bench were two modes by which the confrontation could be sidestepped. But Nash would not agree and so, “notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State,” the judges faced the constitutional issue and found the act of 1785 to be invalid. With the overruling of Nash’s motion the cause was tried at the same term, with defendant receiving judgment. Analyzed, the case was one in which the North Carolina court exercised constitutional review to protect its right to engage in judicial review. Its action was thus of a defensive character, as is true of the earlier precedents examined. Of the Bayard decision Louis Boudin, no friend of broad-ranging constitutional review, astutely observed:

Not only did this case not involve the confiscation laws as such, but it did not even involve the question of trial by jury, which it is commonly alleged to have involved. For the question was not whether a trial ought to be with or without a jury, but whether

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114. 2 G. McRee, Life and Correspondence of James Iredell 145-49 (1857). Haines, supra note 79, at 115-18, quotes from the McRee volume sufficiently to disclose the reasons why Iredell looked to constitutional review for enforcement of constitutional limitation.
115. 1 N.C. at 5-6.
116. Id. at 6-7.
there should be a trial at all—that is to say, whether the judges had a right to hear the case. And one need not be a supporter of the Judicial Power in any of its formulations in order to believe that the Judiciary have a right to hear and determine cases.\footnote{117}

It will have been noticed that for this first decade there are from several of the states no precedents for constitutional review in any form. For Vermont at least we have the explanation that in 1787 “[t]he opinion still prevailed that the Legislature was sovereign; ‘no idea was entertained,’ said Daniel Chipman, ‘that an act of the legislature, however repugnant to the constitution, could be adjudged void or set aside by the judiciary.’”\footnote{118} Judicial power to challenge legislative acts as ultra vires of state constitutions did not come easily although eventually it was to enjoy full acceptance.

For the period from the earliest precedent of 1778 through the year of the Federal Constitutional Convention, 1787, three cases from three of the States have been cited by some commentators as exercises of judicial power beyond either judicial review or defensive constitutional review. None, however, withstands careful analysis. Of these \textit{Commonwealth v. Caton}\footnote{119} is the earliest. Caton and two others had been condemned for treason by the general court under an act of the Virginia General Assembly adopted in 1776. The same act had taken from the Governor the pardoning power, leaving to him only the authority to suspend execution until the next session of the legislature. The lower house granted pardon but the Senate failed to concur. By one interpretation of the Virginia Constitution the pardon was effective; by another, not. The judges of the court of appeal were of the opinion that the action by the House of Delegates was inoperative and, expressly or by implication, found the 1776 statute not unconstitutional. Pendleton, president of the court, was “happy” that it had not been necessary to face the issue of judicial power to “declare the nullity of a law passed in its forms by the legislative power”\footnote{120} but the other judges declared that such power existed. The assertion of a general power of constitutional review is thus dictum as Reporter Call seems to concede in his “N.B.”\footnote{121} that has been read as an assertion that the power was exercised. Boudin would deflate \textit{Caton} completely; he was con-

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\item \footnote{117} 1 L. Boudin, \textit{supra} note 110, at 66.
\item \footnote{118} 3 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 133 n.1 (1875), \textit{quoting} CHIPMAN, \textit{MEMOIRS OF CHITTENDEN} 100-13.
\item \footnote{119} 5-10 Va. 634, 4 Call 5 (1782).
\item \footnote{120} \textit{Id.} at 638, 4 Call at 17.
\item \footnote{121} \textit{Id.} at 639, 4 Call at 20-21.
\end{itemize}
vinced that there was no such case at all, it having been dreamed up by the Reporter to strengthen later claims that judicial power to declare on constitutionality had been early asserted by the distinguished judges who sat on the Virginia high court.  

_Rutgers v. Waddington_, a 1784 decision of the Mayor's Court of New York City, and _Brattle v. Hinckley_, the "lost" Massachusetts decision of 1786 or 1787, involved a type of confiscation law directed at Loyalists but differing from the North Carolina enactment that precipitated _Bayard v. Singleton_. The Massachusetts and New York legislation provided that, in suits by creditor "absentees" brought to recover on bonds executed before hostilities commenced, the courts were enjoined from allowing interest for the period of the War. Reliance upon such legislation was in each instance challenged by plaintiff as contrary to the Treaty of Peace with Great Britain, under which British creditors were not to be hampered in collection of their just claims. Faced with conflict between state law and federal treaty the two courts escaped through strained construction of the former that permitted award of full interest to those suing. Technically, then, the two decisions constituted the exercise of judicial review. There was in them an element of constitutional review, non-defensive in character, born of the view, later to become an accepted derivative of American constitutional law, that treaties of the United States must prevail over state law. But significantly, there was no claim in either case of state judicial power to invalidate state legislation for conflict with the state constitution, absent legislative effort so to invade the judicial provinces as to threaten the courts in their performance of their constitutionally established functions as the third branch of government.

122. 1 L. BOUDIN, supra note 110, at 531-35.
123. 1 THAYER, supra note 104, at 63-72.
124. HAINES, supra note 79, at 120-21. To Louis Boudin, the Massachusetts case is "lost" because it never existed! 1 L. Boudin, supra note 110, at 555-63.
125. A revealing aspect of _Rutgers v. Waddington_ is the court's reference to the place of the Council of Revision in New York's constitutional framework. After summarizing the provision for the Council and its function, the following paragraph appears in the court's opinion:

From this passage of our Constitution, Mr. Attorney seems to regard this determination of the Council of Revision on the law in question in the light of a judicial decision, by which this court ought to be guided, for the sake of uniformity in the dispensation of justice. But surely the respect, which we owe to this honorable council, ought not to carry us such lengths; it is not to be supposed, that their assent or objection to a bill can have the force of an adjudication; for what in such a case would be the fate of a law which prevailed against their sentiments? Besides, in the hurry of a session, and especially _flagrante bello_, they have neither leisure nor means to weigh the extent and consequences of a law whose provisions are general, at least not with that
During the years from the drafting of the Federal Constitution to the eve of the decision of the Supreme Court of the United States in Marbury v. Madison, there were further developments in the state courts and initial decisions in the Federal Supreme Court concerning the scope of judicial power. The period started with a major conflict between legislative and judicial branches in Virginia. In 1778 the Virginia General Assembly provided for the establishment of district courts; the judges of the court of appeals, augmented by the election of four additional for a total of nine, were to preside over these district courts, "allotting among themselves the districts they shall respectively attend." But no provision was made for upward adjustment in salary or reduction in other duties. The judges remonstrated in what is known as the Cases of the Judges of the Court of Appeals. Of considerable length, the remonstrance concludes with the following paragraph before directing the president of the court to deliver the document to the Governor with the request that he lay it before the General Assembly:

To obviate a possible objection, that the court, while they are maintaining the independency of the judiciary, are countenancing encroachments of that branch upon the department of others, and assuming a right to control the legislature, it may be observed, that when they decide between an act of the people, and an act of the legislature, they are within the line of their duty, declaring what the law is, and not making a new law. And ever disposed to maintain harmony with other members of government, so necessary to promote the happiness of society, they most sincerely wish, that the present infraction of the constitution may be remedied by the legislature themselves; and thereby all further uneasiness on the occasion be prevented. But should their wishes be disappointed by the event, they see no other alternative for a decision between the legislature and judiciary, than an appeal to the people, whose servants both are; and for whose sakes both were created, and who may exercise their original and supreme power, whenever they think proper. To that tribunal, therefore, the court, in that case,

accuracy and solemnity which must be necessary to render their reasons incontrovertible, and their opinions absolute. The institution of this council is sufficiently useful and salutary, without ascribing to their proceedings, effects so extraordinary; nor is it probable, that the high judicial powers themselves, would in the seat of judgement always be precluded, even by their own opinion given in the Council of Revision; for instance, if they had consented to a bill, general in its provision, and in the administration of justice they discovered that, according to the letter, it comprehended cases which rendered its operation unseasonable, mischievous, and contrary to the intention of the legislature, would they not give relief? Surely it cannot be questioned.

Thayer, supra note 104, at 70-71.
126. 5 U.S. (1 Cranch) 137 (1803).
127. 5-10 Va. 678, 4 Call 135 (1788).
commit themselves, conscious of perfect integrity, in their intentions, however they may have been mistaken in their judgment.\textsuperscript{128}

Responding to the remonstrance, the General Assembly in late 1778 amended the earlier act to create a new court of appeals consisting of five judges thereby in effect ousting the contentious judges, but directing that the creation of the new court not affect any suits then pending. In turn, the judges asserted "that they are again under an indispensable obligation to advert to an act of assembly which they are constrained to consider as incompatible with their independence" and "in conformity to these sentiments" they tendered in March of 1789 their resignations as judges of the court of appeals.\textsuperscript{129} "On the 20th of June, 1789, the five judges of the court of appeals, appointed under the act of the 22d December, 1788, met according to law, and proceeded to do business."\textsuperscript{130} Their appointments had been by joint ballot of the two Houses of Assembly, as provided in the constitution. In October of 1792 the Assembly legislated once again, to reduce "into one act the several acts concerning the court of appeals," calling for a court of five chosen as specified by the constitution. This further legislative action reintroduced unsettlement into the picture, but as no new judges were chosen by the Assembly, the judges appointed under the 1788 act concluded after a conference in April of 1793 that they were to continue "for, as they held their offices under the constitution, the new law could not have taken them away, had it even been intended" which they concluded was not the case.\textsuperscript{131} The Reporter concluded by quoting Judge Mercer as observing "that the legislature, without intending it, had done all they could to deprive the judges of their offices; but that it was not in their power to do so, except for misbehaviour in office, and in the manner prescribed by the constitution."\textsuperscript{132}

Clearly, the highest court of Virginia was here on the defensive, seeking to preserve its basic authority to exercise its historic function of judicial review free of legislative threat to its independence. In the case of Kamper \textit{v.} Hawkins,\textsuperscript{133} which in time immediately followed the above events, the court of appeals was more assertive but only to the point of claiming power to pass on constitutionality in a judicial context.

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\item \textsuperscript{128} \textit{Id.} at 682, 4 Call at 146.
\item \textsuperscript{129} \textit{Id.} at 683, 4 Call at 149-50.
\item \textsuperscript{130} \textit{Id.} at 683, 4 Call at 150.
\item \textsuperscript{131} \textit{Id.} at 683, 4 Call at 150-51.
\item \textsuperscript{132} \textit{Id.} at 683, 4 Call at 151.
\item \textsuperscript{133} 3-4 Va. 11, 1 Va. Cas. 19 (1793).
\end{itemize}
In one of the district courts, with Spencer Roane on the bench, Kamper moved for an injunction to stay proceedings on a judgment obtained against him at law by Mary Hawkins. The question of the court's jurisdiction being of "novelty and difficulty," it was "adjourned" to the general court. Hawkins's claim was the unconstitutionality of a legislative act, passed late in 1792, that authorized the district courts to "exercise the same power of granting injunctions to stay proceedings on any judgment obtained in any of the said district courts, as is now had and exercised by the judge of the high court of chancery in similar cases. ..."

Basis for the challenge lay in the fact that provisions of the constitution appeared to establish common-law courts and the court of chancery as separate judicial bodies with non-overlapping remedial jurisdiction. The general court was unanimous that the motion should be overruled, with four of the five judges asserting the powers of courts to invalidate legislative acts found contrary to the constitution.

Awarding of new trials by state legislatures, after decision in the courts, was not uncommon during the period under review and well into the nineteenth century. In invalidating such action as a violation of the separation of powers the New Hampshire Superior Court of Judicature in Merrill v. Sherburne cited in support four unpublished decisions to like effect handed down in that State during the 1790's although conceding but not citing other unpublished decisions said to be to the contrary. Calder v. Bull, decided by the Supreme Court of the United States in 1798, arose out of similar facts. After the probate court of Hartford had refused to admit a will to probate and appeal time had expired, the legislature of Connecticut directed that a new trial be given. At the second hearing the probate court reversed itself. In vain the heir sought relief in the superior court and the supreme court of errors; the Charter under which Connecticut was continuing to operate did not, of course, incorporate the structural concept of separation of powers. On writ of error the sole inquiry in the Supreme Court of the United States was, as regarded the limitations in the Federal Constitution, whether the Connecticut law violated the prohibition against ex post facto legislation contained in section 10 of article I. The Court's decision that this prohibition is applicable only to criminal legislation required affirmance of the Connecticut judgment.

134. Id. at 12, 1 Va. Cas. at 21-22.
135. 1 N.H. 199 (1818).
136. Id. at 216-17. The dates given by the court for the supportive cases are 1791, 1797, and 1799.
137. 3 U.S. (3 Dall.) 386 (1798).
Among the earliest decisions of the Justices of the United States Supreme Court, antedating the case of Calder v. Bull, is that reported as Hayburn's Case.\textsuperscript{138} Actually it was a combination of two determinations of the Justices on circuit. Involved was early legislation by Congress seeking to impose upon the circuit courts determination and certification to the “Secretary at War” of the degree of disability of Revolutionary veterans authorized to file pension claims in the circuit courts. But the determination and certification were not to be the end of the matter; the legislation empowered the Secretary to withhold from the pension list those certified if he suspected “imposition or mistake.”

The issue was one of separation of powers, viewed either as a congressional attempt to transfer judicial power to the Executive branch or as imposing upon the Judiciary non-judicial duties. The Justices sitting on circuit for the district of Pennsylvania were divided on the validity of the legislation, but not so those sitting on circuit for the district of New York among whom was Chief Justice Jay. To the majority of the Justices the legislation was unconstitutional; but clearly the exercise of the power to invalidate was that of defensive constitutional review. Legislative efforts to impose on judges what they deemed to be non-judicial functions were not limited to Congress; such were not uncommon in the states. However, no decision of a state court on this issue has been found for the period under review.

On the other hand, for this fifteen-year period reaching to Marbury v. Madison there are recorded a number of cases in which the state courts were faced with the contrasting situation of legislative effort to deny jury trial in the face of constitutional guarantee. In State v.——,\textsuperscript{139} a North Carolina decision of 1794, denial did not result in invalidation. Involving an action by the Attorney General against receivers of public monies, two of the three judges finally took the position, later taken by the Supreme Court of the United States in Murray's Lessee v. Hoboken Land & Improvement Co.,\textsuperscript{140} that there is no constitutional violation in the use of distraint against public officials who fail to account for public funds. Yet even the two judges were hesitant at first, while the third stuck to his conclusion of unconstitutionality. In the same year, in South Carolina, it was held that an ordinance of Charleston empowering the wardens' court to recover fines for violation of a prohibition on the keeping of a tallow-chandler's shop was unconstitu-

\textsuperscript{138} 2 U.S. (2 Dall.) 409 (1793).
\textsuperscript{139} 2 N.C. 28 (1794).
\textsuperscript{140} 59 U.S. (18 How.) 272 (1855).
tional for lack of jury trial. Immediately following the turn of the century Kentucky courts thrice struck down legislative acts for denial of jury trial. In this line of cases the courts were once again engaging in constitutional review for the protection of procedures necessary for the exercise of judicial review.

Of the three Kentucky cases the first decided, Stidger v. Rogers, is most significant because a secondary basis for invalidation was violation of the contract clause of the Kentucky Constitution. Although this judicial action came at the end of the fifteen-year period, other decisions throughout the period do indicate the emergence in several states of judicial flirtation with non-defensive constitutional review. The common prohibition against ex post facto laws, conceptually analogous to that forbidding legislative impairment of contract in that in both instances governmental action follows private conduct, was in mid-period the basis for invalidation of a New Jersey act requiring acceptance as specie of continental money. In Pennsylvania and then in Maryland the courts asserted authority to resolve issues of separation of powers not involving any threat to the independence of the judiciary as a third, co-equal branch of state government. In neither instance, however, did challenged legislation fall.

A trilogy of cases, two from South Carolina and one from Pennsylvania, concerned attempted legislative transfer of rights to real property. In each instance the acts were declared to be unconstitutional. For two reasons, however, these exercises of power to invalidate represent only uncertain beginnings of non-defensive constitutional review. They can be viewed, and perhaps were judicially intended, as defensive exercises on the basis that determination of title, as asserted in Bayard v. Singleton, is a judicial, not a legislative, function. Secondly, the South Carolina decisions were rested on the Magna Carta rather than the State’s constitution, while no basis was given in the

141. Zylstra v. Corporation of Charleston, 1 S.C. 153, 1 Bay 382 (1794).
142. Caldwell v. Commonwealth, 2 Ky. (Sneed) 129 (1802); Enderman v. Ashby, 2 Ky. (Sneed) 53 (1801); Stidger v. Rogers, 2 Ky. (Sneed) 52 (1801).
143. 2 Ky. (Sneed) 52 (1801).
145. Whittington v. Polk, 1 Har. & John. 236 (Md. 1802); Respublica v. Duquet, 2 Yeates 492 (Pa. 1799) (technically an issue of delegation of power from the State to the city of Philadelphia).
146. Austin v. Trustees of the University of Pennsylvania, 1 Yeates 260 (Pa. 1793); Bowman v. Middleton, 1 S.C. 101, 1 Bay 252 (1792); Haw v. M’Claws, 1 S.C. 38, 1 Bay 93 (1789).
Pennsylvania decision which had to be that of Justice Yeates alone because the other three justices were closely related to the University. A later act of the South Carolina legislature, authorizing the laying out of public streets, was challenged by freeholders whose property would be taken without their consent.\textsuperscript{147} Again reliance was placed on the Magna Carta but now with added reference to the constitution of the State. The four judges were in agreement that there was no constitutional violation in this type of taking for public purposes but split evenly on the question whether compensation must be paid the private landowners affected. The judges did not question their power in this context to exercise non-defensive constitutional review supportive of governmental action.

A similar claim of judicial power with respect to an alleged taking was involved in \textit{State v. Parkhurst},\textsuperscript{148} an 1802 decision of the New Jersey Supreme Court of Judicature. In an information in the nature of a quo warranto the Attorney General at the relation of one Aaron Ogden sought to oust Parkhurst from the clerkship of certain local courts to which he had been given an interim appointment by the then governor. Ogden held the clerkship by earlier appointment under legislation providing a five-year term. That period had not expired but meantime Ogden had been elected to the Senate of the United States and had taken his seat. A state legislative act of 1801 declared that when one became a member of Congress his state office stood vacant. The challenge was to the constitutionality of this act presumably because it constituted a "taking" of a right from Ogden to the advantage of Parkhurst. Two of the three Justices found for the State, with Chief Justice Kirkpatrick to the contrary. The Reporter justifies his reporting of the latter's opinion on the ground that on writ of error to the court of appeals the judgment was reversed in favor of Parkhurst.

In finding the act of 1801 to be constitutional the Chief Justice cited as precedent for the power of courts to examine for constitutionality the two New Jersey cases of \textit{Holmes v. Walton}\textsuperscript{149} and \textit{Taylor v. Reading},\textsuperscript{150} previously considered, the force of which in his opinion was greatly increased by the uniform course of decision in other states, particularly Virginia and Pennsylvania, and above all, by reported decisions

\textsuperscript{147} Lindsay v. Commissioners, 2 S.C. 16, 2 Bay 38 (1796).
\textsuperscript{148} 9 N.J.L. 427 (Sup. Ct. 1802).
\textsuperscript{149} Haines, supra note 79, at 92; see note 109 supra.
\textsuperscript{150} Cited in State v. Parkhurst, 9 N.J.L. 427, 444 (Sup. Ct. 1802) (no original report).
involving the same question in the Supreme Court of the United States. There is great significance in Chief Justice Kirkpatrick's alignment of precedent in his assertion of judicial power to pass on the constitutionality of legislative acts, for he made no distinction between defensive and non-defensive constitutional review. Thus as analysis of early New Jersey cases has shown, Holmes v. Walton involved defensive review of constitutionality, whereas in Taylor v. Reading the exertion of the power in no way placed the judiciary in jeopardy. Consistency in the nature of the power exercised can be reasonably claimed for the Pennsylvania decisions, but certainly not for the Virginia. Reference to more than one reported decision of the federal Supreme Court must be taken as further evidence that Kirkpatrick made no distinction in the kind of constitutional review exercised. For Hayburn's Case, considered earlier,\textsuperscript{151} was definitely of a defensive nature, thus suggesting that the Chief Justice must also have been thinking of Hylton v. United States\textsuperscript{152} in which the Supreme Court sustained an act of Congress taxing carriages against the assertion that it was unconstitutional because, although a direct tax, it was not apportioned according to population as required by the second section of article I of the Federal Constitution.

Why after a quarter century of experience with judicial involvement in the matter there was no recognition of the utterly divergent ramifications of defensive and non-defensive constitutional review is in retrospect difficult to fathom. The former is wholly consistent with maintenance of balance among the three departments of government, coordinate in their respective spheres by the Montesquieuian theory so fully embraced as a fundamental principle of political philosophy and practice. Non-defensive constitutional review, exercised by the third branch, disrupts this balance to constitute the judiciary "more equal than the others." The explanation must lie in the fact that once the courts were determined to be preferable to the other five methods for enforcement of constitutional limitations there gradually began to evolve, with or without realization of the consequences, an acceptance of the use of constitutional review to the full extent assumed with respect to the operation of the other methods.\textsuperscript{153}

\textsuperscript{151} Considered in text accompanying note 138 supra.
\textsuperscript{152} 3 U.S. (3 Dall.) 171 (1796).
\textsuperscript{153} A reading of 1 L. Boudin, supra note 110, passim and especially Appendix C, conveys the impression that the question of the extent of judicial power early became so enmeshed in the political partisanship of early periods in American historiography as to render impossible any unemotional, analytical examination of the expansion of constitutional review.
The difficulty with this enlarged role for the judiciary, state and federal, lay in the structure of state constitutions and of the Constitution of the United States fashioned in their pattern. That structure was cast in the mold of the theory of fractionated power taken from Montesquieu. Courts were assigned a co-ordinate place in the structure, but for the purpose of engaging in the historic functions drawn from English judicial practice. As previously described these concerned the exercise of judicial review, of inestimable importance in the governmental scheme but not envisioning anything like constitutional review. This was the problem Chief Justice Marshall faced in *Marbury v. Madison*, in his design of an escape from the dilemma in which Jefferson and Madison had appeared to trap him. No wonder his attempts to justify judicial power to determine constitutionality are so weak and unpersuasive; even the great Chief Justice was scarcely a legal magician. The factual situation was one in which the authority he claimed for the Court was much more defensive in nature than otherwise. Judicial power can be eroded by legislative overburdening of a court as well as by legislative efforts to circumvent it; the factors in the Remonstrance of the Virginia Judges are sufficient to bring this point home.

Marshall could have come out of the *Marbury* predicament much stronger in his claim of the power of judicial invalidation of the latter portion of section 13 of the Judiciary Act of 1789 (as he misinterpreted it) had he limited his assertion to the right of defensive constitutional review. Admittedly, however, he pitched his claim on far broader ground, and proceeded to lead the Court in the invalidation of state legislation under both the contract clause and the commerce clause. The major cases, all decided between 1810 and 1827, were *Fletcher v. Peck*¹⁵⁴ and *Dartmouth College v. Woodward*¹⁵⁵ under the former, *Gibbons v. Ogden*¹⁵⁶ and *Brown v. Maryland*¹⁵⁷ under the latter. Within this period also came *McCulloch v. Maryland*,¹⁵⁸ destined to be the most influential of them all, at one and the same time sustaining the constitutionality of the Second United States Bank and holding unconstitutional the Maryland tax on the Bank's operations.

