

10-1-1972

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Recommended Citation

J. B. Craven Jr., *Paean to Pragmatism*, 50 N.C. L. REV. 977 (1972).

Available at: <http://scholarship.law.unc.edu/nclr/vol50/iss5/3>

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PAEAN TO PRAGMATISM†

J. BRAXTON CRAVEN, JR.*

In Perkins House at the Harvard Law School in the fall of 1939, it was possible to get up a serious discussion about whether judges decided cases and then figured out the reasons for the decisions or whether they were inevitably led to a decision by the reasons. I thought then and think now that the chicken generally comes first and lays down its reason to justify its existence. The opposite conclusion seems to me a bit naive, but some scholars of distinction apparently hold to the contrary and insist that there are neutral controlling principles¹ brooding more or less omnipresently in the sky.

I believe that there are only two kinds of judges at all levels of courts: those who are admittedly (maybe not to the public) result-oriented, and those who are also result-oriented but either do not know it or decline for various purposes to admit it. Those who are unaware of their result-orientation have an advantage; they get where they want to go without the inhibition of a conscious awareness of how they got there. Those who know themselves well enough to recognize their result-orientation are inhibited by the knowledge that they may put into judicial decisions value judgments that may not have enduring validity and may even turn out to be wrong. A judge who is that introspective tends to be more flexible than his less perceptive brother who knows not what he does—if only because he is aware that he is constantly choosing, usually not between right and wrong but between two goods or two evils embraced within conflicting principles.

All judges in America are subject to the supreme authority of the

†During the summers of 1967 and 1970, the author taught Constitutional Law at the University of North Carolina School of Law. Members of his 1970 class, now Editors of this volume of the North Carolina Law Review, asked Judge Craven to put into article form some of his classroom approach to the role and function of the judiciary in the practical implementation of constitutional standards, and this article was written in response to that request.

*United States Circuit Judge for the Fourth Circuit. The author wishes to acknowledge the research assistance of Jim D. Cooley, a second-year student at the University of North Carolina School of Law, who especially assisted in the analyses of *Marbury v. Madison*, text accompanying notes 54-86 *infra*; *Nebbia v. New York*, text accompanying notes 87-135 *infra*; and *Reynolds v. Sims*, text accompanying notes 136-169 *infra*.

¹Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Cf. Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660 (1963), and Birmingham, *The Neutrality of Adherence to Precedent*, 1971 DUKE L.J. 541.

United States Supreme Court. There are some things judges of inferior courts cannot do. If the United States Supreme Court has spoken clearly, it cannot be ignored, however horrible the result that may ensue in application of the principle to a given fact situation. If state law is settled, however wrongly, it may not be ignored. Whatever I may think of capital punishment, and I think poorly of it, I cannot presently vote to afford relief to one fairly convicted of first-degree murder and sentenced to death.² However absurd I may think some applications of the exclusionary rules of evidence in criminal cases to be, and I am not alone (see the concurring and dissenting opinion of Chief Justice Burger in *Coolidge v. New Hampshire*³), I must sometimes vote to let the criminal go free because the constable blundered. Whatever my sense of outrage⁴ that the statute of limitations in North Carolina used to run from the day the doctor left the sponge in the intestinal cavity and not from the day it is discovered,⁵ I was bound by *Erie Railroad v. Tompkins*⁶ to apply this unjust rule in a diversity case arising in North Carolina. However fair and reasonable would be an interpretation of the conscientious objector statute that would allow selective opposition to the Vietnam War,⁷ and however well supported such an idea may be by Christian doctrines of the unjust war, I cannot vote to relieve one who is willing to defend America but whose conscience will not permit him to serve in Vietnam.⁸ There are, as I say, some things judges cannot do.

These are examples of that group of cases, perhaps thirty to forty percent of the total volume,⁹ that can be decided but one way. Whether result-oriented in terms of justice or in terms of sterile intellectualism, a judge need not ponder long such questions. In these situations and others like them, he must "plunge the knife with averted gaze."

Marshal Foch, when jumped over the heads of senior officers, is supposed to have said to Lloyd George that the higher one goes the easier it gets. He was speaking in practical terms, saying that as

²Case v. North Carolina, 315 F.2d 743, 745 (4th Cir. 1963) (Craven, J., dissenting).