But in premising in *Marbury* judicial authority for exercising non-defensive as well as defensive constitutional review, Marshall exposed himself and his assertion to the unanswerable logic of Justice Gibson

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¹⁵⁴. 10 U.S. (6 Cranch) 87 (1810).
¹⁵⁶. 22 U.S. (9 Wheat,) 1 (1824).
¹⁵⁷. 25 U.S. (12 Wheat.) 419 (1827).
of the Supreme Court of Pennsylvania, expressed in *Eakin v. Raub.* A Pennsylvania act of 1785 limited right of entry to twenty-one years from the date of accrual of a claimant's title, but saved "to those beyond the sea," after coming to the United States, ten years in which to make an entry. By an act of 1815, however, the saving clause was repealed. Irish claimants, testing by action of ejectment title to land derived by operation of will, found themselves met by the assertion of title in defendants through adverse possession. On instructions the jury found for defendants and plaintiffs appealed. The result turned on the applicability of the later legislation. For the Court, Chief Justice Tilghman declared there was no doubt of the judiciary's power to void an act in violation of the constitution. Clearly, here the court would have to exercise non-defensive review, entertaining no distinction between types of constitutional review. However, because "the utmost deference is due to the opinion of the legislature," invalidation of the 1815 act was avoided by construing it as intended to have only prospective operation.

This disposition did not satisfy Justice Gibson, who proceeded to challenge John Marshall's reasoning in support of undifferentiated reviewing power by courts despite his recognition of the general acceptance of Marshallian doctrine. To Gibson, "the powers of the judiciary are divisable into those that are political and those that are purely civil." From the analysis that follows it is clear that the civil powers are those comprehended by the concept of judicial review, while the political powers denominate constitutional review. Under a written constitution judicial review embraces "just such powers and capacities as were incident to [the judiciary] at the common law..."; these powers "are, therefore, commensurate only with the judicial execution of the municipal law, or, in other words, with the administration of distributive justice, without extending to anything of a political cast whatever." On the other hand, "[t]he constitution of *Pennsylvania* contains no express grant of political powers to the judiciary." It is conceded that the constitution is a law of superior obligation to that of an act of the legislature, so that in case of collision "the latter would have to give way." "But it is a fallacy, to suppose that they can come

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160. Id. at 346 (emphasis in original).
161. Id.
162. Id. at 346.
163. Id. (emphasis added).
164. Id.
into collision before the judiciary,”¹⁶⁵ for

in theory, all the organs of the government are of equal capacity; or, if not equal, each must be supposed to have superior capacity only for those things which peculiarly belong to it; and as legislation peculiarly involves the consideration of those limitations which are put on the law-making power . . . it follows, that the construction of the constitution, in this particular, belongs to the legislature, which ought, therefore, to be taken to have superior capacity to judge of the constitutionality of its own acts. But suppose all to be of equal capacity in every respect, why should one exercise a controlling power over the rest? That the judiciary is of superior rank, has never been pretended, although it has been said to be co-ordinate.¹⁶⁶

In this way Gibson put the question, never satisfactorily answered, how one of the equal branches of government could enjoy superiority over its coordinates.

“But,” continued Gibson, “in regard to an act of assembly, which is found to be in collision with the constitution, laws, or treaties of the United States, I take the duty of the judiciary to be exactly the reverse” by virtue of the supremacy clause in the Federal Constitution. Gibson thus had no quarrel with what Professor William Van Alstyne has dubbed vertical constitutional review—the review of state legislative acts alleged to be in conflict with the Constitution of the United States, as contrasted with horizontal constitutional review—review of state legislation by state courts and of federal acts by courts of the United States.¹⁶⁷ Thus Gibson must not have disapproved of Marshall’s decisions of the 1810-1827 period save for the first half of McCulloch; his guns were trained on Marbury and all that it comported for judicial claims, at state as well as federal levels, of authority to exercise constitutional review on the horizontal plane.

Analysis of Framer intent supports Gibson in this fundamental distinction. As reported by the Committee of Detail on August 6, article VIII, which was to become article VI, read:

The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the

¹⁶⁵. Id. (emphasis in original).
¹⁶⁶. Id. at 350-51.
¹⁶⁷. W. Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 DUKE L.J. 1, is helpful to a full understanding of the weakness in the Marshall opinion in Marbury, to an appreciation of Gibson’s “rebuttal” to Marshall, and in other respects to the issue of judicial claims to power to exercise substantive (contrasted with formal) constitutional review.
authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants.\textsuperscript{168}

At the same time, article XI, section 3, ultimately to become article III, section 2, was worded:

The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States\textsuperscript{169}

Later in August a number of changes were made in the draft; two are crucial to realization of the correctness of Gibson's position. On the 23d it was successfully moved to rephrase the supremacy clause in such manner that it would commence:

This Constitution & the laws of the U.S. made in pursuance thereof, and all Treaties made under the authority of the U.S. shall be the supreme law of the several States and of their citizens and inhabitants\textsuperscript{170}

Four days later, among a series of actions,\textsuperscript{171}

It was moved and seconded to insert the words "this constitution the" before the word "laws" 2 line 3 sect, II[th] article [sic]. Which passed in the affirmative.

The temporal sequence in these two actions is convincing that the inclusion in the federal judicial power of cases arising under the Constitution was responsive to the rewording of the supremacy clause, a rewording clearly designed to confer upon the Supreme Court of the United States power to exercise vertical constitutional review with respect to state court dispositions of cases involving issues under the Federal Constitution. Inclusion of the word "constitution" in the definition of federal judicial power gives a toehold to those searching for textual basis supporting Court exercise of horizontal constitutional review but it is clear that such was not the intention of the Framers.\textsuperscript{172}

The support for the broader power that Raoul Berger finds in the ratifying conventions\textsuperscript{173} affords slender ground for the claim that the instrument as ratified can bear the desired meaning. To find the broader power is an act of forced construction, an act of will and not of logic.

\textsuperscript{168} 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 183 (1911).
\textsuperscript{169} Id. at 186.
\textsuperscript{170} Id. at 389 (motion by John Rutledge of S.C.).
\textsuperscript{171} Id. at 423. Madison's use, in his Notes for August 23, of what appear to be Roman numerals is confusing. However, from context it is apparent that the references with respect to alterations concerning the Judiciary are to the then eleventh article, ultimately to become article III of the completed document. See usage id. at 422.
\textsuperscript{172} More extended analysis supportive of this conclusion can be found in Strong, Rx for a Nagging Constitutional Headache, 8 SAN DIEGO L. REV. 246 (1971).
\textsuperscript{173} R. BERGER, CONGRESS V. THE SUPREME COURT (1969).
Norris v. Clymer,\textsuperscript{174} decided twenty-one years after Eakin v. Raub, is generally read as an abandonment by Gibson, now Chief Justice, of his earlier views. This reading relies upon the interjection by the Reporter of remarks of Gibson during his summarization of oral argument of defendant’s counsel. Counsel had just cited Eakin for the proposition “[t]hat the courts possess the power to declare an act void is settled . . . though it is said it must be a very clear case.”\textsuperscript{175} Then follows the insertion “[Chief Justice.—I have changed that opinion for two reasons. The late Convention, by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and from experience of the necessity of the case.]”\textsuperscript{176} The first reason given is free of interpretational difficulties. The “late Convention” is that of 1837-38, which resulted in the Pennsylvania Constitution of 1838. It was typical of state constitutional revision of that time and later to make no alteration in the wording of the judiciary article to authenticate judicial power to engage in constitutional review.\textsuperscript{177} There is no denying that despite the unanswerable logic of Gibson’s dissent in 1825 state and federal courts continued their ever bolder stance in exercising horizontal as well as vertical constitutional review, affirmative as well as defensive constitutional review—without making among them any distinction whatsoever.\textsuperscript{178}

Chief Justice Gibson’s second reason is, on the other hand, enigmatic. It must have been this that created in the mind of Louis Boudin doubt that Gibson had reversed his field. That doubt he planned to explore in a separate volume on the early history of the judicial power in Pennsylvania\textsuperscript{179} but if that study was ever published it has not been located. To attempt an understanding it is necessary to consider the facts, statements of opposing counsel, and the court opinion by Gibson. The suit was one for specific performance of a contract to purchase land on a groundrent basis. Plaintiffs were trustees under the will of Joseph Parker Norris who had devised the great part of his Fair Hill estate in such manner as to provide life estates for his male offspring with remainders over to their children. These re-

\textsuperscript{174} 2 Pa. 277 (1846).
\textsuperscript{175} Id. at 281.
\textsuperscript{176} Id. (brackets in original).
\textsuperscript{177} 5 THORPE, supra note 5, at 3104-17. If any American constitution has ever included express authorization for judicial exercise of constitutional review, it is a fact unencountered anywhere in the relevant literature.
\textsuperscript{178} No effort is here made to muster citation of the many state court decisions asserting the authority to exercise undifferentiated constitutional review.
\textsuperscript{179} The statement is found in 1 L. BOUDIN, supra note 110, at 405 n.2.
Remainder interests continued in existence at the time the trustees sought to alienate them under authorization of a private bill enacted by the Pennsylvania Legislature in 1842. The "property interests" of those holding remainders were not, however, destroyed; the groundrents were to be received by the trustees and applied according to the will. Defendant, refusing to meet his obligation under the contract, claimed the legislative act to be unconstitutional and therefore plaintiff's title defective.

Defendant's counsel found invalidity in the Bill of Rights of the state constitution. "The 9th section declares a man shall not be deprived of his property but by the judgment of his peers, or the law of the land. This law interferes with that most sacred right of disposition: one of the strongest inducements to acquisition." In reply, plaintiff's counsel centered on two propositions in support of the statute's validity. "I would not contend for the extreme case of taking one man's property and giving it to another. The evils prohibited were practical ones, under which the people had suffered, such as attainment." The legislation was thus not of a thrust inconsistent with the Bill of Rights but conformed to long usage. The second supportive argument hits pay dirt. "If it [what is here provided] cannot be done, the city must stand still. This estate on the north, Powelton on the west, Blackwell and Wharton's estate on the south, hem us completely in, and for half a century the growth of the city must be stopped to protect contingent remainders."

The opinion of Chief Justice Gibson is a short two pages. To him the legislation is remedial in character, of a type that had long prevailed in Pennsylvania and elsewhere to the benefit, not the prejudice, of all concerned. He recognized the law-of-the-land provision of the state constitution, yet it cannot be said that this statute has deprived any man of his property, or applied it to any other use than his own. The estate is to remain in the trustees; altered, indeed, as to kind, but still applicable to the trusts in the will. It is to be let on perpetual or redeemable ground-rents at the option of the trustees, who are to give such security as the judges of the Common Pleas may require for the due investment of such parts of it as may eventually be turned into money by redemption. Now, as the constitution allows to the legislature every power which it does not positively prohibit,
I am at a loss to perceive, in these or any other of its clauses, an ascription of such sanctity to testamentary directions, as to exclude the interference of the legislature with regulations merely modal, for the advancement of interests both private and public. By a due execution of the powers conferred by this statute, not only will the welfare of the family, but the extension of the city be promoted. It would be fraught with incalculable mischief to let a doubt rest on the power of the legislature and we are entirely clear that the relief sought by the bill be granted.\textsuperscript{183}

It is altogether clear that Gibson was in Norris reacting to the unusual situation there presented. He was resorting to non-defensive, horizontal constitutional review in order to remove any doubt regarding the power of the state legislature to adopt remedial legislation to break the hold on the city's growth from strict adherence to the Norris will. Here, indeed, was a case of necessity for relaxation of strictures on expanded constitutional review that involved not conflict but concert between co-ordinate branches of state government.

Such a finely honed distinction as this could not, however, withstand the pressures for judicial exercise of non-defensive constitutional review; in this sense Chief Justice Gibson in Norris recognized that his position in Eakin represented a lost cause. The Supreme Court was continuing vertical constitutional review of state decisions under the commerce and the contract clauses; the litigated issue was the offensiveness or inoffensiveness of state laws alleged to be in conflict with these major provisions of the Federal Constitution. This was also the very period when, under prodding of counsel, American courts, federal and state, were fully accepting due process as a direct limitation on governmental power, thus greatly expanding the scope of both horizontal and vertical constitutional review. There had been conceptual difficulty in giving such meaning to the inherited form of Chapter 39 of Magna Carta when in the nation of origin it had, by the Glorious Revolution of 1688, been equated with parliamentary supremacy. To quote an "unimpeachable source": "Examination of early American state decisions reveals judicial grappling with this problem, culminating by the middle of the century in the rejection by most jurisdictions of the concept of due process as simply regularized legislative process."\textsuperscript{184} Gibson had treated it in the new light in Norris; as the mid-century mark passed judicial reliance on due process accelerated, among the

\textsuperscript{183} Id. at 285.
\textsuperscript{184} F. Strong, American Constitutional Law 123 (1950).

Acceptance of this full-scale constitutional review was not without opposition. Marshall's interpretation of the contract clause as embracive of executed as well as executory contracts, and of contracts to which a state was a party in addition to contracts between private individuals, placed serious limits on the police power of the states. Combined with these limits were those resulting from his endorsement, though equivocal, of Webster's thesis 189 that the commerce clause carried the negative implication that the states were without power to tax or regulate interstate commerce even though Congress was not acting. The jurisdictional base for Supreme Court review of state judicial action in these two major categories of constitutional litigation had been provided by the first Congress in enactment of section 25 of the Judiciary Act of 1789. Vigorous attack on the validity of this section by the Virginia Court of Appeals had been turned back by the Marshall Court in *Martin v. Hunter's Lessee* 190 in 1816. Nor did Mr. Justice Gibson challenge this vertical form of constitutional review; quite to the contrary, he fully accepted it as a feature of the American constitutional framework. But despite this, resistance to Court exercise of this power continued to the eve of the Civil War. There were state court threats of refusal to obey mandates of the Court; general outcries over particularly disliked decisions; and frequent and determined efforts in Congress to repeal the jurisdictional grant, that of the year 1831 nearly succeeding. 191

At the same time there were mitigating circumstances. Taney's decision in *Charles River Bridge v. Warren Bridge* 192 in 1837, invoking the doctrine of strict construction, took part of the sting out of the contract clause. Six years later *Bronson v. Kinzie* 193 offered some

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185. 12 N.Y. 202 (1854).
186. 59 U.S. (18 How.) 272 (1855).
187. 13 N.Y. 378 (1856).
188. 60 U.S. (19 How.) 393 (1856).
190. 14 U.S. (1 Wheat.) 304 (1816).
191. An account of the stormy aftermath of *Martin* is to be found in Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-fifth Section of the Judiciary Act, 47 AM. L. REV. 161 (1913).*
193. 42 U.S. (1 How.) 311 (1843).
relief through the distinction between remedial and substantive changes in contract terms, although there invalidating a state law restricting mortgagee rights on foreclosure.¹⁹⁴ Two decisions of the Supreme Court gave hope at the time for avoidance of much of the adverse effect on the states of the negative implication theory of the commerce clause. *Cooley v. Board of Wardens*¹⁹⁵ would allow state regulation where, as on the facts of that case, the thrust of state action permitted of local variation. A year before, *Nathan v. Louisiana*¹⁹⁶ had indicated an avenue of escape by way of narrow construction of the concept of interstate commerce. Only later would the consequences of these two decisions be realized.

*Murray's Lessee*,¹⁹⁷ disentangling due process from separation of powers to discover in the former as well protection against summary seizure of the property of citizens, did not place horizontal constitutional review in a bad light, especially as an atmosphere of defensiveness remained by reason of the separation-of-powers element. That the government procedures were there held constitutional only adds to the acceptability of the decision; distraint seems passing reasonable despite its summariness when government is pursuing collectors of its revenue for full accounting of public monies. Although invalidation occurred in the two New York decisions, it was limited to property—remainder interests in *Westervelt*¹⁹⁸ and liquor in *Wynehamer*¹⁹⁹ in existence on the effective date of the challenged legislation. Judicial invalidation of such extremism suggests a “necessity of the case” as strongly as validation seemed to Gibson to be of necessity in *Norris*.²⁰⁰ *Wynehamer* posed no threat to legislative power to legislate prohibition for the future. Similarly, the policy of the New York law of 1848 “for the more effectual protection of the property of married women” was not by *Westervelt* foreclosed from *in futuro* operation.²⁰¹

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¹⁹⁵ 53 U.S. (12 How.) 299 (1851).

¹⁹⁶ 49 U.S. (8 How.) 73 (1850) (one who buys and sells bills of exchange is not engaged in interstate commerce).

¹⁹⁷ 59 U.S. (18 How.) 272 (1855), cited *supra* notes 140 & 186.

¹⁹⁸ 12 N.Y. 202 (1854), cited *supra* note 185.


²⁰¹ The *Wynehamer* view of constitutional power/limitation was later followed by the Supreme Court of the United States in *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1873), and *Mugler v. Kansas*, 123 U.S. 623 (1887).
By far the most condemned exercise of due process as a major facet of expansive constitutional review was Chief Justice Taney's assertion in *Dred Scott*\(^{202}\) of the unconstitutionality of the eighth section of the Missouri Compromise. Yet if there be put aside repugnance to ownership of one human being by another, the facts of the case were startlingly like those of earlier instances of outright taking of property from one for the advantage of another. Like the later Emancipation Proclamation, the constitutionality of which was questioned by some, this taking was without temporal or reciprocal limitation. Recall that plaintiff's counsel in *Norris* declared that he would not support the constitutionality of "the extreme case" of legislative taking of one man's property and giving it to another, instances of which had not been uncommon from colonial times onward.\(^{203}\)

One commentator has said that, up to *Dred Scott*,

we may draw two conclusions concerning the criticism of the Supreme Court: first, the court was criticized quite as much for not declaring congressional acts unconstitutional as for doing so; second, it seems clear that both Federalist and Republican criticism during these early years was directed not so much at the possession of the power of the court to pass on the validity of acts of Congress as at the effect of its exercise in supporting or invalidating some particular party measure.\(^{204}\)

Even as to the *Dred Scott* decision, although it allegedly made Civil War inevitable and unquestionably blackened the name of Taney for a full century, the hostility that was directed to it was more as a mistaken exercise of judicial power than as an exercise of horizontal constitutional review. The same must be said of the continuing challenge to vertical constitutional review as exercised by the Supreme Court. The basic dissension concerned the form of government of the United States, a continuation of the issue whether the country's political organization was to remain a confederation or become a federalism. Because the vertical type of constitutional review operated as a vehicle for the effectuation of judicial federalism, opposition to it but reflected the confederational position. The institution of constitutional review itself, despite some vicissitudes, had by 1860 experienced evolution to its full potential with growing acceptability of it as the enforcing

\(^{202}\) 60 U.S. (19 How.) 393 (1856), cited *supra* note 188.

\(^{203}\) The unlimited transfer of title to land from one party to another, invalidated in *Bowman v. Middleton*, 1 S.C. 101, 1 Bay 252 (1792), was a legislative act of 1712.

mechanism for achieving the original objective of adherence to written constitutional limitations.

What general satisfaction existed with judicial exercise of expansive constitutional review was not to last, however. By the end of the century dissatisfaction with Supreme Court decisions had evolved on two major fronts and in the ensuing thirty-five years had grown to crisis proportions. The two fronts are familiar to all: state and federal power under the commerce clause, and state and federal power in the face of the substantive due process clauses. The first involved a clash of authority in the federalistic context; in the second, the two levels of government faced a common obstruction to ameliorative legislation. Although developments on the two fronts were interrelated in time and other circumstance, analysis can best proceed first with one and then the other.

In the administration of the Cooley Compromise\textsuperscript{205} by the Supreme Court the lion's share of decisions found that the state tax or regulation under challenge concerned matters requiring national uniformity; consequently, the states were powerless to act despite Congressional inaction. Only in the matter of the time as of which the state of destination could tax articles originating in another state did the Court loosen the hold resulting from the failure in Cooley to repudiate, as Taney had urged, the Webster-inspired theory of negative implication of the grant to Congress of power to regulate commerce among the states. The exception was Woodruff v. Parham,\textsuperscript{206} decided in 1868, wherein the Court screwed up its courage to repudiate a dictum of John Marshall's. In Brown v. Maryland\textsuperscript{207} the great Chief Justice had held that under the commerce clause as well as the export-import clause Maryland could not, directly or indirectly, impose the burden of a tax on imported goods until those goods, having reached their destination, had been commingled with other property in that jurisdiction. The test Marshall devised for determining that point is known as the original package doctrine, which delays the time until after breaking or first sale. In dictum Marshall had said in closing his opinion for the Court that "we suppose the principles laid down in this case, to apply equally to importations from a sister State."\textsuperscript{208}

\textsuperscript{205} Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).
\textsuperscript{206} 75 U.S. (8 Wall.) 123 (1868).
\textsuperscript{207} 25 U.S. (12 Wheat.) 419 (1827).
\textsuperscript{208} Id. at 449.
Marshall's holding as to technical imports, however, was not attacked and continued to limit state taxing power. Indeed, only in this year of the Bicentennial has it been "revised" through a strained construction that avoids direct repudiation of one of Marshall's leading decisions.\footnote{209} With respect to \textit{regulation} by states of destination, no distinction was made between goods coming from abroad or from another state; in both instances the original package doctrine was applicable.\footnote{210} The \textit{Leisy v. Hardin}\footnote{211} decision, invalidating Iowa confiscation of liquor shipped into that State from Illinois, made impossible effective administration of state prohibition legislation. In other respects as well, the states were seriously crippled in their efforts to deal with pressing economic and social problems. The classic illustration is \textit{Wabash, Saint Louis & Pacific Railway v. Illinois},\footnote{212} which held invalid Illinois legislation against the hated railroad practice of charging more for a shorter than for a longer haul of freight. The practice was one calling for national uniformity in policy but as Congress had not seen fit to set that policy the states were powerless to act.

Only quite obliquely, in \textit{Gibbons v. Ogden},\footnote{213} had Marshall had a case turning on the time of which interstate commerce commenced. Here then was an avenue for mitigation of the rigors of the theory of negative implication that survived so well the compromise in \textit{Cooley}. The appeal of this to the post Civil War Justices was as reasonable as it was irresistible. The result was confinement of the concept of commerce to narrow compass when to give it functional content would subject to invalidation state sources of revenue and state employment of their police powers in attempts to resolve the pressing problems of the times. The classic decisions are \textit{Coe v. Errol}\footnote{214} and \textit{Kidd v. Pearson}\footnote{215} In \textit{Coe} tax day in New Hampshire found logs stacked on the bank of...
a tributary of the Androscoggin River, awaiting the rise in water level resulting from spring thaw that would make possible their flotation down the Androscoggin to a mill located at Lewiston, Maine. New Hampshire's power to levy a property tax on the logs was sustained against the owner's contention that in a broad sense the logs were already in interstate commerce. *Kidd* sustained Iowa's taxation of liquors manufactured in that State with the intention of sale in other states; at the production stage interstate commerce had not yet started.

When Congress finally began to legislate with respect to the economic and social problems with which the states had been grappling under constitutional difficulty, challenge arose on the ground that the national legislature was reaching beyond its constitutionally assigned province. In *United States v. E.C. Knight Co.*,216 the Sherman Antitrust Act of 1890 was held constitutionally inapplicable to a merger of sugar refiners that together controlled ninety-eight percent of refinery capacity in the United States. For the proposition that "commerce succeeds to manufacture, and is not a part of it" the supporting precedent was *Kidd v. Pearson* which in turn had built on *Coe v. Errol*. The concession that Congress had power under the commerce clause when "the transaction is itself a monopoly of commerce" probably helped to save from similar fate Sherman Act application to a stock acquisition designed to eliminate competition between two railroads operating parallel lines in the Northwest. Even then the decision in *Northern Securities Co. v. United States*217 was five to four with none other than the new appointee of President Theodore Roosevelt among the dissenters. In an opinion for which trust-buster Roosevelt did not easily forgive him,218 Justice Holmes expressed grave doubts about constitutionality.

Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.219

A year later, in *Swift & Co. v. United States*,220 the Sherman Act was saved in its applications beyond instrumentalities of commerce by

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216. 156 U.S. 1 (1895).
217. 193 U.S. 197 (1904).
219. 193 U.S. at 402-03 (dissent).
220. 196 U.S. 375 (1905).
the theory that, if the combination, even though locally effectuated as in Knight, was formed with the intent of monopolizing interstate commerce, then it was an enactment within the power of Congress. The opinion in that case was by none other than Mr. Justice Holmes. The two Coronado cases of the 1920's illustrate the application of the Sherman Act to labor before the Norris-LaGuardia Act. In the first of the two the intent of a local strike adversely to affect interstate commerce was not proved; in the second, it was. The difference was crucial; the Sherman Act was found inapplicable in first Coronado, while applicable in second Coronado. Ten years later the National Industrial Recovery Act was invalidated in Schechter Poultry Corp. v. United States on the basis that the intrastate commerce transactions of the slaughterhouse operators, who in Brooklyn slaughtered for local disposition of the poultry, affected interstate commerce only indirectly. The distinction taken in the Coronado cases was translated, in the Schechter opinion, as one of differentiation between direct and indirect effects on interstate commerce of intrastate activities. This distinction "must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."

Schechter was a unanimous decision. As Thomas Reed Powell observed at the time, "the unanimity of the judgment . . . commands, if it does not compel, respect." Moreover, the factual pattern was the most disadvantageous possible from the Government's point of view. "The Schechters acted only after interstate commerce was over and their sales were wholly local. The effect of their local practices on the previous interstate commerce in chickens or on future interstate commerce in chickens was not demonstrably great."

221. UMW v. Coronado Coal Co., 259 U.S. 344 (1922); Coronado Coal Co. v. UMW, 268 U.S. 295 (1925).
222. "That the distinction rested on the scope of the Act and not on the constitutional power of Congress was asserted in Apex Hosiery Co. v. Leader, 310 U.S. 459, 509 (1940) . . . " 1 P. Freund, A. Sutherland, M. Howe & E. Brown, Constitutional Law 224 (3d ed. 1967). The reference is to footnote 27 in the opinion of Mr. Justice Stone. Note the doubt implicit in the wording by the casebook editors. The assertion is unconvincing. The footnote is a later rationalization after the Court, beginning in 1937, substituted "effect" on for "intent" toward interstate commerce in defining the scope of the commerce power as buttressed by the necessary and proper clause.
224. Id. at 548.
226. Id.
the Recovery Act had spent its force and was about to expire with no New Deal interest in its continuance.

_Carter v. Carter Coal Co._,\(^\text{227}\) decided in 1936, was something else, holding unconstitutional the first Bituminous Coal Conservation Act which had sought to bring economic order out of chaos in an industry that clearly produced for the interstate market. Although the device designed to achieve compliance with the Act's regulatory provisions was a heavy tax on coal at the mine, by agreement the issue of validity was argued under the commerce clause. Again the Court, although now split, found only indirect effect on interstate commerce. The Court's restrictiveness in interpretation of the commerce clause, originating in a judicial effort to protect the states against the dead hand of negative implication, was now precipitating a serious crisis in congressional power to legislate under that clause for national welfare. Meantime, the contemporaneous decision in _United States v. Butler_\(^\text{228}\) had, against strong dissent, blocked Congress from employment of the taxing and spending clause in the interest of the general welfare. The year 1936 had brought to a boiling point the question whether the New Deal program of President Franklin Roosevelt was to be stymied on the federalistic front.

As earlier remarked, dissatisfaction with fully expanded constitutional review emerged on two fronts following termination of the Civil War, quickening in the final decades of the nineteenth century and intensifying in the first decades of the present century. Review of the development under the commerce clause reveals a paradoxical situation in which the Supreme Court, in a commendable effort to protect state power when Congress was leaving to the states attempted solution of the economic and social problems confronting the country, unwittingly laid the basis for serious limitation on federal power when Congress undertook nationalizing legislation. With due process, on the other hand, growing dissatisfaction arose from an expanded conception of the nature of the property interests protected by that guaranty. Invalidation under fifth amendment due process of the Legal Tender Act of 1869 in _Hepburn v. Griswold_\(^\text{229}\) was consistent with the judicial view of protected property that had evolved by the middle of the nineteenth century. The central feature of that view, as illustrated in decisions

\(^{227}\) 298 U.S. 238 (1936).
\(^{228}\) 297 U.S. 1 (1936).
\(^{229}\) 75 U.S. (8 Wall.) 603 (1869), overruled as a result of "improvement" in Court personnel in _Legal Tender Cases_, 79 U.S. (12 Wall.) 457 (1871).
that have been noted, was of due process as a protector of property rights fully vested prior to legislative action. The great expansion began with the dissent in the Slaughter-House Cases of 1873, largely made possible, ironically, by the adoption in 1868 of the fourteenth amendment.

Designed to provide adequate constitutional base for federal civil rights acts on behalf of the newly freed Negro, the fourteenth amendment was first invoked on behalf of the New Orleans slaughterers in their struggle against the near monopoly granted by carpet-bag Louisiana legislators to the Crescent City Livestock & Landing Company. Having lost in the courts of Louisiana, the embattled slaughterers turned to Attorney John A. Campbell for their appeal to the Supreme Court of the United States. Campbell, an Alabamian, had been a Justice of the High Court in the 1850's who on outbreak of the Civil War had resigned out of sympathy for the southern cause. In a brilliant move he urged on the Court as the appropriate interpretation of the privileges or immunities guarantee of the new amendment the construction that had been given to the privileges and immunities clause of section 2 of article IV by Justice Bushrod Washington on Circuit. That unchallenged construction had been an embracive one comprehending "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."

Campbell carried four of the nine Justices. In the dissent of Mr. Justice Field, which had the concurrence of the other three dissenters, appears this passage:

The privileges and immunities designated [in Corfield v. Coryell] are those which of right belong to the citizens of all free govern-

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230. Discussed in text accompanying notes 197-201 supra.
231. 83 U.S. (16 Wall.) 36 (1873). Dissenting opinions begin id. at 83.
233. Id. at 551.
234. Strong, The Economic Philosophy of Lochner: Emergence, Embrasure, Emasculation, 15 ARIZ. L. REV. 419, 423 (1973). As the title indicates, this article reviews in detail the rise, dominance, and fall of substantive property due process. Reference may be made to it for fuller treatment than is given in the present article.
ments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. In the discussions in Congress upon the passage of the Civil Rights Act [of 1866] repeated reference was made to this language of Mr. Justice Washington.\textsuperscript{238}

While joining the Field dissent, Mr. Justice Bradley added for himself the further conviction that:

In my view, 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. Their right of choice is a portion of their liberty; their occupation is their property. Such a right also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.\textsuperscript{236}

A turn of events flowing from the Court's downward revision in the protection afforded by the contract clause\textsuperscript{237} enabled the dissenters in \textit{Slaughter-House} to become concurrers when in 1884 the Crescent City Livestock & Landing Company was before the Court asserting the invalidity of Louisiana legislative repudiation of the monopoly grant before the end of its term.\textsuperscript{238} The majority found no violation of the contract clause; the Field-Bradley contingent declared that the grant had been invalid from its inception. In his concurrence Field continued to relate to the privileges or immunities clause the new-found constitutionally protected right of all to engage in the common callings, to follow freely the ordinary pursuits of life. Bradley agreed in his concurring opinion that the new concept had support in the privileges or immunities clause, but he was no less convinced than he was in \textit{Slaughter-House} that it was equally grounded in due process and equal protection.

Bradley's view was the more prophetic. The move away from privileges-immunities came first in \textit{Yick Wo v. Hopkins},\textsuperscript{239} decided on equal protection grounds. Invalidated was a San Francisco ordinance forbidding laundry operations in wooden structures in the absence of special permit. Fair on its face, it was so administered as to favor Occidentals to the disadvantage of Orientals pursuing this type of liveli-

\begin{thebibliography}{9}
\bibitem{235} 83 U.S. (16 Wall.) at 97-98 (emphasis in original).
\bibitem{236}  Id. at 122.
\bibitem{237}  Stone v. Mississippi, 101 U.S. 814 (1879).
\bibitem{238}  Butchers' Union v. Crescent City Livestock & Landing Co., 111 U.S. 746 (1884).
\bibitem{239}  118 U.S. 356 (1886).
\end{thebibliography}
hood. Ultimate resort to due process as the primary focus of the new constitutional doctrine was foretold in two decisions of the 1890's. In *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*\(^{240}\) intrastate railroad rates set by the State were found to be confiscatory of the railroad's property and as such violative of due process.\(^{241}\) Seven years later came *Allgeyer v. Louisiana*,\(^{242}\) technically involving state power to regulate contracts made beyond its borders but carrying in its opinion expansive dictum on the reach of substantive due process.

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.\(^{243}\)

Five years into the present century the notorious decision in *Lochner v. New York*\(^ {244}\) made it crystal clear that a firm constitutional basis had been laid for broad protection of economic interests by way of substantive due process.

From 1905 to 1934 the economic philosophy of *Lochner* was in the saddle, controlling Supreme Court reasoning and greatly influencing many supreme courts of the states. Most critics of the period have pictured it as one of a freewheeling Court invalidating in a broad sweep federal and state legislation with which it found itself in disagreement. Careful examination of the Court's decisions reveals, not a capricious striking out at legislative enactments willy nilly, but a remarkably consistent insistence that they conform to the basic principles of a competitive market economy. Walton Hamilton, able economist before he became a teacher of constitutional law, pinpointed the dominant philosophy when he wrote that "[i]t was not property upon which they [the majority justices] sought to confer the legal privilege of shaping the terms of the bargain. They professed, with little qualification, an economic creed"\(^ {245}\) to the effect that individual initiative under conditions

\(^{240}\) 134 U.S. 418 (1890).

\(^{241}\) Commentators have found puzzling the fact that Justice Bradley dissented. An explanation is offered in F. Strong, *supra* note 184, at 137.

\(^{242}\) 165 U.S. 578 (1897).

\(^{243}\) *Id.* at 589.

\(^{244}\) 198 U.S. 45 (1905).

\(^{245}\) Hamilton, *Common Right, Due Process and Antitrust*, 7 Law & Contemporary.
of free and open competition more fairly and effectively governed economic relationships than did intervention by government. The creed was a blend of Herbert Spencer’s social Darwinism and Adam Smith’s free market economy. The very consistency with which the Court majority adhered to this economic philosophy in their interpretation of due process exacerbated the political situation, for it did result in overthrow of much major social legislation deemed by Congress or state legislatures to be necessary in the public interest.

The *Lochner* line of decisions did not go unchallenged either within or without the Court. Holmes’s dissent in *Lochner* itself is one of the classics in Supreme Court annals.246 He was again in dissent in *Adkins v. Children’s Hospital*,247 in which his reasoning suggests some instruction in economics by Mr. Justice Brandeis who did not participate because his daughter was a member of the District of Columbia wage board. Chief Justice Taft also dissented in *Adkins*, but separately. As the *Lochner* period came to a close Brandeis assumed from Holmes, who had resigned, the burden of dissent in *New State Ice Co. v. Liebmann*;248 he was there joined by Justice Stone, destined to become Chief Justice during the first half of the 1940’s. Few there were, save of course for the business interests thereby benefited, who outside the Court did not strongly disapprove of the judicial hegemony of *Lochner*.249

Various proposals for relief accompanied the ever-rising criticism. As candidate of the Progressive Party in 1912 Theodore Roosevelt pressed for recall of judicial decisions. His views were well stated in the introduction he contributed to a volume by W.L. Ransom,250 one of his vigorous supporters.251 The platform of the Bull Moose Party contained the following plank:

The Progressive party demands such restriction of the power of the courts as provides: 1. That when an act passed under the police

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246. 198 U.S. at 74-76.
249. Haines, *supra* note 79, at 428-66. This source includes further illustrations, beyond those given in the text, of conflict within the Court. Also included is consideration of *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895), in which the majority invalidated the income tax thus necessitating the sixteenth amendment. *Contra* the majority of commentators is Boston, *Some Conservative Views Upon the Judiciary and Judicial Recall*, 23 Yale L.J. 511 (1914).
251. *Id.* chs. VIII-XIII contain the author’s supporting contentions.
power of the state is held unconstitutional under the state constitution by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the act to become law, notwithstanding such decision; 2. That every decision of the highest appellate court of a state declaring an act of the legislature unconstitutional shall be subject to the same review by the supreme court of the United States as is now accorded to decisions sustaining such legislation. 252

It will be noted that the Roosevelt proposal was directed at state court exercise of horizontal, non-defensive constitutional review, the very type against which Gibson had inveighed. In New York especially the new due process fever had taken such a hold that before as well as after Lochner the court of appeals of that state had invalidated a number of state laws intruding upon a regime of laissez faire. 253 This development culminated in Ives v. South Buffalo Railway, 254 in which the State's workmen's compensation act was invalidated on the ground that in its attempt to impose an alien relationship between employer and employee it effected a taking of the manufacturer's property and as such was inconsistent with the due process clauses of the New York and Federal Constitutions. 255 Sharing in the ire created by the Ives decision, the presidential candidate of the Progressive Party proposed both the review of such decisions by the people as the ultimate sovereign and the revision of the federal jurisdictional statutes to provide for Supreme Court review of state court decisions sustaining as well as denying federal constitutional claims. Only Colorado actually adopted decisional recall 256 but the other proposal met with success in congressional action of 1914. 257

In the same year in which Ransom's volume was published another volume appeared under the authorship of Gilbert Roe, 258 with an introduction by Robert M. LaFollette. To critic Roe, recall of judicial decisions would be "absolutely destructive of the constitution." 259

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252. Haines, supra note 79, at 484.
253. People v. Williams, 189 N.Y. 131 (1907) (restrictive hours of labor for females); People v. Marx, 99 N.Y. 377 (1885) (manufacture of oleo); In re Jacobs, 98 N.Y. 98 (1885) (production of cigars in tenement houses). In Jacobs the New York court cited Justice Field in Butchers' Union v. Crescent City Livestock & Landing Co., 111 U.S. 746 (1884), to the effect that the common callings are open to all as privileges of citizens of the United States. 98 N.Y. at 107.
254. 201 N.Y. 271 (1911).
255. Contra, State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101 (1911) (decided contemporaneously with Ives).
256. Munroe, Initiative and Referendum, 8 ENCYC. Soc. Sci. 50, 52 (1932).
257. This has been incorporated into 28 U.S.C. § 1257(3) (1970).
259. Id. at 219.
BICENTENNIAL BENCHMARK

The great vice in this idea... is that it would be used as a means of amending the Constitution by a majority vote [of wholly untrained laymen]... The Constitution, therefore, would be immediately reduced to the level of a statute, since any portion of it could be amended, or repealed, at any time by a mere majority of the popular vote.260

The needed reform was, rather, the introduction of recall of judges themselves. This type of recall was inevitably denounced by some as contrary to the independence of the judiciary yet defended by others as a necessary solution to the blind adherence of judges to outworn economic, political and social dogmas.261 Ransom felt recall of judges neither wise nor necessary but insisted it was not so radical as opponents claimed, citing article VIII of the Declaration of Rights of the Massachusetts Constitution of 1780 as “the first American statement of the ‘recall’ doctrine.”262 With decisional recall it seems always to have been assumed that the sovereign people would make the determination. Recall of judges could be effected by the legislative branch, as was not uncommonly provided in the original state constitutions, or by vote of the electorate. Of the five States having this form of recall in the Lochner period, the four adopting it during that period provided that the recall would be directly by the people.263

In the presidential campaign of 1924 Robert M. LaFollette ran as an independent, feeling that Calvin Coolidge and John W. Davis

260. Id.
262. W. Ransom, supra note 250, at 89. The wording of article VIII was that “in order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life...” 3 Thorpe, supra note 5, at 1890.
263. Legislative: PA. CONST. art. V, § 15 (1874); 5 Thorpe, supra note 5, at 3135. Popular: ARIZ. CONST. art. VIII, § 1 (1910, as amended 1912); CAL. CONST. art. XXIII (1879, as amended 1911); NEV. CONST. art. II, § 9 (1864, as amended 1912); ORE. CONST. art. II, § 18 (1859, as amended 1908). For a discussion of the latter four constitutions see C. BEARD & B. Shultz, DOCUMENTS ON THE STATE-WIDE INITIATIVE, REFERENDUM AND RECALL 242-73 (1912).

The original Oregon Constitution read almost as did the Pennsylvania Constitution of 1874, effective to 1968, save that it was the judges of the supreme court who could be removed by the Governor on joint resolution of the Legislative Assembly, ORE. CONST. art. VII, § 20 (1859), whereas in Pennsylvania the supreme court judges were excepted from the recall provision.

The Arizona Constitution of 1910 subjected judicial officers to recall. The opposition to this of President Taft and Congress forced the State to except the judges as the price of admission to the Union. Arizona had the last say: as soon as admitted, it removed the exclusionary clause. The pertinent documents are found in C. BEARD & B. Shultz, supra, at 244-64.
offered the national electorate little choice. One of his concerns was the extent to which the Supreme Court was striking down legislation on the basis of incompatibility with the Court's view of due process. With the candidates of the two major parties indisposed to take any remedial steps, the elder LaFollette proposed that the Federal Constitution be amended to read:

No inferior federal judge shall have authority to hold void a law of Congress on the ground that it is unconstitutional. If the Supreme Court assumes to decide any law of Congress unconstitutional, or by interpretation undertakes to assert a public policy at variance with the statutory declaration of Congress, which alone under our system is authorized to determine the public policies of government, the Congress may, by reenacting the law, nullify the action of the Court.

Thereafter the law would remain in full force and effect precisely the same as though the Court had never held it to be unconstitutional.\footnote{264} In the LaFollette platform appeared the following supporting contention:

The Constitution specifically vests all legislative power in the Congress, giving that body power and authority to over-ride the veto of the president. The federal courts are given no authority under the Constitution to veto acts of Congress. Since the federal courts have assumed to exercise such veto power, it is essential that the Constitution shall give to the Congress the right to over-ride such judicial veto, otherwise the Court will make itself master over the other co-ordinate branches of the government. The people themselves must approve or disapprove the present exercise of legislative power by the federal courts.\footnote{265}

Several features strike one at once. The assertions of the Platform plank come close to reviving early views that constitutional review was a usurpation of power by the judiciary. Roe, for one, had so argued in 1912. To him the absence on the Constitution of signatures of many of the delegates and the “protracted struggle” for ratification made it “obvious that the Constitution would never have been ratified by the people had they suspected that it gave judges the power now exercised by them.”\footnote{266} Not long after 1924 there was to appear the

\footnotesize  \footnote{264. \textit{Haines}, \textit{supra} note 79, at 486. Note that La Follette's proposal was directed at both constitutional review and judicial review of congressional acts on the part of the Supreme Court.}

\footnote{265. \textit{C. Gilbert, You Takes Your Choice} 239 (1924).}

\footnote{266. \textit{G. Rob, supra} note 258, at 29.}
monumental two-volume study of Louis Boudin asserting lack of justification for constitutional review save for that defensive in character as illustrated by the opinion in Bayard v. Singleton. LaFollette’s proposal disclosed that concern had now shifted to Supreme Court invalidation of congressional legislation and that recall was to be by the people’s representatives rather than by direct popular vote. Charles Grove Haines offered a similar yet more expansive proposal. In his view “Congress ought to be given, by constitutional amendment, the right to reenact the measure thus invalidated by a two-thirds vote of each house after a general election has transpired, if the measure in any way restricts or changes materially the power of the states; and by a majority vote after a general election if the act is one relating primarily to the powers granted by the Constitution to the Federal Government.” The same volume of The Forum that carried the Haines solution included advocacy by still another critic of a constitutional amendment that would “deprive the Court of its power to declare void or refuse to enforce any act of Congress whatever.” Senator Owen of Oklahoma introduced in Congress an amendment forbidding any federal judge to declare an act of Congress unconstitutional and declaring vacant the judgeship of any who had the temerity to act in the teeth of this prohibition. This proposal went beyond the judicial recall plan; under it, one offense and the offender was out of judicial office with no opportunity to justify his action to the people.

Professor Felix Frankfurter of Harvard Law School supported the candidacy of Robert LaFollette. In his celebrated article on the Red Terror of Judicial Reform, published in The New Republic, Frankfurter did not espouse any of the various proposals for relief that others were advocating; he did not embrace LaFollette’s recommendation for wholesale nullification by Congress of Court decisions adverse to acts of Congress. He urged the Progressives not “to fall back upon mechanical contrivances when dealing with a process where mechanics can play but a very small part.” Rather, he focused on due process as the seat of the trouble. He believed that informed examination of

267. 1 L. BOUDIN, supra note 110, passim.
268. 71 THE FORUM 842 (1924).
269. Id. at 567-70.
270. Culp, A Survey of the Proposals to Limit Or Deny the Power of Judicial Review By the Supreme Court of the United States-II, 4 IND. L.J. 474, 487 (1929) (quoting the exact wording of the proposal made during the second session of the 64th Congress). The first section of Professor Culp’s survey appears id. at 386.
271. 40 NEW REPUBLIC, Oct. 1, 1924, at 110.
the work of the Court "will probably lead to the conclusion that no nine men are wise enough and good enough to be entrusted with the power which the unlimited provisions of the due process clauses confer." His conclusion: "The due process clauses ought to go."

The number and variety of restrictions advanced for narrowing or eliminating Court exercise of the power to invalidate under due process were near legion, as can be seen from literature of the time. Included were proposals for requiring more than a majority vote for invalidation; favorite requisites were two-thirds or even complete unanimity. There was nothing new about these as concerned the Supreme Court of the United States; many limitations of this type had been proposed in the nineteenth century in conflict over vertical Court review of state decisions. A new wrinkle appeared in the middle of the Lochner period in the form of amendment of three state constitutions to put a stop to bare majority holdings of unconstitutionality. Ohio was first, incorporating into its major constitutional revision of 1912, under the influence of Theodore Roosevelt's castigation of constitutional review, a provision that "[n]o laws shall be held unconstitutional and void by the Supreme Court without the concurrence of all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void." Amendments of the Nebraska and North Dakota constitutions were much less complicated. Nebraska's required the concurrence of five out of seven of the supreme court justices with respect to any legislative act held invalid, which would include congressional enactments as would Ohio's; on the other hand, the North Dakota provision, calling for concurrence of four out of five judges for invalidation, was specifically limited to "any legislative enactment or law of North Dakota."