³403 U.S. 443, 492 (1971).

⁴See *Williams v. Camblos*, Civil No. 2422 (W.D.N.C., filed 1965) (mem.).

⁵See the opinion of Chief Justice Bobbitt in *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957). The North Carolina General Assembly finally changed the law in 1971.

⁶304 U.S. 64 (1938).

⁷See *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969).

⁸*Gillette v. United States*, 401 U.S. 437 (1971).

⁹Cardozo estimated over 50% in this category. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 164 (1921).

commander-in-chief of the allied armies he would have a bigger staff and more expert assistance, but what he said is also true with regard to the exercise of judicial power. A judge of the United States Court of Appeals is bound only by the decisions of the United States Supreme Court, and as to state law in diversity cases by decisions of the highest court (that has spoken) of the particular state. He is free to ignore the most well reasoned decision of the Second Circuit, the Fifth and the Ninth and all the others, not to mention the most persuasive opinions of the district judges. If he can get another judge to vote with him, he may lawfully "overrule" or ignore a panel decision of his own circuit, although he will likely hesitate to do it and may, instead, suggest en banc consideration. There are more limitations on trial courts, and above the courts of appeals, in the rarefied atmosphere of the United States Supreme Court, there is almost but not quite complete freedom. The limitations there are more political than legalistic, although often they are expressed technically.

I have never had the misfortune to be closely associated with a truly conservative judge. I do not mean "conservative" in its ordinary sense. A more apt word is, perhaps, "sterile."¹⁰ I have in mind sterile intellectualism that is not in the least offended but, instead, is delighted that there may be no reason for decision other than that the rule "was laid down in the time of Henry IV."¹¹ I have known very few such judges, and them only at a distance, but I have read others. This is the kind of judge who, if he is a trial judge, likes to say from the bench, "This is not a court of justice; it is a court of law." When I was a young judge (under age forty) I said it once or twice myself and am sorry for it. This is cold intellectualism that finds no room at the inn for people. This type of legal mind is concerned with "legal problems"—entirely unaware that the term is a misnomer, that there are only peoples' problems for which the law sometimes may afford answers. The life principle of such a judge is *stare decisis*. He fervently believes that it is far, far better that the rule be certain and unjust than that he tinker with it. It is a delight to him to construct painstakingly, with adequate display of erudition, an edifice of logic and precedent upon which justice may be sacrificed. That the result in terms of the people involved would make an Apache

¹⁰On the Fourth Circuit over the decade I have known it as a participant (first as a visiting district judge in 1961), there has not been a sterile judge—whether or not any one of us may have been labelled as liberal or conservative.

¹¹Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

cry is to him simply proof in full measure of his dedication to law. When one reads such an opinion, complete with pious disavowal of judicial power to usurp the legislative prerogative, the feeling comes through that the author is not sorry that he cannot and may even be glad that the legislature will not. Such a judge categorically rejects Holmes' aphorism that the life of the law is not logic but experience, and such a judge, of course, has never entertained the following thought of Yeats: "God guard me from those thoughts men think In the mind alone; He that sings a lasting song thinks in (the) marrow-bone."¹²

It may be thought that I have refuted my own thesis that all judges are result-oriented. I think not. The result-orientation of a sterile judge is toward continuity, certainty, and intellectual symmetry and against change. He loves law instead of people and may indeed have a deep hostility towards people. He is as much predisposed to the vindication of precedent for its own sake as his brother may be predisposed to achieving within the framework of the law a just result. Such a sterile judge may hold justice in contempt. Because it cannot be defined, he is likely to believe it does not exist. But he probably would not say the same thing about love and certainly not about obscenity.

Compared with other judges, the lot of the sterile judge is an easy one. He can pretty well accomplish his objective by doing nothing, and when he does nothing he can wear the robe of humility—an appealing garment. There is something for everyone when a judge points toward justice and wrings his hands that he cannot attain it.

Nor can I define justice, but I am quite certain that it exists, both abstractly and in the context of every adversary proceeding. In five years of sitting on the Fourth Circuit with six other judges of diverse backgrounds and predilections, I do not believe there have been more than half a dozen instances of disagreement as to the "desirable" or "just" result. More often there has been disagreement as to whether the desirable or just result is attainable within the framework of the law.

There is not as much sterile intellectualism in the law schools today as there used to be, but there is still too much. There are probably yet some law professors who think the word "justice" belongs in Sociology I rather than in Property II. Perhaps the greatest contribution of Chief Justice Warren was to make respectable a very simple question: "Is it fair?" The legal mind that will not talk about injustice because it cannot

¹²W.B. Yeats, "A Prayer for Old Age."

be defined is like a surgeon who will not treat cancer because it is not yet fully understood. It might well be remembered that the United States Constitution was ordained to establish "justice"—not law.

If I have exaggerated the result-orientation of judges, and perhaps I have, I think it difficult to exaggerate the overriding importance of the result in the most important cases—all of which are, of course, constitutional law cases. In the truly "big" case I should think the mind of a sterile judge would boggle, and even he must think in terms of the "desirable" result in view of the interests of the people and the Nation. I believe the truly important constitutional decisions are exercises in pragmatics often clothed in legalistic syllogisms and that the controlling principle, seldom expressed, is expediency: What is best for the nation? Sometimes the true rationale of decision is never mentioned. Worse, it may be covered up and buried beneath page after page of legalese.

Of the three branches of government, the judicial branch alone must assign and articulate reasons for its decisions. Conclusions are not enough. No American appellate court has ever simply announced that the result below is unjust and unwise and therefore ought to be and is reversed. The assigned reasons must be precedent-related and plausibly interpretive of prior decisions, and in addition our judicial tradition demands that the contrary reasons advanced by the losing litigant be examined, discussed, and plausibly rejected, again in harmony with, even though a departure from, prior decisions and interpretations. Manifestly this tradition, to which I think every lawyer and judge would adhere, strictly limits the range of choice available and sometimes dictates to the most free-wheeling and "unprincipled" judge how he must vote and decide the matter. Erwin N. Griswold, Solicitor General and former Dean of Harvard Law School, described this process and some of its implications for the judge as follows:

To a very large extent, law is reason. Judges act professionally. They use the materials of the law, and they use them logically and thoughtfully, in the way sanctioned by an external standard, which we call the law. They are not free to go on frolics of their own or to decide according to their free choice or whim. But, recognizing this, it is still true that in many cases that come before appellate courts, the law, in those professional terms, does not provide a clear answer. At this point the judge must make a choice, albeit usually a narrow one. And when this is done, in constitutional law as well as elsewhere, law becomes the will of the judges.

It is important to understand and accept the fact that there is

nothing illegitimate or evil in this process. The process of reasoning involved in judicial decisionmaking requires careful training and high ability. It is largely a matter of the intellect. The process of choice involved in many judicial decisions requires character, breadth of vision, outlook, and wisdom. It is, to a considerable extent, a matter of the spirit. This combination of intellect and spirit in people like Holmes, Brandeis, Hughes, Cardozo, Stone, Roberts, Hand, Frankfurter, and Jackson has given us our greatest judges. These men adhered to the rationality of the law. They recognized that texts and precedents are of great significance and are often binding on the judge. But they recognized too, that texts and precedents are not always as clear as they may seem.

It is here that the process of judging rises to its highest level. It is not a matter of strict construction or of loose construction.¹³

Somewhere along the line, beginning with the first classroom command to state what a case *holds*, every good lawyer-judge learns to distrust what an appellate court *says*. Doubt goes far beyond mere dictum, whether admitted or otherwise obvious. What is held may not be even what the court *says* it holds. The discerning lawyer-judge doubts the rationale of decision except in its own factual context, and sometimes even there. This is not because appellate judges are less intellectually honest than their counterparts in other walks of life. Indeed, I think there is less dissembling on the bench than off it. But the very nature of the judicial process, hallowed in tradition, is to explicate decision interpretatively, whether of legislative intent or prior judicial decision. It is accepted judicial craftsmanship to show that the new result rests solidly upon an old foundation. The technique runs something like this: Case *A* is very old and is very bad. Cases *B*, *C*, *D*, *E*, *F*, and *G*, although adhering to *A*, have gradually eroded it so that it will come as no surprise to discerning members of the bar that we now reject it. In so doing we make no sharp break with the past; instead, we merely follow the established precedent of *B* and especially *F* and *G*. If this is done expertly enough, and not too often, the shock wave of change will scarcely register on the law review seismograph. Indeed, if enough time has been allowed to elapse from *A* to *G*, or if *G* can obviously win a popularity contest over *A*, the appellate court may even dare to praise *G* in terms not of law but of fairness and decency and excoriate *A* as a mere hobgoblin of an unenlightened era.