Franklin Roosevelt interpreted his landslide victory in the 1936 presidential election as a mandate from the American people to find the means for effecting the economic recovery of the nation. The most

272. Culp, supra note 270, includes in his review coverage of the agitation for reform that marked the first three decades of the present century.
273. Detail may be found in Warren, supra note 191.
274. Fite & Rubinstein, Curbing the Supreme Court—State Experiences and Federal Proposals, 35 Mich. L. Rev. 762 (1937), discuss the three state provisions after providing background on some of the federal proposals, including one of Senator Borah's that would have required for unconstitutionality the vote of seven of the nine Justices of the Supreme Court in any case reaching the Court via its appellate jurisdiction. The Senator was advancing a curb that presumably would not require constitutional amendment because grounded on congressional power to limit the Court's jurisdiction on appeal.
apparent obstacle to New Deal legislation was of course the Court's interpretation of the commerce clause. Looming in the background, nevertheless, was the question of the position of the Court on due process. *Nebbia v. New York*,\(^{275}\) decided in 1934, had appeared to remove from constitutional dimension the requirement of legislative adherence to *Lochner* economics. "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."\(^{276}\) Yet the sustainment of the New York minimum price control law had been by a scant 5 to 4; the *Lochner* decision of 1905 had not been categorically repudiated; involving as it did the chaotic performance of market forces in milk production, the statutory program was not inconsistent with competitive theory; and some passages in the Roberts opinion seemed responsive to limitation of the majority position to situations where the forces of private competition were not achieving an orderly market.

Moreover, even if *Nebbia* could be relied upon for loosening the grip of Lochnerian principles, decisions of 1935, 1936, and early 1937 were not reassuring. Two decisions during 1936, although not unanimous, served notice that the Court's basic validation of New York's milk control legislation did not mean the state was free of all due process and equal protection limitation.\(^{277}\) In that same year came the disturbing decision in *Morehead v. New York ex rel. Tipaldo*,\(^ {278}\) in which a 5 to 4 Court split in effect confirmed the earlier decision of *Adkins v. Children's Hospital*\(^ {279}\) invalidating minimum wage legislation for women. Even in the fullness of *Lochner*'s time there had been no question of legislative power, federal or state, to enact minimum wage laws for women provided they were based on "value of service"; the issue was the validity of a statute keyed to "cost of living." The New York Court of Appeals had construed the New York law as requiring that the minimum wages fixed be sufficient to meet the minimum cost of living although, in an effort to circumvent the *Adkins* ruling, the statute had been so drawn as to incorporate as well the standard of "value of service."

\(^{275}\) 291 U.S. 502 (1934).
\(^{276}\) Id. at 537.
\(^{278}\) 298 U.S. 587 (1936).
\(^{279}\) 261 U.S. 525 (1923), cited *supra* note 247.
This construction, said the Supreme Court, was binding on it, and that was the end of the matter. Sandwiching Morehead in time were two decisions striking down a federal and a state attempt to accomplish major reallocation of property rights in the interest of the disadvantaged. Both opinions were by Brandeis and both were unanimous. In the later of the two, Mr. Justice Brandeis was moved to observe that “[o]ur law reports present no more glaring instance of the taking of one man’s property and giving it to another.” Thus there was no assurance that essential features of important legislation of the New Deal might not run afoul of due process as well as of the commerce clause.

The expected move by the “mandated” President came swiftly after entrance upon his second term. Under amendment XX of the Constitution, effective February 6, 1933, presidential terms commence on January 20 rather than March 4; the Roosevelt proposal was made public on February 5, 1937. For the top of the judicial hierarchy it called for appointment of additional Justices of the Supreme Court to a maximum of fifteen for those sitting Justices not resigning or retiring at age seventy. The reason given was the necessity of having more and younger Justices to carry the Court’s increasing workload as manifested by the great percentage of denials of certiorari. It soon developed that the President, famed for his political sagacity, had blundered. Age was not the problem, and to attempt to justify the proposal on the rising percentage of denials of certiorari disclosed abysmal ignorance of the workings of the Court. Brandeis, then eighty years of age, was angered on both counts and made his irritation known. Hurriedly retreating from this fakery, the President came clean in his celebrated fireside chat with the American people on March 9.

Citing then recent invalidations under the commerce and due process clauses, the popular President declared that:

In the last 4 years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body. . . .

The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress—a superlegislature, as one of the Justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there.

281. 300 U.S. at 79.
We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men.

I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized.

How, then, could we proceed to perform the mandate given us?...

After outlining his proposal in detail, the President insisted that the Bill proposed was clearly constitutional, a point few disputed, thus making it possible to “secure results by legislation within the Constitution.” Continuing, he informed his listeners of his hope “that thereby the difficult process of constitutional amendment may be rendered unnecessary.” Opponents of the Bill would, he knew, contend that solution of the problem lay in constitutional amendment. He therefore proceeded “to examine that process.”

There are many types of amendment proposed. Each one is radically different from the other. There is no substantial group within the Congress or outside it who are agreed on any single amendment.

It would take months or years to get substantial agreement upon the type and language of an amendment. It would take months and years thereafter to get a two-thirds majority in favor of that amendment in both Houses of the Congress.

Then would come the long course of ratification by three-fourths of the States. No amendment which any powerful economic interests or the leaders of any powerful political party have had reason to oppose has ever been ratified within anything like a reasonable time. And 13 States which contain only 5 percent of the voting population can block ratification even though the 35 States with 95 percent of the population are in favor of it.

And remember one thing more. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be...

sitting on the Supreme Court bench. An amendment like the rest of the Constitution is what the Justices say it is rather than what its framers or you might hope it is.\textsuperscript{284}

After 168 days of constitutional crisis\textsuperscript{285} the President's Bill went down to defeat. Contributing to that defeat, to a degree difficult to ascertain, was the decision of the Supreme Court handed down on April 12 holding constitutional as a valid exercise of commerce power the National Labor Relations Act. A bare majority in \textit{NLRB v. Jones \& Laughlin Steel Corp.}\textsuperscript{286} declared that the fact the employees were engaged in production was not determinative; what was decisive was the physical impact on commerce among the states that can flow from labor strife. Thus the connecting link between local activities and interstate commerce was no longer defined as demonstrated intent to affect the latter but rather as presence of actual impact. Once that step had been taken it was analogically possible, although significantly different, to find the link in competitive effect, as was done in sustaining the Fair Labor Standards Act and the second Agricultural Adjustment Act.\textsuperscript{287} Sustainment of the latter in \textit{Wickard v. Filburn} is of especial moment because there Mr. Justice Jackson for the Court explained the difference between viewing the commerce clause from the standpoint of state power and from that of national power.\textsuperscript{288}

\textsuperscript{284} Id. at A471-72.


\textsuperscript{286} 301 U.S. 1 (1937). Thomas Reed Powell somewhere remarked that "a switch in time saved nine."


\textsuperscript{288} He explained:

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference, instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as "production," "manufacturing," and "mining" were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.

It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce
On the other hand, *Wickard* did not, as many insist, completely unhinge former limitations on congressional power under the commerce clause. There remained the question whether Congress could constitutionally regulate any and all local activity on the basis of broad non-competitive economic interrelationship with interstate commerce. Such power had been denied to Congress in the *Schechter* case. As Thomas Reed Powell had conceded:

If interstate commerce was promoted by increasing the buying power of the Schechter Shochtim, it would be promoted equally by increasing the buying power of any or every one else. To the buying power argument, there pretty clearly is no stopping place. . . . All the economics of the buying power argument is disputable, quite possibly too disputable to have one view accepted by a court as a sufficient reason for turning us all at once into a well-nigh unitary rather than a federal system of government.289

The buying-power thesis of Keynesian economics, although warmly welcomed by the New Deal, did not achieve Court acceptance in commerce cases until after Roosevelt's extended presidency.290 Although parentage was not admitted by the Court, that acceptance came in *Katzenbach v. McClung*.291 There was some dependence on the mere physical obstruction of interstate commerce that had grounded the companion decision in *Heart of Atlanta Hotel, Inc. v. United States*,292 and *Wickard v. Filburn* was cited for its proposition that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." . . ."293 But the economic effect in *Wickard* had been of a different kind, born of competitive interrelationships. Here the economic effect had to be spelled out in terms of general, overall impact. Decisive in the Court's mind was the finding of the lower court that forty-six percent of the meat served at Ollie's Barbecue, and a "substantial portion" of other food served, had moved in interstate commerce. It followed that the refusal to serve Negroes was adversely affecting the flow of goods

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290. However, "the economics of buying power" had been accepted in support of federal taxing-spending powers in 1937. *Helvering v. Davis*, 301 U.S. 619 (1937). This was of course early enough for argumentative use by New Deal lawyers.
293. 379 U.S. at 302, *citing* 317 U.S. at 125.
across state lines, despite the finding of the lower court that a requirement to serve Negroes would cause a substantial reduction in business.

Five years later this fancy concept was pressed to the breaking point in Daniel v. Paul when the Lake Nixon Club located in the back Arkansas hills was found to have purchased one paddle boat from an Oklahoma concern, to be leasing fifteen other such boats from the same company, and to own a juke box manufactured outside Arkansas that played records manufactured beyond the State's borders. For Mr. Justice Black it went "too far" to stretch "the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States." In these two decisions the Court took giant steps toward releasing the commerce clause, implemented by the necessary and proper clause, from any viable limitation of congressional power. This is evident from the fact that there had been much debate on the question whether the Civil Rights Act of 1964 could be predicated upon the commerce clause, as implemented by the necessary and proper clause, or should be rested on section 1 of the fourteenth amendment, as implemented by section 5. Among others, Professors Gunther and Wechsler had entered the intellectual fray. The latter had no difficulty with basing the legislation on the grants to Congress in the original Constitution. He saw "nothing fictive in the proposition that the practices to which the measure is directed may occur in or affect 'the commerce that concerns more States than one' or, even more plainly, may occur, as the Taft-Hartley Act requires, in an industry which affects such commerce." On the other hand, Professor Gunther had "basic difficulties with the proposal in light of our constitutional structure . . . ." His carefully reasoned elaboration is convincing:

Where immediate regulations of intrastate conduct have been imposed, a demonstrable economic effect on interstate commerce, business, or trade has normally been required. That kind of showing has been made, for example, with regard to the control of 'local' affairs in the labor relations and agricultural production fields. The commerce clause 'hook' has been put to some rather

295. Id. at 315 (dissent).
296. The Wechsler view was submitted by letter to the chairman of the Senate Commerce Committee during its hearing on the bill that became the Act of 1964. The paragraph from which the quotation is taken is conveniently found in G. GUNThER, supra note 194, at 219.
strained uses in the past, I know; but the substantive content of the commerce clause would have to be drained beyond any point yet reached to justify the simplistic argument that all intrastate activity may be subjected to any kind of national regulation merely because some formal crossing of an interstate boundary once took place, without regard to the relationship between the aim of the regulation and interstate trade. The aim of the proposed anti-discrimination legislation, I take it, is quite unrelated to any concern with national commerce in any substantive sense.

... I would much prefer to see the Government channel its resources of ingenuity and advocacy into the development of a viable interpretation of the Fourteenth Amendment, the provision with a natural linkage to the race problem. That would seem to me a considerably less demeaning task than the construction of an artificial commerce facade. ...

The language of Title II of the 1964 Civil Rights Act offered the Court a choice, the opinion of the Court elected the commerce route, and those concurring were satisfied although Justice Douglas would have preferred the fourteenth amendment basis.

The crusade of the 1960's against racial discrimination did not, of course, stop with the Civil Rights Act of 1964. That major legislation was followed by the Voting Rights Act of 1965, with the lesson learned to shift constitutional undergirding to the War Amendments. The general framework and many of the major provisions of this legislation survived challenge by South Carolina and other states in *South Carolina v. Katzenbach*. Inasmuch as racial discriminations in voting were the evil attacked, decision was rested on sections 1 and 2 of the fifteenth amendment. Despite the drastic medicine prescribed by Congress for eradication of effective denial of the franchise to the Negro, the Court was unanimous save for Mr. Justice Black's strenuous objection to the requirement of section 5 of the Act that a state within the formula prescribing literacy tests or devices must secure the approval of the United States Attorney General or the Federal District Court for the District of Columbia before in any way altering its constitution or laws pertaining to voting rights. To Justice Black, compelling the covered states "to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction

297. *Id.* at 218. The Gunther letter was addressed to the Department of Justice prior to the Hearings.
drawn in the Constitution between state and federal power almost meaningless.”

The question of the validity of one major section of the 1965 Voting Rights Act was reserved for resolution in *Katzenbach v. Morgan*. Section 4(e) forbade denial of the franchise to Puerto Ricans educated in Spanish. A majority of the Court sustained the provision under sections 1 and 5 of the fourteenth amendment, thus prohibiting enforcement of New York law requiring as a condition of voting the ability to read and write the English language. Justices Harlan and Stewart were in vigorous dissent, unable to fathom by what authority Congress could make its own independent judgment on the substantive content of section 1 of the fourteenth amendment. They reasoned that

> [w]hen recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. . . . But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all.

In short, the two Justices demanded to know how the majority’s assertion of congressional power to read the Constitution differently than does the Court on its own could be squared with the Court’s declaration in *Cooper v. Aaron* that *Marbury v. Madison* “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.” Reconciliation is possible, but this no whit diminishes the possible reach of the doctrine of *Morgan*. True, that decision could not quite avoid the necessity of constitutional amendment for reduction of voting age for *state* elections, but *Oregon v. Mitchell* must not be misread as blighting the growth potentialities of *Morgan*. A state’s control of the franchise by which it maintains its polity is surely the last bastion that should fall in the demise of federalism.

299. *Id.* at 358.
301. *Id.* at 666.
303. *Id.* at 18.
Racial discrimination was also dealt telling blows in two major decisions of the 1960's involving provisions of the post Civil War civil rights statutes. With two dissents, Jones v. Alfred H. Mayer Co.\(^{305}\) accorded broad interpretation to 42 U.S.C. section 1982, derived from the 1866 Act, and then found the section as so construed to be within congressional power under the thirteenth amendment. It was even possible for the majority, speaking through Justice Stewart, to cite the Civil Rights Cases\(^{306}\) of 1883 for authority. Whether or not section 1 of that amendment does go beyond abolition of slavery, the enforcing section, section 2, "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'"\(^{307}\) An inclusive interpretation of "badges and incidents" could embrace just about every manifestation of discrimination against blacks.

Probably more significant, however, is United States v. Guest\(^{308}\) in which the Government was successful in criminal action under 18 U.S.C. section 241, deriving from the Civil Rights Act of 1870. Highly significant was the fact that two-thirds of the Court, while in technical concurrence with Justice Stewart's opinion for the Court, nevertheless moved far toward reading out of section 1 of the fourteenth amendment any requirement of state action when Congress is legislating under section 5. Indeed, Justices Clark, Black, and Fortas seem in their concurrence to have gone all the way; "there now can be no doubt that the specific language of § 5 empowers Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."\(^{309}\) Brennan, Warren, and Douglas, in their separate concurrence, held back somewhat. Speaking for himself and the other two, Justice Brennan could

find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose.\(^{310}\)

Yet even this diminution in the limiting effect of the concept of state

\(^{305}\) 392 U.S. 409 (1968).
\(^{306}\) 109 U.S. 3 (1883).
\(^{307}\) 392 U.S. at 439, quoting 109 U.S. at 20.
\(^{309}\) Id. at 762.
\(^{310}\) Id. at 784.
action greatly enhances congressional power under section 5. In combination, *United States v. Guest* and *Katzenbach v. Morgan* mount enormous authority in Congress to legislate for the vast area of civil relations to the same embracive extent available to it in the field of commercial relations. By 1970 divided government in the federalistic sense of its original conception had faded as the bloom on the flower; through the process of amendment by Court decision constitutional federalism had all but given way to congressional federalism.

Contemporaneously with the breakthrough for the congressional power over interstate commerce, due process experienced a collapse in substance. Just two weeks before the *Jones & Laughlin* decision the Court in *West Coast Hotel Co. v. Parrish* had sustained the minimum wage statute of the State of Washington. In view of the low wage levels then obtaining it could probably have been demonstrated that even a “cost of living” standard would not deprive the employer of “property” because of the favorable effect of increased wages on productivity. But eschewing a resolution of the question on economic terms, the Court majority through Chief Justice Hughes waxed highly emotional, condemning those “unscrupulous and over-reaching employers” unwilling to pay a minimum wage “fairly fixed in order to meet the very necessities of existence.” Continuing his castigation, the Chief Justice observed that

> [w]hat these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.\(^{314}\)

Like *Jones & Laughlin, Parrish* must have aided the opponents of the Roosevelt Court plan; the Court was rendering the Bill unnecessary.

Significant as was the minimum-wage decision, the next year brought Court action that sucked all strength out of due process as a protector of property-type interests. In *United States v. Carolene Products Co.*,\(^{315}\) the Court dispatched the assertion of a manufacturer

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311. 301 U.S. 1 (1937), cited and discussed in note 286 and accompanying text supra.
312. 300 U.S. 379 (1937).
313. *Id.* at 398.
314. *Id.* at 399.
315. 304 U.S. 144 (1938).
of filled milk that the prohibition by Congress of the movement of this article in interstate commerce was violative of due process. Reports of committees of the two houses had "concluded, as the statute itself declares, that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public."\textsuperscript{316}

Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.\textsuperscript{317}

The full extent of the deflation of property due process is seen when even this subliminal test was rejected by Roosevelt's first appointee to the Court. It is clear from context that Mr. Justice Black would have applied no restriction whatever to legislative power in such circumstances. Actually, however, the distinction was inconsequential; under either view invalidation of economic legislation was at an end. It is unnecessary to recite the numerous decisions in support. Two are of especial interest. \textit{Day-Brite Lighting, Inc. v. Missouri}\textsuperscript{318} sustained legislation requiring employers on pain of criminal sanction to allow their employees four hours off on election days without diminution in wages. This was too much for Justice Jackson to stomach: "[T]here must be some limit to the power to shift the whole voting burden from the voter to someone else who happens to stand in some economic relationship to him."\textsuperscript{319} \textit{Ferguson v. Skrupa}\textsuperscript{320} sustained a Kansas law restricting to licensed attorneys the "business of debt adjusting." "Whether the legislature takes for its textbook Adam Smith, Herbert

\textsuperscript{316} \textit{Id.} at 149. This first \textit{Carolene} decision was on demurrer to the indictment. After conviction the company again challenged the legislative prohibition as violative of due process. \textit{Carolene Prods. Co. v. United States}, 323 U.S. 18 (1944). Sustaining the law, the Court now based its justification on the avoidance of consumer confusion between filled milk and condensed or evaporated milk; the bases of fraud and injury to health had been effectively refuted by company argument. The new basis advanced by the Court precipitated the question of the constitutionality of Court validation of governmental product favoritism. This issue the Court skirted by denying that the action of Congress involved a prohibition of one article "merely because it competes with another such article which it resembles." \textit{Id.} at 31.

\textsuperscript{317} 304 U.S. at 152.

\textsuperscript{318} 342 U.S. 421 (1952).

\textsuperscript{319} \textit{Id.} at 427 (dissent).

\textsuperscript{320} 372 U.S. 726 (1963).
Spencer, Lord Keynes or some other is no concern of ours. At long last the three principals in the constitutional drama of due process are identified by name.

First reaction to these striking developments was the understandable one that the impactful life of the due process clauses was over, that in effect they had been "retired" from the Constitution as Professor Frankfurter had urged decades earlier or that they were to be relegated to limbo by one or another restriction on the exercise of constitutional review as had been urged by other of the Court's critics. But Franklin Roosevelt had not proposed an end to constitutional review under the due process clauses, only "new blood" for their interpretation, a subtle yet portentous fact quickly appreciated by the more sophisticated. The difficulty was not with the clauses but with their interpreters. Indeed it is to the very sentence from first Carolene, quoted two paragraphs back, that there was appended the famous footnote 4:

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U.S. 359, 369-370; Lovell v. Griffin, 303 U.S. 444, 452.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536; Nixon v. Condon, 286 U.S. 73; on restrictions upon the dissemination of information, see Near v. Minnesota ex rel. Olson, 283 U.S. 597, 713-714, 718-720, 722; Grosjean v. American Press Co., 297 U.S. 233; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra 369; Fiske v. Kansas, 274 U.S. 380; Whitney v. California, 274 U.S. 357, 373-378; Herndon v. Lowry, 301 U.S. 242; and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see DeJonge v. Oregon, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religions, Pierce v. Society of Sisters, 268 U.S. 510, or national, Meyer v. Nebraska,
262 U.S. 390; Bartels v. Iowa, 262 U.S. 404; Farrington v. Tokushige, 273 U.S. [284], or racial minorities, Nixon v. Herndon, supra; Nixon v. Condon, supra; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., 303 U.S. 177, 184, n.2, and cases cited.323

The change in judicial attitude toward due process is highlighted by the two flag salute decisions that followed closely in time. With only Justice Stone in dissent, the Court in Minersville School District v. Gobitis324 sustained, as against protestations of Jehovah's Witness parents, compulsory flag salute by all school children in the school district. Writing for the Court, Mr. Justice Frankfurter declared:

The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant.325

Later in his opinion he observed:

It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board of the country. That authority has not been given to this Court, nor should we assume it.326

Within three years, however, after public recantation by Justices Black and Douglas327 and a Rutledge-for-Byrnes switch on the Court, Gobitis bit the dust in West Virginia State Board of Education v. Barnette.328 In a strong opinion by Justice Jackson a basic distinction was made between the fourteenth amendment when alone operative as contrasted with the situation where it finds its wellspring in the first amendment:

Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The

323. 304 U.S. at 152-53 n.4.
324. 310 U.S. 586 (1940).
325. Id. at 594.
326. Id. at 598.
328. 319 U.S. 624 (1943).
right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.226

In a long dissent, Justice Frankfurter stood steadfast in his views. It has ever since been a part of anecdotal comment about Court personalities that this quick and unglowed rejection of those views by most members of the Court hurt him deeply and remained a painful scar throughout his time on the Bench.

_Barnette_ constituted a major step in entrenchment of the double standard in constitutional jurisprudence. There were many who found it to their liking, but by no means all. Those of the latter view found that criticism of extended invocation of the first amendment, whether directly or through the fourteenth amendment, itself now drew attack. Thus Eugene Rostow, in finding in this new judicial philosophy a reconciliation of constitutional review with democracy, exhibited little patience with doubting Thomases.330 Familiar is Learned Hand's celebrated address in commemoration of the 250th anniversary of the Supreme Judicial Court of Massachusetts in which he insisted that the price of judicial immunity is that the courts "should not have the last word in those basic conflicts of 'right and wrong—between whose endless jar justice resides.'"331 It was his considered judgment that courts could satisfactorily umpire written constitutional provisions distributing the powers of government but not those general principles that American constitutions always include in order "to insure the just exercise of those powers." This view of one of this century's ablest jurists Rostow refers to as "Judge Learned Hand's monkish rule of complete abstinence. . . ." This observation is made in the course of condemnation of another's studied analysis of the proper function of the Court with respect to freedom of expression.332 In the eyes of Professor Rostow,
Elliot Richardson's offense is the long quotation from the Hand address which includes the above excerpt from it. That quotation is introduced in support of Richardson's own conclusion that

the intervention of courts inevitably encourages the impression that they constitute the first line of defense where civil liberties are concerned. This confusion of wisdom and constitutionality can only result—who is to say we are not already witnessing it?—in a progressive sapping of self-discipline in respecting minorities. The result of this process, in turn, is suspicion, intolerance, bigotry, and discrimination which the sporadic forays of the judiciary are helpless to check.333

The Richardson suggestion that the reconstructed Court was demonstrating inability to distinguish between the wisdom and constitutionality of governmental action in the civil rights domain put the shoe on the other foot. Had not the objective of the Roosevelt Court Reform Bill been, as the President said, to rescue the Constitution from the Court? Stated otherwise, had not the constitutional crisis of 1937 turned on the issue whether the Court could be made to function, in the role ultimately conceded to it, as the agency for enforcement of limitations on governmental power to be found in the written Constitution and to be construed with all the detachment the nature of man will permit? Justices Chase and Iredell had very early debated the matter in Calder v. Bull.334 Chase was sorely tempted to invalidate the Connecticut legislative act that, like the North Carolina law in Bayard v. Singleton, constituted an invasion of the state's judicial province even though it did not violate the Federal Constitution once the ex post facto prohibition was viewed as limited to criminal legislation.

Chase's celebrated declaration includes the passage to the effect that:

An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A law that punished a citizen for an innocent action . . . [A] law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B.: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.335

333. Id. at 52.
334. 3 U.S. (3 Dall.) 386 (1798).
335. Id. at 388 (emphasis in original).
The response of Iredell was that if Congress or a state legislature were to pass a law within constitutional limits,

the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standards: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.\textsuperscript{336}

Admittedly, \textit{Lochner} and its progeny had read into the Constitution the mixed bag of economic and sociological theories of Adam Smith and Herbert Spencer, while \textit{E.C. Knight} had fathered a roughly contemporaneous \textit{refusal} to read into the Constitution an expansive reach of congressional commerce power. Supposedly, however, the reform effort culminating in the Roosevelt Court Bill of 1937 was designed to put an end to such deviations from the manifest Constitution, not to redirect their course into channels more acceptable to the Court's critics. As for the status of the states under the new federalism it was Justices Black and Douglas, surprisingly, who first resisted the onrush of congressional authority. Dissenting in \textit{New York v. United States,}\textsuperscript{337} they asserted that

\[
\text{[t]he notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the States and the Nation outside the field of legislative controversy.}\textsuperscript{338}
\]

With respect to substantive limitation of governmental power Mr. Justice Frankfurter was the first member of the Court to express concern over the temptation to read "liberal" values into due process. The Justice, who had dissented in \textit{Barnette} in a futile effort to hold the line in the flag-salute situation, had asserted, three years before \textit{New York v. United States}, that "[a]s a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard."\textsuperscript{339}

\begin{itemize}
  \item \textsuperscript{336} Id. at 399.
  \item \textsuperscript{337} 326 U.S. 572 (1946).
  \item \textsuperscript{338} Id. at 594.
  \item \textsuperscript{339} West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 647 (1943) (dissent).
\end{itemize}
Speaking extra-judicially, Chief Judge Irving Lehman of the New York Court of Appeals was much more vigorous in a contemporaneous condemnation of the re-budding judicial freedom in constitutional interpretation:

There are some, indeed, who say that the law of this land, as pronounced and administered by the highest court of this land, in January, 1937, was very different from the law of the land, pronounced and administered by the same Court in January, 1941; or even, some say, in January, 1938. If history could prove that these changes in the law have come through decrees of legislative bodies in the exercise of their unrestrained will, or by judges who determine what is the law in accordance with their own judgment and benevolent will instead of "by the artificial reason and judgment of law," then what we call law is, indeed, only a fiction, and what we call liberty is not an inalienable right but is a privilege which may be granted or withheld by the will and in accordance with the judgment of those who control the government or administer the courts. Judicial despotism, though benevolent, is hardly to be preferred to a despotism of the majority in the State, and the tyranny of a majority, unrestrained by law, may threaten the fundamental rights of individuals no less than the despotism of a single man.  

Professor Edward S. Corwin could well have been thinking of Justice Frankfurter and Chief Judge Lehman when a few years later he commented as follows:

The fundamental elements of American Constitutional Law reduce, therefore, to a single element, Judicial Review, and this has gradually emancipated itself from all documentary and doctrinal restraints, and even from the restraint which was originally implicit in common law jurisdictions in the judicial function as such—the principle of stare decisis. But now the result of this self-achieved emancipation has been to extend and at the same time to obliterate the frontier between Constitutional Law and policy; and without a definite boundary to defend, Judicial Review itself becomes an instrument of policy, and thereby exposes itself more and more to political criticism.

Familiar is the clash between Justices Black and Frankfurter in Adamson v. California, a major decision that soon followed the two

342. 332 U.S. 46 (1947).
just considered. There the opinion of the Court, sustaining California law permitting consideration of an accused's failure to testify, was dwarfed by the concurring opinion of Frankfurter and the dissenting opinion of Black. Frankfurter, who twenty-three years earlier was for doing away with the due process clauses, was now defending the Palko-Twining doctrine of selective incorporation of the Bill of Rights into fourteenth amendment due process, inclusion or exclusion to turn on whether the guarantee be "of the very essence of a scheme of ordered liberty." Black, on the other hand, "would not reaffirm the Twining decision. I think that decision and the 'natural law' theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise." The debate resumed in Rochin v. California in the early 1950's. Writing the Court's majority opinion, Frankfurter had overturned as a violation of due process a state court conviction resting on evidence produced by forced stomach pumping of the accused. "This is conduct that shocks the conscience." Defending the Adamson approach Frankfurter insisted that when due process is responsive to "considerations deeply rooted in reason and in the compelling traditions of the legal profession" it "is not to be derided as a resort to a revival of 'natural law.'" Black's retort included the inquiry as to "what avenues of investigation are open to discover 'canons' of conduct so universally favored that this Court should write them into the Constitution?"

The late Alexander Bickel re-posed this question a dozen years after Justice Black had put the query. The response of Professor Bickel was this:

The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and, as Judge Hand once suggested, in the thought and the vision of the philosophers and the poets. The Justices will then be fit to extract "fundamental presuppositions" from their deepest selves, but in fact from the evolving morality of our tradition.

344. 332 U.S. at 70 (dissent).
346. Id. at 172.
347. Id. at 171.
348. Id. at 176 (concurrence).
On this basis, Bickel continued,

I would assert that the rightness of the Court's decision in the School Segregation Cases can be demonstrated... I would deny, however, that any similar demonstration can be or was mounted—could have been mounted even by a Brandeis—to show that a statute setting maximum hours or minimum wages violates fundamental presuppositions of our society.350

With due respect, Bickel's conclusion regarding Lochner can be disputed. Save for Montesquieu's theory of separation of powers, the universally accepted bellwether of this nation's founders, there has not been a more fully entertained philosophy than that of laissez faire at the end of the nineteenth century. True, it was not the product of Bickel's philosophers and poets; it was a socio-economic philosophy blended from the sociology of Spencer and the economics of Smith, an admitted departure from the Constitution conceived as a vehicle of intended powers and limitations. But of its dominance in American thought there is no question,351 and by this "so universally favored" concept the Court of the early twentieth century was lured into imbedding it in the due process clauses.352 It must be granted that Court decisions based upon laissez faire philosophy outlasted the concept's general acceptance. Nevertheless, there is room to question Holmes's assertion that already in 1905 it was "an economic theory which a large part of the country does not entertain." Only a decade before he had observed in a letter to Lady Pollock that "you English never quite do justice to" H. Spencer; at least this was true of those English with whom he had talked. Granted that Spencer was dull, wrote with an ugly style, and took as his ideals those of "a lower middle class British Philistine. And yet after all abatements I doubt if any writer of English except Darwin has done so much to affect our whole way of thinking about the universe."353 Could so much change in viewpoint have occurred so rapidly?

350. Id. at 237-38.
352. As Curtis put it, supra note 351, at 332,
The Court was importing into a silent and receptive Constitution the philosophy which they had drawn from their own contemporary, or juvenile, sources. Inescapably and not wholly consciously, and so they mistakenly saw it in the Constitution itself. Suppose that instead of Spencer the Justices had been brought up on Henry George, or on Demarest Lloyd, or Edward Bellamy, or, to come down a few years, on Thorstein Veblen. We complain only because the Justices were listening to a different drummer.
353. Id. It must be realized that laissez faire theory, far from negativistic, constituted a positive philosophy of control by social rather than governmental forces.
And then there was the reinforcing impact of acceptance of Adam Smith's rejection of mercantilism for economic control through market forces. State antitrust laws, followed by congressional enactment of the Sherman Antitrust Act just fifteen years before *Lochner*, represented full commitment to a policy of competitive capitalism. These were the years when *every* contract in restraint of competition was illegal; dilution through introduction of the rule of reason was yet to come. Taking these considerations into account it seems more accurate to credit Holmes with insight into the future that was to follow than with accuracy of observation with respect to the then present. Be this as it may, the issue precipitated by *Lochner*, bias against its policy aside, was and remains whether, if there is to be any toleration of Court “discovery” of policy that is not to be found in the basic instrument, amendment by judicial decision ought to be limited to instances in which consensus on the alteration of the Constitution is near crystal clear.

A passage in Professor Bickel's posthumously published volume provides a transition to the following decade, one that witnessed intensified conflict among the Justices over the ultimate issue of the proper function of the Court in constitutional adjudication. After condemnatory comment on the *Lochner* period, when the Court was “grinding out annual answers to social and economic questions on the basis of personal convictions of what was wise—derived, as it happens, from the laissez-faire philosophy of Herbert Spencer,”354 Professor Bickel continues:

None has reread Herbert Spencer into the Constitution since, but in the 1960s a majority of the justices, under Earl Warren, again began to dictate answers to social and sometimes economic problems. The problems were different—not regulation of economic enterprise, not labor relations, but the structure of politics, educational policy, the morals and mores of the society. And the answers were differently derived, not from Spencer’s Social Statics, but from fashionable notions of progress. Again, it may take time before the realization comes that this will not do.356

The first of these decisions again found Mr. Justice Frankfurter in dissent, his *Barnette* wound reopened by the majority's rejection of the position he had taken in *Colegrove v. Green*.356 His retirement from the Bench came soon thereafter, his illness said to have been

355. Id. at 27.
aggravated by the repudiating decision of Baker v. Carr.\textsuperscript{357} To him representation was a complex of political dynamics far different from the less complicated issue of voting rights. "The present case . . . is, in effect, a Guarantee Clause claim masquerading under a different label,"\textsuperscript{358} that label being the equal protection clause on which the majority decision was predicated. "What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union."\textsuperscript{359} The making of such a choice involves the Court in fashioning, not interpreting, constitutional limitations.

Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.\textsuperscript{360}

Contrary to Mr. Justice Stewart's assurance in Baker that the Court was concerned only with crazy-quilt malapportionment,\textsuperscript{361} the product of long years of legislative inaction, the six decisions of June 15, 1964,\textsuperscript{362} made it clear that the judicial objective was firm adherence to the principle of equally populated voting districts. The principle applied to both houses of a bicameral state legislature; the federal analogy was irrelevant. Immaterial were the causes of existing malapportionment; even a currently expressed preference of the majority

\textsuperscript{357} 369 U.S. 186 (1962).
\textsuperscript{358} Id. at 297 (dissent).
\textsuperscript{359} Id. at 300.
\textsuperscript{360} Id. at 267.
\textsuperscript{361} Id. at 265-66 (concurrence).
of the voters of a state for a regional pattern of representation for one house was verboten. Despite Frankfurter's insight into the nature and complexity of the concept of representation, the equal protection clause was deemed applicable because the "rights allegedly impaired are individual and personal in nature." This postulated, it was possible for Chief Justice Warren, as spokesman for the Court, to make the profound observation that "[l]egislators represent people, not trees or acres." Aided then by superficial analysis offered by some that "equal" means "equal," the Chief Justice found it easy to reach the proposition that any differences in district populations produced de-basement of those votes cast in districts of relatively larger numbers of persons.

There is no agreement on the "original understanding" of the equal protection clause. Mr. Justice Harlan dissented in all of the 1964 reapportionment decisions on the basis of a thorough inquiry into the intended reach of the clause. Professor William Van Alstyne undertook his own investigation "to determine whether the legislative history on which Mr. Justice Harlan relied supports the original understanding he found in it," concluding that that history does not.

The application of the Equal Protection Clause to practices of state legislative malapportionment is unexceptionable in terms of the inconclusive legislative history of the Fourteenth Amendment. . . . Under these circumstances, it is difficult to believe that the decision in Reynolds v. Sims should have been foreclosed solely on the strength of the legislative history of the Fourteenth Amendment. But this conclusion is not shared by others, and the Court majority offered no rebuttal to the Harlan analysis. "The recent study of Professor William Van Alstyne . . . badly shakes up some of the Harlan history and gives a somewhat different total picture, but the weight of the whole history remains with Harlan."
Beyond the doubt that the original understanding of the equal protection clause had any relevancy for malapportionment lies the fact that Court interpretation of the clause up to 1964 offered no precedent for the action of the majority. The familiar meaning of the clause, incorporated into hundreds of decisions, was that of a requirement that legislative classifications be meaningful in themselves and related to the objective of the legislation under constitutional scrutiny. Under "old equal protection" that relationship need be only rational; with the coming of "new equal protection" the relationship was required to be tighter. But in either instance the equal protection concept allowed legislatures freedom in choice of objectives. In thrust it was essentially procedural as contrasted with the substantive character of the restraints of due process. Only in one context had the Court given substantive content to equal protection; first with respect to racial covenants and then as to school segregation, choice of objective had been ruled out for the states. In correlative decisions concerning the District of Columbia, equal protection had been equated with due process to reach identical results. Nowhere is the significance of this development more sharply revealed than in the opinion in the Bolling case, which immediately followed Brown I. "Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." This one context was unique; concerned with what the Civil War and the fourteenth amendment were all about, it supplied no precedent for the constitutional stance taken by the majority in Reynolds and associated decisions that population alone was relevant to representation in the face of historical recognition of areal, demographic, economic, local and other factors as also relevant. It was

AND THE USES OF HISTORY 135-38 (1969) concludes his consideration of this aspect of Reynolds by observing that

the framers of the fourteenth amendment were not really concerned with [apportionment]. Their amendment was about Negro rights. Everything else said at the time was in effect obiter dictum. If the Supreme Court had cared to use it, the principle of an adaptable Constitution would have aided in overcoming the historical argument of Justice Harlan. Instead, the Court ignored the entire issue, leaving the impression that Justice Harlan's history, though powerless, was both right and relevant. Id. at 138.

this result-oriented action of the majority that provoked Mr. Justice Stewart, Justice Clark concurring, to the powerful dissent he entered in two of the six decisions:

To put the matter plainly, there is nothing in all the history of this Court's decisions which supports this constitutional rule. The Court's draconian pronouncement, which makes unconstitutional the legislatures of most of the 50 States, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union. With all respect, I am convinced these decisions mark a long step backward into that unhappy era when a majority of the members of this Court were thought by many to have convinced themselves and each other that the demands of the Constitution were to be measured not by what it says, but by their own notions of wise political theory. The rule announced today is at odds with long-established principles of constitutional adjudication under the Equal Protection Clause, and it stifles values of local individuality and initiative vital to the character of the Federal Union which it was the genius of our Constitution to create.

What the Court has done is to convert a particular political philosophy into a constitutional rule, binding upon each of the 50 States, from Maine to Hawaii, from Alaska to Texas, without regard and without respect for the many individualized and differentiated characteristics of each State, characteristics stemming from each State's distinct history, distinct geography, distinct distribution of population, and distinct political heritage. My own understanding of the various theories of representative government is that no one theory has ever commanded unanimous assent among political scientists, historians, or others who have considered the problem. But even if it were thought that the rule announced today by the Court is, as a matter of political theory, the most desirable general rule which can be devised as a basis for the makeup of the representative assembly of a typical State, I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system of representative government the interest and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.

374. Id. at 746-49.
BICENTENNIAL BENCHMARK

Professor, now Dean, Auerbach was allotted eighty-seven pages in the *Supreme Court Review* of 1964\(^{375}\) for "defending the principle espoused by the Court" against vigorous attacks by Dean, now Professor, Phil Neal, Alfred de Grazia, Jerold Israel, Robert Dixon and others.\(^ {376}\) Whatever is to be said in support of or opposition to the assertion that only representation based on "one man, one vote" is consistent with political democracy, the constitutional issue is that of whether it was the Court's business to read the requirement into the equal protection clause. Professor Archibald Cox found justification from the following analysis:

The power of the ruling in *Reynolds v. Sims*—its claim to be law—rests upon the accuracy of the Court's perception of what it took to be the dominant theme of American political development, and upon the Court's ability, by expressing the theme, to command a national consensus.\(^ {377}\)

He continued, but with a cautionary observation:

Out of such a *coup de main* great legal principles may occasionally be created. As a staple diet, however, political perceptions without roots in objective standards are an inadequate basis for law, and to accept them would give judges unacceptably dangerous power. Such a course is even self-defeating.\(^ {378}\)

*Reynolds* was thus an even bolder exercise of raw judicial power than was *Lochner*, for it involved the Court in bringing a consensus to a head rather than reacting to one of evident existence. The Court proved to be correct in its perception of the extent to which egalitarian philosophy had undercut traditional notions of legitimate representational considerations, yet, as Professor Cox states, evolution of a pattern of judicial action of such dimension would accord the Court "unacceptably dangerous power."

Another proffered justification of *Reynolds* might provide the needed constriction on its potentiality. That justification has lain in


\(^{378}\) *Id.* at 98-99.
the conviction that existing malapportionment measured by population variances endangered American democracy; that in consequence the political malignancy must be removed; and that, undeniably, no political institution was willing to undertake the necessary surgery. But if that be justification, the judicial operation cannot be successful unless the Court also eradicates gerrymandering in districts of equal population, a radical procedure that it has been unwilling to pursue save for cases in which the gerrymandering discloses racial manipulation. The Court is on the horns of a dilemma; use of computers makes possible such an infinite number of patterns for "gerrymanders vastly more subtle and devastating than those of the past" as to defy judicial resources for diagnosis and therapy, while failure to remove the other half of the total malignancy leaves in doubt the success of this venture into judicially enforced egalitarianism.

The "egalitarian revolution," as Professor Kurland dubbed it in his critical comments on the success of "The Reform Club, 1964", registered further advance in Reitman v. Mulkey. Readily conceding that Mr. Justice White's opinion for the majority, in which Mr. Justice Douglas concurred, "utterly failed to justify its decision," Professors Karst and Horowitz nevertheless concluded a thorough analysis of it in a paean of praise for the result:

Granting the lack of that "comprehensive completeness for candor" for which we all yearn, granting the reshaping of precedent, granting the disingenuousness in the "deference" to the California Court —granting all that, the vital fact is that in holding Proposition 14 unconstitutional the Court made one of its most significant contributions to date to the principle of substantive equal protection. In that sense Reitman v. Mulkey is a great decision. After all, how many great decisions have come equipped with great opinions?

These are indeed portentous words, placing top priority on "right" results regardless of admitted inability to relate them to a written consti-

381. Id.; A. Bickel, The Supreme Court and the Idea of Progress 151-61 (1970); cf. Smith, The Failure of Apportionment; The Effect of Reapportionment on the Election of Blacks to Legislative Bodies, 18 How. L.J. 639 (1975) (contending that population-based reapportionment has been successful but that racially based apportionment has been a failure).
tutional base. It is all so simple: "The public has come to expect the Court to intervene against gross abuses. And so the Court must intervene." The judicial function in constitutional adjudication is visualized as that of a reading into the fundamental instrument a content supposedly demanded by the political philosophy of the day. Thus the rule is far different from that insisted upon as proper when it was an economic philosophy that was dominant at an earlier time. Bluntly put, the end is conceived to justify the means. This was too much for Mr. Justice Black who with Justices Clark and Stewart joined the dissent of Mr. Justice Harlan. Yet the break between Black and Douglas predated Reitman; it appeared in Griswold v. Connecticut and intensified in Harper v. Virginia Board of Elections.

Writing for the Court in Griswold Mr. Justice Douglas rejected outright "[o]vertones of some arguments suggest[ing] that Lochner v. New York . . . should be our guide." The "invitation" was declined because "[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." But one may ask by what authority Justice Douglas distinguishes between the two situations? Anticipating the question, the Justice explains that, although the right of association is not mentioned in the original Constitution or the Bill of Rights, there are Court decisions finding constitutional base for it. For precedent he cites not only cases in which association-related concepts had been read from the first amendment into fourteenth amendment due process, but also Meyer v. Nebraska and Pierce v. Society of Sisters which were pure substantive due process decisions of the 1920's. Unabashedly, he "converts" these two decisions into first amendment declarations. Aided by this judicial sleight-of-hand we are assured that the cited cases "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." The guarantees named are the

385. Id. at 79.
386. 381 U.S. 479 (1965).
389. Id.
390. 262 U.S. 390 (1923).
391. 268 U.S. 510 (1925).
392. 381 U.S. at 484.
first, third, fourth, fifth, and ninth amendments, which together "create zones of privacy." 393

Mr. Justice Douglas well knew that, were he to flirt with the seductive implications of *Lochner*, Mr. Justice Black would have no part in any invalidation of the Connecticut law prohibiting dissemination of contraceptive information or devices, even to married couples. It was clear by 1965 that Black's grand strategy was to confine substantive due process by holding its content to the provisions of the Bill of Rights. This explains Douglas's cleverly devised theory of penumbras formed by emanations from particular provisions thereof, a theory he was probably justified in believing would be acceptable to Black. The tactic was alluring enough, but the wary Black was not to be trapped by a catchword. "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." 394 Justice Black was no more satisfied with the views of those concurring; to him their bases for invalidation were predicated on the reasoning of *Lochner*, which had supposedly been consigned to outer darkness and had the gates of justice firmly closed against it. For Black, consistency was the mark of proper constitutional construction. "That formula, based on subjective considerations of 'natural justice,' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all . . ." 395 He made no effort to put a new face on *Meyer* or *Pierce*; they were of the *Lochner* vintage and no amount of fancy reinterpretation could justify them. Although these comments on the two decisions are made apropos his challenge of the reasoning of the concurers, they are equally pertinent to Mr. Justice Douglas's effort somehow to free them of the *Lochner* taint. In sum, Mr. Justice Black expressed his position as follows:

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to

393. *Id.*
394. *Id.* at 509-10 (dissent).
395. *Id.* at 522.
time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.\textsuperscript{396}

In the following year Mr. Justice Black was again dissenting from an opinion for the Court by Mr. Justice Douglas, this time invalidating Virginia's imposition of a poll tax as a denial of equal protection.\textsuperscript{397} Heavy emphasis is placed by Black on the reach of the Court's power to exercise constitutional review. Two passages stand out. In the first he gives as a further reason for his dissent a belief that the Court seems to be using the old "natural-law-due-process formula" to justify striking down state laws as violations of the Equal Protection Clause. I have heretofore had many occasions to express my strong belief that there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems. Nor is there in my opinion any more constitutional support for this Court to use the Equal Protection Clause, as it has today, to write into the Constitution its notions of what it thinks is good governmental policy. If basic changes as to the respective powers of the state and national governments are needed, I prefer to let those changes be made by amendment as Article V of the Constitution provides. For a majority of this Court to undertake that task, whether purporting to do so under the Due Process or the Equal Protection Clause amounts, in my judgment, to an exercise of power the Constitution makers with foresight and wisdom refused to give the Judicial Branch of the Government.\textsuperscript{398}

Shortly thereafter, the Justice returns to his now dominant theme:

The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be "shackled to the political theory of a particular era," and that to save the country from the original Constitution the

\textsuperscript{396} Id.
\textsuperscript{398} Id. at 675-76.
Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society. It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written unless changed through the amendment process which the Framers wisely provided. Moreover, when a "political theory" embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V. 399

Mr. Justice Douglas denies the charge that he is reading into the Constitution policy that the instrument's language cannot bear. "Our conclusion, like that in Reynolds v. Sims, is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires." 400 Yet Douglas's explanation that the invalidation lies in the fact that "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause do change," 401 and that "the Equal Protection Clause is not shackled to the political theory of a particular era" 402 does not support his denial. The Justice fails to heed his own counsel offered earlier in his Benjamin N. Cardozo Lecture before the Association of the Bar of the City of New York. "The principle of full disclosure has as much place in government as it does in the market place. A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe." 403 His admirers, or at least some of them, are more candid. Witness Professor Karst in his tribute to the Justice for returning to the "Natural-Law-Due-Process Formula."

Despite Justice Douglas's protestations to the contrary, this process of growth [in the employment of the doctrine of invidious

399. Id. at 677-78. In footnote 7 of the Black dissent, dropped at the middle of the paragraph just reproduced, the Justice seeks to reconcile his vote in Brown v. Board of Educ., cited supra note 370, with the position he takes in Harper. "In my judgment the holding in Brown against racial discrimination was compelled by the purpose of the Framers of the Thirteenth, Fourteenth and Fifteenth Amendments"; for Black it was not a matter of using the equal protection clause "to keep the Constitution up to date." 383 U.S. at 677-78 n.7. Conspicuously absent is any attempt on the Justice's part to square his position in the Reapportionment Cases with his position in Harper.

400. 383 U.S. at 670.
401. Id. at 669 (emphasis in original).
402. Id.
403. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 754 (1949).
discrimination "to make the judiciary into an instrument of positive egalitarian social change" has been and properly continues to be a process in which the present generation of Justices has sought to fill the "moral adjurations" of due process and equal protection from their own collective bosom.404

Associating himself with Professor Cox with specific reference to Harper, Professor Karst had in the same article earlier observed to the following effect:

Professor Archibald Cox has remarked of the Harper opinion that, apart from its reliance on Reynolds v. Sims, "it expressly or impliedly repudiates every conventional guide to legal judgment," including the constitutional text, the intention of the framers, a long history of use of the poll tax as a condition on voting, and explicit judicial precedent upholding the condition's validity. Such a repudiation would, for most lawyers and certainly for Justice Black, signify the illegitimacy of what the Court was doing in the Harper case. Professor Cox, however, is unwilling to draw that conclusion: "The question, what is best for the country," he says, "makes special claims in constitutional litigation." Justice Douglas, more than any other Justice in the past generation, has sought to translate his answers to that question into constitutional law.405

On one fundamental aspect of constitutional process there has to be complete agreement; this is that alterations must from time to time be made in the fundamental law. "Thomas Jefferson, the apostle of American democracy used to argue that the constitution of every state should be revised at least once 'every nineteen or twenty years,' so as to allow each generation to determine for itself its fundamental law."406 The Framers of the Federal Constitution incorporated in that instrument a method of amendment and it is resort to this formal process on which Mr. Justice Black insisted when change is deemed needed. The alternative is to concede the amending power to the Court, an end Mr. Justice Douglas was actually promoting and that scholars like Pro-

404. Karst, Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula," 16 U.C.L.A.L. Rev. 716, 738-39 (1969). The bracketed words are taken from id. at 718. The phrase "moral adjurations" is assuredly taken from Learned Hand's 1942 address before the Massachusetts Bar Association, reprinted in L. Hand, supra note 331, where it is quoted in part. As Professor Karst is frank to point out, Justice Douglas did not heed Hand's recommendation that the courts get out of the business of pouring into due process and equal protection their own conceptions of appropriate substantive content.

405. Karst, supra note 404, at 720. The Cox article is cited supra note 377. The Karst excerpts are from pages 95 and 97 of that article. Earlier, at page 93, Professor Cox had observed: "The kind of propertyied-nonpropertied distinction which Harper v. Virginia Bd. of Elections rejects is too familiar a part of American history for anyone seriously to suggest that the decision gives effect to any intention of the framers."

fessors Cox and Karst are openly advocating despite their antipathy for the consequences that ensued the first time the Court clearly indulged the idea of amendment by Court decision. During the *Lochner* reign, as opposition to its philosophy grew, the great majority of the proposed "cures" required constitutional amendment; this was true, for instance, of Professor Frankfurter's recommendation that the due process clauses be removed from the Constitution. Yet amendment there was none, indicating one or more problems with it. The dilemmic mood of the time was suggested by one writer to be "that the machinery for constitutional amendment is vexatious, cumbersome, and long; and that there is great difficulty in framing an apt amendment."\textsuperscript{407}

As for difficulty with the machinery of amendment, the evidence indicates that when there is widespread support alterations in the Constitution are quickly made. It is when consensus has not solidified, as was true of the child labor amendment and of the Bricker amendment, that the amendatory process is to proponents "vexatious, cumbersome, and long."\textsuperscript{408} The deeper problem was that of drafting amendatory language that could win overall agreement. For as earlier observed, the thinking of this century was rapidly becoming inhospitable to the faith of the late eighteenth century, persisting well into the nineteenth, that governing political principles could be articulated in broad generalizations acceptable for inclusion as constitutional provisions.

Recalled from earlier consideration of the Roosevelt Court Reform Bill of 1937 will be the President's desire to avoid resort to the amendment process. His reasons were similar to those given back in 1913; yet significantly he commenced by stressing the difficulty of "framing an apt amendment." "There is no substantial group within the Congress or outside it who are agreed on any single amendment."\textsuperscript{409} The disarming frankness of this opening concession reveals that the difficulty lay, not truly in temporal delays as such but in ability to achieve consensus on the principles curative amendments should embody.

Detectable in the Roosevelt solution was a "disbelief in the possibilities of articulation of broad political principles which the concept of formal amendment necessarily presupposes; distinct preference is hinted for *ad hoc* disposition of concrete problems of intergovernmental

\textsuperscript{408} F. Strong, *supra* note 184, at 333-34.
\textsuperscript{409} This assertion is to be found in the Roosevelt message to the Nation, March 9, 1937, reproduced *supra* at text accompanying notes 283-84.
and other basic political relationships. Critics of the Court had openly conceded as much in calling for Court reform. One of the most lasting impacts of the debate over the Court Bill lay in its trenchant rejection of solution through the formal amendment process.

For many, especially those of more liberal persuasion, disenchantment with Article V gave way to outright distrust when three decades later Senator Dirksen nearly won in his crusade to recall *Reynolds v. Sims* through the convening of a national constitutional convention on application of two-thirds of the legislatures of the states, the alternative route to constitutional change that the Framers had included in Article V. Typical of the excited and frantic alarums that appeared in popular media were Theodore Sorensen's "The Quiet Campaign to Rewrite the Constitution" and Senator Joseph Tydings's "They Want to Tamper with the Constitution." The fear was that were a National Constitutional Convention to convene, it would not only authorize representation in one house of a bicameral legislature on other than a population basis but also would set about to undo much of the Bill of Rights. The situation was examined in a calmer, scholarly manner by Professor Robert Dixon. Writing with respect to the Dirksen effort to push through Congress a reapportionment amendment, the failure of which inspired the Senator to attempt to sneak the same result via state legislative call for a National Constitutional Convention, Professor Dixon took account of drafting difficulties, especially when use is made of the amendatory process to recall an unpopular Court decision. At the same time he put the "much larger question":

Is article V irrelevant to the grander issues of constitutional form and policy which we call constitutional law? The unique American process of judicial [i.e., constitutional] review, so foreign to our English or continental forebears, is for us a traditional and valued process. Few now fail to perceive and admit that it is a major form of American policy-making. But is it not a condition of the exer-

410. F. STRONG, supra note 184, at 334.
412. Revision of state constitutions continues to be attempted, with mixed results. A recent review, with emphasis on successful alteration in Virginia, is provided by Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. Rich. L. Rev. 1 (1974).
413. 50 SAT. REV., July 15, 1967, at 17.
ercise of such great power that it be deemed to be honorably subject to the process of constitutional amendment?\textsuperscript{416}

Striking indication of the current low esteem of formal amendment has appeared in eschewal of repudiation of the abortion decision on the part of presidential aspirants and party platform draftsmen. In media commentary, lay reaction, and the judgment of some highly reputable scholars, there is evidence that the equal rights amendment suffers from this malaise.\textsuperscript{417} Professor Tucker Dean of Cornell probes deeply for an explanation for the greatly altered attitude toward Article V:

There was a time when political scientists were attracted to the idea of redrafting the Constitution. William Yandell Elliot made a name for himself in the thirties with his book *The Need for Constitutional Reform*, and much more recently an article, "Amending the Constitution through a Convention," by John D. Feerick, 60 *A.B.A.J.* 285 (1974), posed the issue. The practical political difficulty, naturally, has been the unwillingness of large segments of the population to reexamine basic political compromises embodied in the Constitution. Powerful interests now rely on these compromises. And a reexamination could open the door to all sorts of terrifying and untried ideas. Most lawyers would probably prefer to muddle through and hope.\textsuperscript{418}

Far preferable to those who paradoxically fear reconsideration of political fundamentals through a direct representational mechanism is the common-law process of law making, elevated to employment at the constitutional level.

Professor Harry Jones has recently demonstrated the "persistence of common-law ways" in constitutional adjudication as well as elsewhere in the domain of judicial process.\textsuperscript{419} We need "not mourn for the common-law tradition. It is alive and well and living, among other places, in American constitutional law."\textsuperscript{420} More specifically:

Constitutional adjudication in the United States exhibits every phenomenon of common-law method: the factual distinguishing and reconciliation of cases, the discounting of past overbroad statements as mere dicta, and all the other elements that, taken to-

\textsuperscript{416} Id. at 947-48.


\textsuperscript{420} Id. at 463.
To be sure, we have the warning of Justice Brandeis that stare decisis is "not a universal, inexorable command" in constitutional cases, and the Supreme Court, particularly in this century, has not hesitated to overrule constitutional precedents that the Justices, or a majority of them, consider outmoded or socially unsound. But, as we have seen, stare decisis is not, and in the United States never has been, a rule of absolute obligation. Precedents are but generally binding, even in private-law cases, and the reservation of an undefined power to overrule is an integral part of the common-law precedent cluster.\footnote{421}

Appended to the penultimate sentence of this paragraph is a citation to Mr. Douglas's address on \textit{Stare Decisis} to which reference has already been made.\footnote{422} There is no citation to a specific portion of this address of 1949, yet Professor Jones's reference to the overruling of constitutional precedents the Court has deemed "outmoded or socially unsound" suggests that he had in mind the following paragraph:

From age to age the problem of constitutional adjudication is the same. It is to keep the power of government unrestrained by the social or economic theories that one set of judges may entertain. It is to keep one age unfettered by the fears or limited vision of another. There is in that connection one tenet of faith which has crystallized more and more as a result of our long experience as a nation. It is this: If the social and economic problems of state and nation can be kept under political management of the people, there is likely to be long-run stability. It is when a judiciary with life tenure seeks to write its social and economic creed into the Charter that instability is created. For then the nation lacks the adaptability to master the sudden storms of an era. It must be remembered that the process of constitutional amendment is a long and slow one.\footnote{423}

This paragraph places in quite different perspective the relationship that should obtain between amendment by organic process and amendment by judicial say-so. At first reading, one wonders whether this is the same Justice Douglas who later wrote the opinions in \textit{Griswold} and \textit{Harper}, for in 1949 his thesis was that the judiciary should not "write its social and economic creed into the Charter" and that the exorcising of illicitly introduced constitutional dogma is the office of the cumbersome "process of constitutional amendment." Quickly, however, the mist of perplexity rises. Justice Douglas was in his address looking

\begin{footnotes}
\item[421] Id. at 462.
\item[422] Douglas, \textit{supra} note 403.
\item[423] Id. at 754.
\end{footnotes}
back on the *Lochner* episode; to him as a leader of the double-standard advocates on and off the Court, exercise of judicial power to amend the Constitution in the interest of values deemed by him vital to a democratic society is quite another matter. As with Senator Ashurst so with Justice Douglas: consistency is the mark of a small mind. We are left with the clear view that at appropriate times and on appropriate occasions, amendment by Court decision is the dynamic method of adjustment of the Charter for protection of "proper" values judged to be of fundamental dimension.

There remains for consideration that portion of the 1970's that is now history, thus rounding out the bicentenary period of American constitutionalism. Far greater significance attaches to this partial decade, however, than that it brings the account to a close. For the Court is, in personnel, in transition. The so-called Warren Court is at an end; by 1972 President Nixon had named four members to the High Court, and by 1975 his anointed successor had named a fifth Justice.

The decisive decisions prior to 1976 were *Perez v. United States*,\(^\text{424}\) *Roe v. Wade*,\(^\text{425}\) *San Antonio Independent School District v. Rodriguez*,\(^\text{426}\) and *Goldfarb v. Virginia State Bar*.\(^\text{427}\) Writing the opinion for the Court in *Perez*, Mr. Justice Douglas asserted that the basis for decision was the category of "those activities affecting commerce," thus suggesting analogy to *Wickard v. Filburn* of the 1940's and *Katzenbach v. McClung* of the 1960's. But in those decisions, expansive as they were in identifying a competitive or Keynesian effect on commerce among the states,\(^\text{428}\) a finding to that effect was constitutionally controlling. In *Perez*, by contrast, such finding is assumed, not made. Rather, the judicial finding stressed was that Perez in his wholly intra-state extortionist activities was "clearly a member of the class which engages in 'extortionate credit transactions' as defined by Congress"\(^\text{429}\) in Title II of the Consumer Credit Protection Act. As Justice Douglas recognizes in his opinion, citing from *McClung*, this determination must be made, but such is subsidiary to a finding of the effect on interstate commerce of the class of activities as a whole. Ascertainment of constitutionality is a two-step process; both types of finding are essential.

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428. Analysis of these decisions appears in text accompanying notes 287-95 *supra*.
429. 402 U.S. at 153 (emphasis in original).
to validity. In *McClung* the Court found that discrimination against Negroes at Ollie’s Barbecue had *in toto* the effect of reducing the flow of food into Alabama from other states. Congressional and executive studies, cited by Douglas, suggest that funds derived from local extortions do involve interstate flow, yet the opinion never makes clear the constitutional necessity of a finding to this effect.

As remarked by Robert Stern, *Perez* "upheld the application of the loan shark statute to a purely intrastate extortionate credit transaction without requiring the government to demonstrate any interstate nexus."\(^{430}\) In his appraisal of *Perez* Mr. Stern describes himself as "a lawyer who fought for a realistic interpretation [of the commerce clause] which would recognize that in commercial matters the United States was one nation . . .";\(^{431}\) he was indeed one of the Government's major attorneys in the days of the New Deal.\(^{432}\) The title of the recent Stern article is itself significant. To its author the Court has in effect adopted a new base for justification of congressional power under the commerce clause; Congress may constitutionally act provided the facts present a national problem. After 184 years the Court has bottomed federal power on the Randolph Resolution, modified by delegates to the Federal Convention to provide that "the national legislature ought . . . to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent."\(^{433}\) Mr. Stern finds this "hardly a novel or radical concept" because he had convinced himself as attorney for the Government that "[t]his was the standard pursuant to which the enumeration of the powers of Congress was drafted."\(^{434}\)

This is unacceptable intellectual bootstrap. Granted that this Randolph Resolution was voted to be the guide to the Committee of Detail in fixing the bounds of congressional power vis à vis the states, what were proposed by the Framers and ratified were delegations of legislative power to Congress, one being over commerce among the states. Those delegations therefore constitute the outer bounds of the committee's determination of that which the states were deemed to be


\(^{431}\) Id. at 284.

\(^{432}\) Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335 (1934), was a much-cited presentation asserting the validity of New Deal legislation under the commerce clause reinforced by the necessary and proper clause.


\(^{434}\) Stern, *supra* note 430, at 285 & n.79.
separately incompetent to handle. It is standing reasoning on its head
then to tolerate enlargement beyond all recognition of the interstate com-
merce and omnibus clauses, as a bottom for the claim that there is
nothing novel about holding that Congress possesses power to legislate
in any matter in which the states are separately incompetent. Were
such involuted interpretation acceptable, courts and commentators have
spent for nothing much blood, sweat and tears in locating the reach of
congressional power through interpretation of the separate, specific
delENSIONS. No, the concept of congressional power deriving directly
from the Randolph Resolution is new constitutional doctrine, and it is
radical. Certainly the Court had not before openly flirted with this con-
ception of the division of legislative power between nation and states.

Despite the new dimension in commerce power introduced by
Perez there was only one dissent, and that by Mr. Justice Stewart.
The new Chief Justice and new Associate Justice Blackmun, both
Nixon appointees, were in accord with the holdovers from the Warren
era. Although one swallow does not make a spring, this unexpected
lineup in a decision surprising even to Mr. Stern creates wonderment
as to whether appointment of Justices with the avowed purpose of intro-
ducing elements of conservatism into Court philosophy makes any dif-
ference in outcome as respects the crucial issue of genuine versus spuri-
ous constitutional interpretation. Can it be that in this context
differences in prior political persuasion have little significance, that the
power resident at the top level of the judicial hierarchy, reinforced by
life tenure, induces great temptation on the part of all appointees to
employ constitutional review in the interest of those results that seem
"right" irrespective of the limits set by what continues to be in great
part a constitution of the late eighteenth century? An affirmative
response comes quickly from analysis of two further decisive decisions
of the immediate past.

There is merit in considering Goldfarb v. Virginia State Bar out
of chronological order because it, like Perez, is a commerce clause case.
By the time of Goldfarb two additional Nixon appointees had had a
full three years of acclimatization on the High Court. Appropriately,
Mr. Justice Powell took no part in the consideration or decision of the
case. But Justices Rehnquist and Blackmun were among those joining
in the position that commerce among the states was involved, and Chief
Justice Burger wrote the opinion. Again quoting an "unimpeachable
source,"

435. Strong, Court vs. Constitution: Disparate Distortions of the Indirect Limita-
The primary constitutional prop was the concept of stream of
commerce, first formulated in *Swift & Co. v. United States*, raised to full decisional level in *Stafford v. Wallace*, and occasionally invoked thereafter. Title examination being, in the Court's view, commercially necessary in real estate transactions, it followed that "a title examination is an integral part of an interstate transaction" where mortgage money flows across state lines. "The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved." This statement contains a classic non sequitur. It is quite correct that the Court's cases hold that once some effect is demonstrated the magnitude is immaterial. But here the Chief Justice has just stated for the Court that there has been shown no effect on interstate commerce.

The deceptive reasoning in the *Goldfarb* opinion is in contrast with that in *Perez* although constitutionality is found in both instances. In the latter, effect on interstate commerce, although unsupported by a finding of nexus, was apparently assumed from governmental studies suggesting the presence of a connection; whereas in *Goldfarb* the Court "conclude[d] that interstate commerce has been sufficiently affected" while at the same time finding "that there was no showing that home buyers were discouraged by the challenged activities..." Technically, *Goldfarb* brought within the Sherman Act only minimum fees charged for title examination. However, there is every reason to believe that the decision reaches far beyond its strict holding. A subsequent sentence in the opinion says as much, although leaving to bar associations the uncertain possibility of some freedom. "Of course, there may be legal services that involve interstate commerce..."
in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act.\textsuperscript{443} In this posture \textit{Goldfarb} has broken the back of minimum fee scheduling, just as \textit{Perez} has federalized intrastate crime. There are few to resent the results; price riggers and extortionists are hardly public favorites. The larger consequence, however, would appear to be the final demise of federalism as a mechanism designed by the Framers for effectuation of indirect constitutional limitations on federal power for the protection of individual interests. The states will be fortunate to survive as polities against federal inroad on their own independence. \textit{Fry v. United States},\textsuperscript{444} building on the earlier decision in \textit{Maryland v. Wirtz},\textsuperscript{445} forecast federal omnipotence in this aspect as well. The tide has been turned back for the present by the Court's decision in \textit{National League of Cities v. Usery}.\textsuperscript{446} Not only did the Court invalidate congressional extension of the Fair Labor Standards Act to the great bulk of state personnel; the earlier inclusion by Congress of personnel of state hospitals and schools was overthrown by express overruling of \textit{Maryland v. Wirtz}. Yet the result was achieved by the slimmest of margins, with Mr. Justice Blackmun, the swing Justice, teetering between the clashing positions. And if the blistering dissent of Mr. Justice Brennan, joined by Justices Marshall and White, is convincing this momentous braking action was effected only through the exercise of "raw judicial power."\textsuperscript{447}

Sandwiched in time between \textit{Perez} and \textit{Goldfarb} were the momentous decisions in \textit{Roe v. Wade}\textsuperscript{448} and \textit{San Antonio School District v. Rodriguez}.\textsuperscript{449} The year for each was 1973, by which time all four of the Nixon appointees were in full participation in constitutional adjudication. In each, the positions taken by the four were decisive of the outcome.

In \textit{Roe} three were among the majority, with one of them, Mr. Justice Blackmun, writing the opinion of the Court from which the fourth Nixon appointee, Mr. Justice Rehnquist, dissented. Justice White was the only other dissenter. Yet \textit{Roe}, in insulating the first trimester of pregnancy from governmental intervention, permitting regulation in the

\begin{itemize}
\item \textsuperscript{443} \textit{Id.}
\item \textsuperscript{444} 421 U.S. 542 (1975).
\item \textsuperscript{445} 392 U.S. 183 (1968).
\item \textsuperscript{446} 96 S. Ct. 2465 (1976).
\item \textsuperscript{447} \textit{Id.} at 2487.
\item \textsuperscript{448} 410 U.S. 113 (1973).
\item \textsuperscript{449} 411 U.S. 1 (1973).
\end{itemize}
second only for protection of maternal health, but allowing proscription of abortion in the third except when necessary for preservation of life, is a classic illustration of constitutional amendment by judicial say-so. Amazingly, the Court remembers Holmes’s admonition in his *Lochner* dissent, only to disregard it in the act of substituting for that of the state legislatures its own judgment as to how the complex interests involved in the abortion quagmire should be resolved.

In his posthumously published volume Alexander Bickel describes the result in *Roe* as possibly “a wise model statute.” But the drafting of model statutes is no part of the judicial business, regardless of the wisdom of the product, unless the Court is to abandon its traditional interpretive function for that of constitution maker. Mr. Justice Stewart recognized this critical fact in his decision to concur. The Connecticut law struck down in *Griswold* violated no specific provision of the Constitution; he had therefore dissented on the understanding that *Ferguson v. Skrupa* “purported to sound the death knell for the doctrine of substantive due process.” But it was now apparent to him that *Griswold* had revived the doctrine “and I now accept it as such.” Mr. Justice White saw in the majority opinion this same revival but could not embrace it.

I find nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. . . . As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an unprovvident and extravagant exercise of the power of judicial [i.e., constitutional] review that the Constitution extends to this Court.

Joining in this appraisal, Mr. Justice Rehnquist added on his own that “[t]o reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.”

In his vigorous criticism of the decision in *Roe*, Professor John Ely declares that

452. This statement is found in *Roe v. Wade*, 410 U.S. at 167.
453. Id. at 168.
454. Id. at 221-22 (dissent).
455. Id. at 174 (dissent).
What is frightening about \textit{Roe} is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-à-vis the interest that legislatively prevailed over it.\footnote{460}

This intellectual fright flows from Ely's conviction that even though "[a] neutral and durable principle may be a thing of beauty and a joy forever. . . . If it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."\footnote{457} In a word, Ely is concerned to remain within the framework Marshall is generally taken to have posited in \textit{Marbury v. Madison}, namely the authority of the Court to interpret provisions of the written Constitution, whether the constitutional review be defensive or otherwise, but not to go beyond the instrument.

It is a mark of the times, however, that there are constitutional commentators who have abandoned worship at the Marshall shrine to embrace what Professor Thomas Grey dubs "non-interpretive" modes of constitutional construction or what Professor Louis Henkin calls "constitutional modernization by the judiciary."\footnote{458} To many this departure precipitates much concern even if bounded by serious efforts to hold to the spirit of the fundamental law. But what can give grave concern is judicial resort to amendment by decision when there does not exist a consensus that can substitute for that required by the formal amendment process. A consensus does not exist on the legitimacy of early abortion;\footnote{459} \textit{Roe} is thus more extreme in its exercise of judicial authority than was \textit{Lochner} where at the time, however detestable it came to be later, the socio-economic theory of Smith and Spencer held sway in American thought. \textit{Griswold} can be given footing by resort to the ingrained hostility toward governmental snooping long evident in the

\footnote{457. Id. at 949.}
\footnote{459. In his trenchant criticism of the Blackmun opinion in \textit{Roe}, Professor Richard Epstein states: "Our society remains as divided today as before on the questions when abortions should be made criminal and when they should be permitted." Epstein, \textit{Substantive Due Process by Any Other Name: The Abortion Cases}, 1973 \textit{Sup. Ct. Rev.} 159, 167-68.}
spirit of the American people. *Reynolds* can possibly be explained by the surge of egalitarianism that swept the country in the 1960's, or as essential to the vitality of the representational process. Nothing comparable can be called up to ground a fundamental right of personal autonomy, "the freedom to live one's life without governmental interference."

Perceptive scholars have sensed that in the background of the reasoning in *Roe* lies the philosophy of John Stuart Mill as expressed in his volume *On Liberty*. In this work, which has recently been incisively examined by Ms. Gertrude Himmelfarb, Mill posited that "one very simple principle" governs the dealings of society and government with the individual. This principle is that "the individual is sovereign," his "independence absolute," save when "harm to others" is involved. In an excellent review of the Himmelfarb study Professor George Carey comments that Mill's insistence on this one absolute principle as a guide to individual-societal relationships induces an insatiable demand for liberty [that] knows scarcely any bounds, certainly not those of tradition, moderation, prudence, common sense, decency, civility, or any higher law. It also breaks with the tradition of the Western world with its complete denigration of authority which perforce, must be viewed illegitimate. It erodes and finally destroys any sense of perspective. . . .

Ms. Himmelfarb notes in the introduction to her volume that in modern context the principle of absoluteness of individual autonomy is invoked to support legalization of homosexuality, of pornography, of obscenity, of birth control, and of hallucinatory drugs. To add an illustration of very recent date the principle would resolve the question at issue in the tragic case of Karen Quinlan.

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464. Paul W. Armstrong, Esq., attorney for Joseph Quinlan, Karen Quinlan's adoptive father, in his closing argument in the trial court stated in poignant language the case for "the right to die":

At present, Karen lies in St. Clare's Hospital no more than 60 or 70 pounds of flesh and bone, a poor and tragic creature whose life is no more than a patterned series of the most primitive nervous reflexes, while in this courtroom it is seriously proposed, in the face of the most compelling contrary medical testimony, that her now disunified and unperceiving body be constrained to function against all its natural impulses.

Could anything be more degrading to a human being, a human being who has come to this earth full of love and promise? . . . Can anything be more
matters there exists anything but consensus. The societal ramifications of Roe, if it is destined to spawn a progeny of derivative decisions, boggle the mind. The resulting crippling of governmental control over the moral aspects of civil relations would cause the maligned Lochner syndrome to fade into comparative insignificance. The response must be in the negative to the query of Professor Paul Brest: "If the constitution does not enact Herbert Spencer's Social Statics, does it enact John Stuart Mill's On Liberty?" On principle, one has no more justification than the other.

It is significant that Professor Laurence Tribe in his second effort to find a satisfactory explanation of the Roe decision falls back on "the right of the judiciary to intervene when moral consensus is in flux, to permit a new moral consensus to evolve." Professor Henkin appears to go as far, if not further, in his acceptance of Roe. Treating it and Griswold as having common grounding in a newer conception of freedom from official regulation, as contrasted with the more familiar view of the right to privacy as a freedom from official intrusion, he has expressed no difficulty with Roe either for its specific holding or as a harbinger of a "zone of prima facie autonomy, of presumptive immunity from regulation, in addition to that established by the first amendment." "The Court's creation of an additional zone of individual autonomy to include some (perhaps all) it has recently put into it, and more to come, does not, I think, clearly exceed the bounds of proper judicial innovation."

Plaintiff submits the State cannot, without demonstrating a contrary interest both compelling and secular, interfere with the free exercise of the Quinlan's religious beliefs, with their personal decisions, or with their sovereignty over their own bodies. The right to privacy includes individual and familial decisions to terminate the futile use of extraordinary medical measures.


467. Henkin, supra note 458.
468. Id. at 1425.
469. Id. at 1427.
Professor Henkin’s position is not surprising; it had been anticipated in an article of his published just a decade prior to Roe, wherein he had advanced the proposition that obscenity in our contemporary morality classifies as a sin and that governmental proscription of obscenity and sexual misconduct is not a permissible function of a government of limited powers in a secular society.\textsuperscript{470} In the following passage, Henkin echoed Mill’s tenets:

Civilized societies, including ours, have increased the area of government responsibility to protect one against his neighbor. The authority of government to protect us from ourselves is less clearly recognized today, except when injury to ourselves may in turn have undesirable social consequences; although, we have suggested, one may justify—within the limits of the “rational”—governmental efforts to prevent suicide, or compel health measures, “for the individual’s own good.” When we deal not with physical injury to ourselves but with “sin,” respectable and authoritative voices are increasingly heard that there exists “a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.” Should not the Supreme Court today, or tomorrow, consider whether under the Constitution some morality, at least, may be not the law’s business and not appropriate support for legislation consistent with due process of law?\textsuperscript{471}

At the same time, Professor Henkin recognized, as he must, that

the right of the state to legislate in the field of morals, to deprive the citizen of liberty or property for the sake of accepted notions of morality, is deeply part of our law; some will argue that it is beyond question or need for justification. It asks much of the Supreme Court to tell legislators, and communal groups behind them, that what has long been deemed the law’s business is no longer, that even large majorities or a “general consensus” cannot have their morality written into official law. And a reluctant Court can find support in history, and some among the philosophers.\textsuperscript{472}

The view that the Court can properly act to take the leadership in developing societal consensus, even to the point of redirecting it, places the Court in a position of supremacy at odds with traditional conceptions. According such creativity to the Court in the exercise of constitutional review would implicate a complete break with inherited constitutional design. It would mean the endowment of the Court with policymaking authority undreamed by, and wholly alien to the prin-
ciples of, those who turned to the courts for the effective vindication of written constitutional limitations. Yet Professors Henkin and Tribe are not alone in their approval of this new and far reaching conception of the role to be played by the Supreme Court of the United States. In a sensitive tribute to Mr. Justice Louis Brandeis, on the occasion of the fiftieth anniversary of his appointment to the High Court, Professor Louis Jaffe had earlier questioned whether his idol had not, albeit with some reluctance, embraced the conception in embryo.

Nowhere in the Constitution is there mention of "fundamental rights." . . . [There being "no catalogue,"] [i]s it improper, as Dean Acheson implies, for the judge to consult his own understanding of "the ethos of democracy"? Is the judge to look beyond the Court for something like a consensus? How does one isolate and discover a consensus on a question so abstruse as the existence of a fundamental right? . . . There may be a profound ambiguity in the public conscience; it may profess to entertain a traditional ideal but be reluctant to act upon it. In such a situation might we not say that the judge will be free to follow either the traditional ideal or the existing practice, depending on the reaction of his own conscience? And in many cases will it not be true that there has been no general thinking on the issue? May it not be that the judicial decision itself catalyzes public consideration and brings opinion into line with the Court's view? What indeed is the relevant public? Do we look for guidance to our leaders? To our great moral and political leaders of the past only or to leaders of thought today as well, and, if the latter, are not the judges among those leaders at least ex officio?473

473. Jaffe, Was Brandeis an Activist? The Search for Intermediate Premises, 80 Harv. L. Rev. 986, 994-95 (1967). Professor Jaffe notes, in opening his article, that Dean Acheson, another of Brandeis's former law clerks, was sharply critical of Warren Court activism, quoting from D. Acheson, Morning and Noon 69 (1965) to make the point. In drawing his own conclusion that Brandeis's opinions show traces of "the propriety and inevitability of at least a personal element in the decision of disputed constitutional issues," id. at 1001, Professor Jaffe makes no reference to the Brandeis opinion for the Court in Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 150 (1932). To place this case in context it is necessary to refer to an episode in the Court's history either forgotten by, or never known to, most constitutional commentators. At the opening of the 1930's, the majority of the Court invoked due process in its territorial aspect to invalidate double taxation of intangibles by the states. Power to tax was "assigned" to the state of the owner's domicile. Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930). Along with Holmes, Brandeis dissented. But two years later Brandeis led the Court in restricting to that state in which the contract was made power to apply its workmen's compensation policy. The state of the injury was forced to yield under an interpretation of the full faith and credit clause which Justice Stone, although concurring, declared was contrary to precedent and flew in the face of the fact that the state of injury possessed an interest "at least as valid" as that of the state of the contract. Bradford Elec. Light Co. v. Clapper, supra. Brandeis's flirtation with what was deemed "best for the country" is clear. Bradford was distinguished out of existence in
And Professor Cox in his latest volume displays evidence of intellectual kinship with those espousing acceptance of the Court as national leader and philosopher to the extent of consensus builder.

Constitutional adjudication depends, I think, upon a delicate, symbiotic relation. The Court must know us better than we know ourselves. Its opinions may, as I have said, sometimes be the voice of the spirit, reminding us of our better selves. In such cases the Court . . . provides a stimulus and quickens moral education. But while the opinions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must be already in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. For the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus.474

Yet in these Lectures at Oxford University there is an indication that the former Special Prosecutor stops short of full acceptance of Mill's philosophy carried to its logical end in current context. Critical of the opinion for the Court in Roe for failure to predicate decision on stable principle rather than on current medical and other evidence, he himself cannot articulate a reasoned principle for Roe "unless it be that a State cannot interfere with individual decisions relating to sex, procreation, and family with only a moral or philosophical State justification: a principle which I cannot accept or believe will be accepted by the American people."475

In light of all that Roe signifies there is immense significance in the fact that three-fourths of the Nixon appointees are to be found in the majority. Flirting with a reading of J.S. Mill into the Constitution, in the present state of the reception accorded On Liberty, is scarcely what would be expected of Justices selected for strict construction. One may be entitled, with due respect, to wonder whether the three Justices fully grasped the implication of their association with Justices Douglas, Brennan, and Marshall, whose propensities for constitutional revision to fit their own policy preferences make their position .

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475. Id. at 113.
in Roe quite understandable. The able intellects of the newer Justices create a presumption that they did comprehend the consequences of their action. If so, revolutionary change in constitutional theory can be markedly immune from alteration in personnel on the Court, in itself a consideration of momentous import. However, continued evolution in constitutional furtherance of personal autonomy against governmental intrusion received a setback in two decisions of the Court on March 29 of this bicentenary year. Both decisions involved the constitutionality of state prohibition of homosexual relations between consenting adults. A Virginia statute survived constitutional challenge before a three-judge federal court;476 a similar North Carolina law had been allowed to stand by the State’s highest court.477 In the latter certiorari was denied by the Supreme Court;478 in the former the lower court was affirmed on appeal without argument or opinion.479

With the aid of Justice Stewart, concurring in result, the four Nixon appointees were the majority in San Antonio Independent School District v. Rodriguez,480 the decision sustaining against equal protection attack the Texas system of financing public primary and secondary schools. Professor Cox well describes the challenge to constitutionality as the “most ambitious effort to use the Constitution to reform on-going State programmes by imposing new affirmative duties . . . .”481 Mr. Justice Powell wrote the opinion of the Court, rejecting the reasoning of the California Supreme Court in Serrano v. Priest482 which had invalidated an analogous pattern of California financing as violative of the equal protection provision of that State’s constitution. A battery of amici briefs on each side of the issue attests the great importance of the case. Serrano requires state-wide equalization of financial support as among local school districts of high and low tax base. In refusing to follow Serrano the Supreme Court has erected a major barricade to the onrush of newer, far reaching conceptions of the equality content of the equal protection guaranty.

479. Doe v. Commonwealth's Attorney for City of Richmond, 96 S. Ct. 1489 (1976) (lower court affirmed; Brennan, Marshall, and Stevens, JJ., would have allowed oral argument).
481. A. Cox, supra note 474, at 92.
482. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
Something of what that added content could portend was disclosed by Mr. Justice Douglas in \textit{Douglas v. California},\footnote{372 U.S. 353 (1963).} decided just a decade earlier. Indeed, the Justice's step in there blending equal protection with due process to invalidate California denial to indigent criminal defendants of appointed counsel on first appeal looked suspiciously like a trial balloon to test judicial receptivity to a conception of the guaranty as including affirmative governmental obligation to eliminate inequalities in wealth. Joined by Justice Stewart, Justice Harlan thought the unnecessary involvement of equal protection had that appearance and did his best to deflate it. Drawing the deadly aim of which he was capable, he insisted that

\begin{quote}
the Equal Protection Clause does not impose on the States “an affirmative duty to lift the handicaps flowing from differences in economic circumstances.” To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.\footnote{Id. at 362.}
\end{quote}

The majority of the Warren Court let the matter pass. The heady air of equality with which the balloon was inflated may have helped to float, the next year, the decisions in the \textit{Reapportionment Cases}. The lineup of the Justices tempts speculation. And Mr. Justice Stewart may have thought back on the \textit{Douglas} debate when reaching in \textit{Rodriguez} his decision to tip the balance to validity.

The idea of equality has an ancient heritage and the search for its meaning resembles the quest for the Holy Grail.\footnote{Among the notable searchers are G. Abernethy, \textit{The Idea of Equality} (1959 ed.); R. Harris, \textit{The Quest for Equality} (1960); R. Sokol, \textit{The Puzzle of Equality} (1967).} It has been said that “[o]riginally . . . equality was a concept borrowed from mathematics and . . . meant identity.”\footnote{R. Sokol, \textit{supra} note 485, at 48.} In a pagan framework this perspective led to a conception of equality of quantity, an equation of numbers, whereas Christian philosophy emphasized qualitative equality, thus recognizing dissimilarities in humans while stressing the unity of mankind in the spiritual sphere.\footnote{Sister Ferguson, \textit{The Philosophy of Equality}, 68 CATH. U. PHILOSOPHICAL STUDIES 197-98 (1943).} When in the Declaration of Independence Jefferson declared that “all men are created equal” he
was not denying differences in personal attributes but asserting their equivalency with respect to the unalienable rights with which men were endowed by their Creator. The first fruits of this declaration lay in achievement of equality before the law. "Liberty and equality were the twin themes of the American Revolution." Yet many of those who carried the Revolution to victory were owners of slaves. "It was the Abolitionists, therefore, who revitalized doctrines of equality and natural rights under a literal interpretation of the Declaration of Independence..." Even so, the concept of equality was that of levelling only in the legal sense—all men are free of subjugation by others, an equality before the law that finally embraced the Negro with the white.

Adoption of the fourteenth amendment supplied the idea of equality with a constitutional base in the equal protection clause. Incorporating the concept that had evolved, the clause opened an era of constitutional protection for economic and political rights against governmental discrimination. Equality of opportunity was theoretically vouchsafed to all as former privileges were dethroned. "Once loosed, the idea of Equality is not easily cabined," it has been observed. Equality of opportunity can be frustrated by inequalities in the social structure; differential environments can make a sham of the presumed equivalency in starting point. The heart of the problem can then be found in disparities in income and wealth that preclude meaningful equality in opportunity. The inadequacy in the conception of equality as that of sameness in legal contemplation is captured in the ridicule that attends the observation that "the law punishes equally the rich and poor for stealing bread." The seat of the inequity is the societal structure that tolerates gross inequality in income and wealth, and attention turns to methods of rectifying the evil. Equality in result is the rising cry. A familiar proposal for solution is adoption of some variant of socialism. Recently, the issue has been debated in more philosophical terms by John Rawls and Robert Nozik. Rawls's volume, A Theory of Justice, advances as its basic principle of justice that "[a]ll social primary goods—liberty and opportunity, income and wealth, and

488. R. Harris, supra note 485, at 14.
489. Id. at 17-18.
490. Id. at 18-23.
492. R. Tawney, Equality chs. 2 & 3 (1964 ed.).
the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.” Rawls would cede to the state an enormous power in order to achieve this essential condition. In short, in the words of Professor Bernard Schwartz, “Equality of result has received its philosophical foundation in John Rawls's *A Theory of Justice*.”

In rebuttal to Rawls, Robert Nozik in *Anarchy, State and Utopia* “has reargued the case for the classical liberal, virtually laissez-faire, conception of the state, justice, and the good life.” Whereas Rawls sacrifices liberty for equality, Nozik prizes liberty over equality; only a state charged solely with conventional police functions is justifiable. A stronger state would use its coercive power to redistribute property which to Nozik lies at the heart of private right. Only a “night watchman” state is therefore compatible with individual liberty. It follows that to Nozik the “minimal” state is the only morally acceptable state.

From the chasmy divergency in political philosophy that these two influential volumes manifest, it is apparent that deeply conflicting forces in society were stirring behind the constitutional overlay in *Rodriguez*. In immediate terms the slim majority will withstand the counter-pressures; because Mr. Justice Stevens replaces Justice Douglas even his association with the minority views would not bring overruling in a subsequent case of similar factual pattern. But for the longer run one wonders. Judicial thrusts at wealth levelling in the name of equal protection would assuredly have explosive reverberations; this political thicket could not but feature briars far more thorny than those in reapportionment. Yet as the great disparities in wealth and income now obtaining in this country disclose no signs of shrinking, pressure and temptation may combine to induce a majority of the Court to sidetrack *Rodriguez* on its own specific facts and try its hand at wealth levelling. Judge Bazelon of the United States Court of Appeals for the District of Columbia has provided a powerful inducement: “Commission after commission on crime, race, violence or children has recommended some sort of income redistribution as the only

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498. *Time*, Jan. 15, 1973, at 69. Indeed, the disparities may even be increasing.
Reliable statistics demonstrate that the nation faces a spiraling crime rate threatening our prized open society. Crimes against property must be directly relevant to increasing discontent over economic imbalance; crimes against the person must be in part psychological onsets of frustration born of the presence of abject poverty in the midst of lavish luxury. Present attitudes reflect the teaching of history that the "haves" will willingly do little by way of rectification, and efforts by and on behalf of the "have nots" to effect positive change, while achieving some gains, are woefully inadequate to the total task. The situation resembles the most acceptable explanation of the Warren Court's reaction to widespread malapportionment. Those in legislative power by virtue of malapportionment would not yield; urbanites, disadvantaged on a population basis in the exercise of the franchise, were helpless to force change through the political processes. Ergo, the franchise being the most fundamental of all civil rights, something had to be done and the Court stepped in.

Any serious effort by the Court to exercise its power to press for equality of result in terms of mandated reallocation of economic resources would clearly present major problems of judicial enforcement. It will be recalled that one reason for Justice Frankfurter's opposition to the Court undertaking to umpire in "broad issues of political organization" was his belief that the judicial process was ill fitted to the task. Especially out of the question for him was reapportionment by judicial decree. In this judgment he proved to be mistaken; within a decade from the implementing decision in Reynolds the lower federal courts under Supreme Court guidance had effectuated the objective of population equality. On the other hand, the Court's hesitancy to tackle other than racial gerrymandering within districts of equalized population suggests that the majority at least sees limits to its ability to fashion judicially manageable standards for this second form of gerrymandering. The complexity of the problem is compounded by the infinite number of patterns that use of the computer can produce within the constitutional framework of the Court's decisions. There also comes to mind comparison of the relative ease of

judicial enforcement of desegregation with the seemingly insoluble task of achieving integration by judicial means.

_Hawkins v. Town of Shaw, Mississippi_502 has understandably received attention for its favorable reception to use of the injunction in a class action to remedy disparity in municipal services between black and white citizens. From the record made in the district court, a panel of the Court of Appeals for the Fifth Circuit found major favoritism toward the white district of the town with respect to street paving, street lights, sanitary sewers, storm drainage, water pressure, fire hydrants, and traffic control signs. Finding clear violation of the equal protection clause, the court of appeals panel put aside the contention that "the correction of this problem is not a judicial function" and granted relief in the following terms:

> We feel that issuing a specific order outlining exactly how the equalization of municipal services should occur is neither necessary nor proper in the context of this case. We do require, however, that the Town of Shaw, itself, submit a plan for the Court's approval detailing how it proposes to cure the results of the long history of discrimination which the record reveals.503

On rehearing en banc the panel's decision was affirmed. However, the trial judge, who had dismissed the action, enjoyed the support of three dissenting circuit judges. Two of the three put their views pithily in these remarks:

> In remitting Mr. Hawkins and the members of his class to a solution at the ballot box, rather than dangling the carrot of reform by judicial injunction before them, the district court followed the course of wisdom and practicality. Hard reality fore-ordains that no plan can be devised which will solve the complex variables of "equalizing" municipal services. This court's broad-brush approach to this case guarantees such a fruitless result. . . . Shaw's resources are finite. Its daily needs must be met by public servants who must anticipate long-range requirements, both for the handful of classes of projects specifically dealt with and also for that wide spectrum of services and facilities that aren't even mentioned.504

The fact that _Hawkins_ involved racial discrimination might be thought to explain majority acceptance there of affirmative relief.505

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503. 437 F.2d at 1293.
504. 461 F.2d at 1185.
505. However, Anderson, _Toward the Equalization of Municipal Services: Variations on a Theme by Hawkins_, 50 J. URBAN L. 177 (1972), contends that wealth as a
But similar judicial action had been taken in the enforcement of Supreme Court standards for relief of malapportionment. "The task [was] utterly unlike any previously thought appropriate for a court, but has been performed with apparent success by a number of State and federal judges."506 Some courts even took into their own hands the redistricting for congressional or state legislative representation.

Another district court within the Fifth Circuit extended relief to class action plaintiffs challenging the failure of the Mental Health Board of Alabama to provide anything like adequate rehabilitation in state institutions for the mentally ill507 and mentally retarded.508 Having found a constitutional "right to appropriate care for people civilly confined to public mental institutions," the trial court decreed in the second Wyatt decision (1) that defendants "implement fully and with dispatch each of the standards set forth in Appendix A attached hereto and incorporated as a part of this decree"; (2) that a "human rights committee for [one named institution] be and is hereby designated and appointed [by the court]"; (3) that defendants forthwith employ on a permanent basis "a professionally qualified and experienced administrator" for one of the institutions; and (4) that defendants within six months prepare a "comprehensive and precise" report "reflecting in detail the progress on the implementation of this order."509 The appendix, requiring twelve pages in the reporter, must be read to be believed; illustrative of the details is item 38.i.(3):

Thermostatically controlled hot water shall be provided in adequate quantities and maintained at the required temperature for resident use (110°F at the fixture) and for mechanical dishwashing and laundry use (180°F at the equipment). Thermostatically controlled hot water valves shall be equipped with a double valve system that provides both auditory and visual signals of valve failures.510

With respect to the financing required by the decreed standards the district court declared that should the state legislature or the Mental Health Board fail to satisfy the well-defined constitutional obligations involved, "it will be necessary for the Court to take affirmative steps, including appointing a master, to ensure that proper funding is realized

suspect classification can be spelled out of Hawkins independent of race. Wealth levelling was argued in the district court but abandoned on appeal, 437 F.2d at 1287 n.1.
506. A. Cox, supra note 474, at 19.
509. Id. at 394-95.
510. Id. at 405.
The Court had in mind not alone a reallocation of state appropriations, but also sale of lands owned by the Mental Health Board. If the court contemplated direct action by the master in revising the State's budget and selling land, there would be involved a greater inroad on state authority than the Supreme Court approved in the Prince Edward County dilemma when it declared not only that the federal court was empowered to reopen the schools but also that it "may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." At least there the action to be taken was left with local authorities.

Because of the position it had taken in its intervening decision in Donaldson v. O'Conner, the Court of Appeals for the Fifth Circuit agreed on the existence of federal judicial power to "order state mental institutions to provide minimum levels of psychiatric care and treatment to persons civilly committed to the institutions." However, the court of appeals found difficult to stomach the boldness and reach of the lower court's decree. "The serious constitutional questions presented . . . should not be adjudicated unnecessarily and prematurely." The reviewing court expressed preference for "the remedy ordered by this court in Hawkins v. Town of Shaw . . . . This approach should hasten the day when the district court can be reasonably assured that appellees' constitutional rights are no longer being violated, and when ultimate control over the institutions in question can be returned to the state." The only Supreme Court involvement in this line of litigation has been denial of certiorari in Burnham v. Department of Public Health of the State of Georgia, in which the same court of appeals reversed the decision of a third trial court of the circuit that had found no constitutional right. Reversal was of course based on the Donaldson and Wyatt holdings.

511. Id. at 394.
513. 493 F.2d 507 (5th Cir. 1974).
514. Wyatt v. Aderholt, 503 F.2d 1305, 1306 (5th Cir. 1974). The quotation is taken from the opening paragraph of the opinion, expressed there as the question to be decided. The question is answered in the affirmative, id. at 1313-14.
515. Id. at 1318.
516. Id. at 1319.
517. 503 F.2d 1319 (5th Cir. 1974) (per curiam), cert. denied, 422 U.S. 1057 (1975).
The last decade thus discloses an enormous extension in judicial enforcement procedures. The reading to be made of this may be that the Court will tolerate whatever inroads on traditional state and local independence it deems essential to achieve the substantive extensions in personal autonomy and economic equality judicially decreed in the name of due process or equal protection. Yet as one columnist has recently asked:

How much governance can the court offer, especially when it has declined to create mechanisms beyond the conventional court structure to do this job?

How much governance is acceptable, whatever its thrust and quality, from an institution that is, finally, answerable to no one but itself for its decisions?518

As if responding to these questions the Court, split 5 to 3 with Justice Stevens not participating, has recently reversed519 the Third Circuit's affirmance520 of a district court order directing for that court's approval the draft of "a comprehensive program for improving the handling of citizen complaints alleging police misconduct, in conformity with the views expressed in the Opinion of this Court filed this date."521 On a voluminous record the trial court found that although violations of the legal and constitutional rights of Philadelphia citizens "are committed by only a small percentage of the members of the police force . . ., [n]evertheless, such violations do occur, entirely too frequently"; that while there was no evidence of "conscious departmental policy of racial bias . . . presence of racial prejudice on the part of an individual police officer . . . is unlikely to be reflected adversely in the performance ratings accorded him by his superiors"; and that "[e]xisting procedures for handling civilian complaints and for enforcement of police discipline related to civilian complaints is [sic] totally inadequate."522 On these findings of fact and on the assertion as matter of law that the federal court has the legal power to supervise the functioning of the police department, the district judge had demanded a revision of the Police Manual to his satisfaction.

518. Patrick Owens, The Court's Increasing Role, Newsday, reprinted in Durham (North Carolina) Morning Herald, Sept. 12, 1975. A. Cox, supra note 474, at 96, finds it easy to sympathize with the Supreme Court's hesitancy, in litigation over school finance, to involve itself in the "kind of morass" illustrated by the enforcement cases of the Fifth Circuit.


522. Id.
It is difficult to foresee what this decision signifies in terms of Court restriction on affirmative relief when substantive constitutional violation is found. There are considerations peculiar to the litigation that look both ways. If the Supreme Court decision does project retrenchment, it is especially noteworthy by reason of the fact that little if any additional expenditure was required by the decree of the district court. The rub comes when, as in the Hawkins and Wyatt situations, federal court decrees require the outlay of large sums of governmental funds in order to meet constitutional standards. Indirectly if not directly, this means resort to local or state taxing power for the production of increased revenues. For the Court to approve direct federal court exercise of that power would involve a complete break with both federalistic and separation-of-powers traditions. It is a question whether the body politic could withstand such a wrench in the traditional constitutional fabric. However, it would not be necessary for the federal courts to assume the taxing power, or even to mandate its exercise by state or local officials. By their forcing of greater expenditures in the interests of lower-income groups, local and state legislative units would of necessity have to levy heavier taxes if services to the upper-income groups were not to be curtailed. With tax “take” at current levels the new impositions would have to employ steeply progressive rate structures, thus achieving the objective of major wealth levelling.

The last thirty-five years have witnessed the increasing boldness with which majorities have both read out of the Constitution what was there in the way of federalistic limitation on congressional power and read into the document what is not there but that in their way of thinking should be. The dual process has at times borne resemblance to Lochner reasoning in the sense that the powers or limitations found had some basis in contemporaneous political and social consensus. The process could be tolerated as a substitute for formal amendment of the Constitution, a process rapidly losing favor from the time of its rejection as a satisfactory solution to the constitutional crisis of 1937. But as the curtain falls on two hundred years of evolution in constitutional processes, and this in the face of Nixon appointment of supposedly strict constructionists, the Court is often not averse to imposing its policy preferences with respect to complex problems precipitating clashing views quite the antithesis of consensus. This ultimate in assertion of judicial supremacy suggests, even in
the face of Rodriguez and, by one view, National League of Cities, that the judicial function in constitutional adjudication may well be metamorphosing from that of constitutional enforcer to that of constitution maker. Judged by conventional views of the role allocated to the Supreme Court in the American governmental scheme, such further evolution necessarily raises the issue of judicial usurpation. It was one thing for the judiciary to lay claim to power to exercise constitutional review as well as judicial review; it is quite another now to employ constitutional review not so much in enforcement of written constitutional provisions formally adopted by the sovereign people as in creative constitutional revision on the strength of its own conclusions of what is best for the country at given times. In effect, what the Court is proposing is that with respect to constitutional review it indulge in the same breadth of creativity long accepted in its exercise of judicial review. Those who hail evidence of metamorphosis are either insensitive to its implications or they are purposely advocating abandonment of the American political experiment in democratic government.

Were the Court, as they seemed to assume, offering only advisory opinions few would gainsay the value of its judgments for thorough consideration of the more intractable problems facing the nation as it enters the third hundred years of its existence. Analytically, this is the contribution the courts have for centuries made in the development of the common law through their exercise of judicial review. The legislative and executive branches are not bound by the judicial judgment, which by majority vote can be overturned if unacceptable to the people’s representatives. But exercised at the constitutional level, that judgment is binding on all; if it is to be undone, a heavy burden is laid on elected representatives, federal and state, to wend their way through a formal amendment process that has lost much of its dynamics. Critics of Lochner saw this antithesis to the nation’s commitment to a framework of balanced government of three coordinate branches with popular sovereignty as the cornerstone. Even granted that the Court’s policy making is today for better ends than was true forty to seventy years ago, there is no whit of difference in the principle involved. This fact explains, by the way, why Lochner is such an irritation to those who embrace non-interpretive constitutionalism. It must be explained away while holding to its principle.

Familiar is Learned Hand’s celebrated statement:

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I
assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course, I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.\textsuperscript{523}

In his latest book Archibald Cox quotes this passage and then expresses reactions to the contrary:

\begin{quote}
I should be no less irked than Judge Hand if the Supreme Court were to void an ordinance adopted in the open town meeting in the New England town in which I live—a meeting in which all citizens can participate—but I should have little feeling about a statute enacted by the Massachusetts legislature in the normal political pattern, and none about a law made in that normal pattern by the Congress of the United States. Perhaps my sense of the matter is distorted by years of advocacy in constitutional cases, but it appears to me that modern government is simply too large and too remote, and too few issues are fought out in elections, for a citizen to feel much more sense of participation in the legislative process than the judicial. Nor does the Supreme Court's intervention lessen my sense that we are all engaged in a common adventure.\textsuperscript{524}
\end{quote}

It is distressing to find a man of the character of Professor Cox preferring judicial oligarchy to representative government. Yet one can sympathize; it is not a hazardous guess to estimate that many entertain similar feelings. Even more productive of dissatisfaction with government than its enormity and remoteness are two further considerations. One is widespread loss of confidence in the quality of officialdom. Almost daily disclosures of unethical conduct and outright criminality are convincing that the lesson of Watergate has not been learned, or perhaps to be more accurate, accepted. A second consideration is that there seems to be in neither legislative halls nor executive offices that demonstration of capacious leadership so desperately needed. Against this unhappy picture stands an institution believed to be untouched by the weaknesses of other departments. It is no wonder that there obtains a feeling of quiet confidence in the Supreme Court of the United States. Yet history warns us to be wary of abandoning government by elected representatives of the governed. Indeed, it seems incredible that anyone would be seriously considering abandonment of this nation's great political inheritance for rule by a bevy of Platonic Guardians, notwith-

\textsuperscript{523} L. Hand, The Bill of Rights 73-74 (1958).
\textsuperscript{524} A. Cox, supra note 474, at 116.
standing the aura of appeal that this solution may seem to have in these troubled times.\textsuperscript{525}

Earl Warren repeatedly stated that the \textit{Reapportionment Cases} were the most momentous decisions of his years as Chief Justice of the United States. To him, then, they outranked in ramification \textit{Brown I} and \textit{Brown II},\textsuperscript{526} the basic decisions calling for an end to de jure segregation in American education. Because the latter are of such extreme importance it must be that Chief Justice Warren saw in malapportionment an evil even more serious to the national polity than educational separation of the races. That evil was, in his judgment, the threat of malapportionment to the effective exercise of the franchise, the right that is conceived to underlie all other rights of the individual. It is irrelevant that many did not think and continue to doubt that near-wooden adherence to population count—the sixth-grade arithmetic Justice Stewart thought it—offers a manageable yet viable solution. What counted was the conviction that the evil must be exorcised. Viewed in this light the \textit{Reapportionment Cases} are justified because the Court stepped in to prevent what appeared to the Warren-led majority to be a serious breakdown in representative democracy. They can thus be thought of as constituting the exercise of constitutional

\textsuperscript{525} My colleague Professor Arnold Loewy has made incisive comments apropos reliance on platonic guardians. Loewy, \textit{Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases}, 52 N.C.L. REV. 223, 229-34 (1973). Yet some judges enjoying distinctive reputations cannot resist the temptation to claim judicial supremacy to be consistent with democratic theory. Thus in the late 1960's Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit persuaded himself that barnacles on the political processes are such as to make judicial supreme-ty little less democratic. Wright, \textit{The Role of the Court in a Democratic Society—Judicial Activism or Restraint?} 54 CORNELL L. REV. 1, 9-11 (1968). More recently Chief Justice Donald Wright of the Supreme Court of California defended constitutional review against the charge that it is anti-democratic. He instanced People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880 (1972), invalidating the death penalty under the California Constitution "in accordance with contemporary standards of decency." Wright, \textit{The Role of the Judiciary: From Marbury to Anderson}, 60 CALIF. L. REV. 1262, 1273 (1972). However, the decision did not prove to reflect the existence in California of consensus on this issue. It was overturned by constitutional amendment on initiative petition. CAL. CONSTR. art. I, \S\ 27. Currently, on the other hand, Mr. Justice Rehnquist has extra-judicially rejected that conception of constitutional review that embraces "contemporary, fashionable notions of what a living Constitution should contain." Rehnquist, \textit{The Notion of a Living Constitution}, 54 TEX. L. REV. 693, 699 (1976). But those following Mr. Justice Brennan's views in his dissent in \textit{National League of Cities v. Usery}, discussed \textit{supra} in text accompanying notes 446-47 and \textit{infra} in text accompanying note 541, will find it difficult to reconcile the judicial with the extra-judicial thesis of Justice Rehnquist.

review in a new pattern of defensiveness that, like the defensive constitutional review that first involved the courts in departing from their historic role in governmental structure, can be reconciled with the American heritage of policy determination by the governed.

On reflection, United States v. Nixon carries overtones of defensive Court action in both the original connotation and that implicit in Reynolds v. Sims and its progeny. In requiring production of the subpoenaed presidential tapes the Court was at the same time protecting the integrity of the federal judiciary's criminal process and squelching mounting claims of a revolutionary presidency that to many threatened the American governmental framework. The decision was heralded by many as saving the Constitution, a short-hand way of expressing the view that the Court had saved popular sovereignty from creeping authoritarianism. Exaction of the death penalty, while opposed as vengeful inhumanity at least in the absence of positive evidence of deterrence, does not so threaten the political or social fabric of the nation. There exists, therefore, no basis for constitutional invalidation on a theory of defensiveness in the connotation that can be drawn from the Reapportionment Cases and certainly none from the historic meaning of defensive constitutional review. For this reason the decisions of the Supreme Court in the five death-penalty cases, concluding the 1975 Term, afford significant indication of the direction in which the judicial winds are now blowing.

On first reaction, these five decisions appear to mark a rejection of further resort to constitutional amendment by Court decision. Three Justices assert and four Justices implicitly accept the assertion that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.532

528. The historic decision is analyzed as one of traditional defensive constitutional review in Strong, President, Congress, Judiciary: One is More Equal Than the Others, 60 A.B.A.J. 1050 (1974). Its more far-reaching extent is considered id. at 1203.
530. The historic limitation of the eighth amendment concerns the method by which the legislative-executive branches may inflict death, and requires that punishment be reasonably proportioned to the crime. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Weems v. United States, 217 U.S. 349 (1910).
Only Justices Brennan and Marshall were responsive to the vigorous contentions of opponents of the death penalty, led by Anthony Amsterdam, that the time had come for outlawing this form of punishment lock, stock and barrel. Yet reflection advises caution in judging the import of these decisions. Only a minority, albeit of but one, would accord Congress and state legislatures constitutional latitude to decree death for those committing what society deems the most heinous offenses against it, subject only to prohibition of arbitrariness in imposition of the extreme penalty. The position taken by Justices Stewart, Powell, and Stevens effectively blocks legislative resort to the death penalty unless this ultimate in punishment is proportionate to the baseness of the crime.

The constitutional line thus drawn inescapably places on the Court the burden of final judgment in all instances of attempted resort to the death penalty. Where, as in the five cases, the offense is murder the Court will be forced by the doctrine of constitutional fact to review each imposition to determine whether the circumstances fall within or afoul of the new constitutional boundary lines.303 Otherwise, the Court will not fulfill its claimed function of final exclusive enforcer of constitutional limitations. The situation could well generate a quagmire reminiscent of that in the obscenity area. Where extremely deviant criminal behavior other than murder is involved, the Court is faced with determination of whether the death penalty is justified by the rule of proportionality. The opinion of Justice Stewart, for himself and Justices Powell and Stevens, recognizes this in part by stating in a footnote that:

We do not address here the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life—for example, when capital punishment is imposed for rape, kidnapping, or armed robbery that does not result in the death of any human being.534

In setting forth the Georgia statute Justice Stewart necessarily quotes the provision that "[t]he death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case"

534. Gregg v. Georgia, 96 S. Ct. at 2932 n.35.
535. Id. at 2921 n.9.
punishment has passed constitutional muster. The societal "right" to it may turn out to be more the exception than the rule.

To the position of partial invalidation of the death penalty taken by Justices Powell, Stevens, and Stewart, as well as to that of total invalidity espoused by Justices Brennan and Marshall, four members of the Court took exception. Speaking for himself, the Chief Justice, and Justices Blackmun and Rehnquist, Mr. Justice White declared with respect to the plurality view:

The plurality claims that it has not forgotten what the past has taught about the limits of judicial [i.e., constitutional] review; but I fear that it has again surrendered to the temptation to make policy for and to attempt to govern the country through a misuse of the powers given this Court under the Constitution.536

The Brennan-Marshall reliance on supposedly evolving moral standards of decency, advanced in Furman v. Georgia537 as basis for complete invalidation of capital punishment, the group of four found completely undercut by the massive re-enactment of the death penalty for the most gross forms of criminal violence.538 This had the effect of forcing the two into a position of insistence on a reading of the eighth amendment to fit their own personal views as to what the Constitution should forbid.539

Three of the four in the same group of Justices dissented from the decision of the previous day in Planned Parenthood of Central Missouri v. Danforth.540 There the basic determination of Roe v. Wade was reaffirmed, strengthened by the holding that neither spouse nor parent can constitutionally be given the power to veto the election of abortion by the wife-daughter and her physician during the first twelve weeks of pregnancy. True, the decision was close, with the newest Justice agreeing with the majority as to the power of the spouse but with the minority as regards that of the parent. But Mr. Justice Blackmun had deserted the group to join the opposing side; indeed, he had been the author of the bizarre prevailing opinion in Roe in which Mr. Justice Holmes's warning against amendment by judicial say-so had been quoted

536. Roberts v. Louisiana, 96 S. Ct. at 3020.
537. 408 U.S. 238 (1972) (per curiam).
538. 96 S. Ct. at 3015-3017.
539. In dissent Justice Brennan stuck to his "moral precepts" thesis, whereas Justice Marshall, conceding the impact of extensive public reaction to his earlier reasoning, moved to other grounds in support of his continuing judgment that capital punishment is invalid. Their respective opinions are found at 96 S. Ct. 2971 & 2979.
540. 96 S. Ct. 2831 (1976).
only to be flouted. What of the remaining three? Just a week earlier two of them, the Chief Justice and Mr. Justice Rehnquist, with the latter writing for the Court, had been in the majority in *National League of Cities v. Usery*, a decision that was castigated by Mr. Justice Brennan, in a dissent in which Mr. Justice White joined, as an exercise of "raw judicial power" in order to "erect a mirror of its [their] own conception of a desirable constitutional structure."541

On this analysis, of all the present Justices only Justice White emerges free of recent Brotherly accusation of yielding to temptation to remodel the Constitution to reflect his own personal convictions.542 Mr. Justice White's position must be the consequence of unusual sensitivity to the nagging doubt, never fully dispelled, as to the consistency between constitutional review and representative democracy.543 In closing his remarks at the cornerstone-laying ceremonies for the new Kansas Supreme Court Building, held July 5, 1976, Justice White reflected some of his own uncertainty concerning the justification for judicial exercise of embracive constitutional review:

> It is constantly asked how this could be in a land such as ours, as wedded to concepts of representative government as we are. Judicial officers in the main are not representative in the political sense, but are supposedly independent and may not be discharged on short notice. Yet there is built into our system the requirement that they perform important law-making tasks. The answers to this question have been many and varied and apparently have been convincing enough to fend off various strong attacks on the entire idea of judicial [i.e., constitutional] review.544

Sensitivity of this degree would assuredly induce extreme hesitancy to join in any Court decision manifesting characteristics of spurious constitutional interpretation.

But this degree of sensitivity does not trouble minds that have long accommodated to the full-blown practice of constitutional review. Once acclimatized to the proposition that the Court is the ultimate interpreter

541. 96 S. Ct. at 2487, 2485.
542. And even he bears prior taint from the dissent of Mr. Justice Black by virtue of his concurrence in *Griswold v. Connecticut*.
543. *E.g.*, R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY vi (1941); *cf.* the valiant effort of Professor Rostow to demonstrate the democratic character of constitutional review provided the power is exercised only with respect to civil liberties. Rostow, *supra* note 330.
544. B. White, Remarks on the Occasion of the Laying of the Cornerstone of the Kansas Supreme Court Building, July 5, 1976 (edited text obtained from Kansas Bar Association, on file in University of North Carolina Law School Library). A short newspaper report of the Justice's remarks discloses that at least one person at the
of the Constitution, it then does not come hard to think of the Court as an appropriate institution for fulfilling the representational function as surrogate of the People. Reasoning thereby comes full circle; constitutional amendment by judicial decision claims a legitimacy alongside that of the formal amendment process provided by article V. Impulses in this direction within the Court are encouraged by enticements on the part of commentators artfully pressing for causes obtainable only through constitutional interpretation amendatory in character. In this year of the bicentenary there thus remains a strong temptation in and for the Court to embrace the seductive role of Platonic Guardians, to make the question of who is to play the dominant role in constitutional amendment one of the major political issues as the Nation completes celebration of its two-hundredth anniversary.

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