¹³Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 729 (1971).

But because fairness and decency are seldom demonstrable, although they do exist, the rationale of decision does not always contain the reason for it. It would be a brave judge indeed who would ever admit in an opinion that his intuitive thought in an insurance coverage case is that if the fellow has paid his premiums he ought to have his coverage. But I strongly suspect that fleeting thoughts—such as, “No matter how good a tax lawyer one has, he still ought to pay *some* taxes”—have as much to do with the decision-making process, consciously or subconsciously, as do the articulated reasons.

Maybe the distinction is between the reason for a decision and its motivation. I leave to psychologists whether the two can be kept apart.

I am entirely convinced that the most compelling principle of decision in the area of constitutional law is pragmatism. I believe it entirely possible for a bright but “dumb” law student to memorize and fully grasp every constitutional maxim and be wholly unable to project future constitutional decisions. Logic, reason, and awareness of subordinate constitutional principles will not, I think, take one very far in this field. For example, complete familiarity with *Roth v. United States*¹⁴ and with *Stanley v. Georgia*¹⁵ and a good grasp of logic would not have been enough to anticipate *United States v. Reidel*¹⁶ and *United States v. 37 Photographs*.¹⁷ The latter decisions are good illustrations of what some of my students came to call the “Aw, hell” principle of constitutional law; the translation is “we have gone far enough for now.” The result in those cases, however illogical, has a common sense of its own: one may possess pornography with impunity in his home, but he may not lawfully carry it there.

In no other area of the law is there more room for healthy skepticism of the articulated rationale of decision. The real question in these cases always seems to me to be whether the result will work in the national interest. I agreed to write this article in praise of pragmatism on the assumption that it would be demonstrable as the one great overriding principle in constitutional law. Rather than picking and choosing cases to support my purpose, I thought it might be more persuasive if I chose for discussion among those selected by others. So I wrote four distinguished American law professors, knowledgeable in constitutional

¹⁴354 U.S. 476 (1957).

¹⁵394 U.S. 557 (1969).

¹⁶402 U.S. 351 (1971).

¹⁷402 U.S. 363 (1971).

law, asking them to list for me the fifteen or twenty most important decisions ever rendered by the United States Supreme Court. I got three serious answers.¹⁸ The combined listing is set out in a footnote.¹⁹

EX PARTE YOUNG

Let us begin with *Ex Parte Young*.²⁰ This seems to me the most important decision of them all. All three of my distinguished panel of professors included it within the top thirty, but one panelist balked at ranking it in the first fifteen or twenty.

This important litigation was begun by stockholders of nine railroads in the federal court in Minnesota to enjoin the railroad companies from complying with legislation enacted by the Minnesota legislature to reduce railroad rates. There was federal question jurisdiction, the Supreme Court decided, because of the allegation that the compulsory rates, if enforced, would take property without due process of law, and because there might well be a denial of equal protection of the law as well as a denial of due process if the rates were so confiscatory and the penalties so enormous that the companies would be compelled to submit to confiscation of their property rather than risk the enormous fines and

¹⁸One professor replied that it had never occurred to him that the Supreme Court had decided 15 important cases.

¹⁹*Cases on all three lists* (in alphabetical order): *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Ex parte Young*, 209 U.S. 123 (1908); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Nebbia v. New York*, 291 U.S. 502 (1934).

Cases on two lists: *Baker v. Carr*, 369 U.S. 186 (1961); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Powell v. Alabama*, 287 U.S. 45 (1932); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Cases on one list: *Adamson v. California*, 332 U.S. 46 (1947); *Borwn v. Mississippi*, 297 U.S. 278 (1936); *Civil Rights Cases*, 109 U.S. 3 (1883); *Dennis v. United States*, 341 U.S. 494 (1951); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Korematsu v. United States*, 323 U.S. 214 (1944); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Moore v. Dempsey*, 261 U.S. 86 (1923); *Near v. Minnesota*, 283 U.S. 697 (1931); *Reid v. Covert*, 354 U.S. 1 (1957); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Schenck v. United States*, 249 U.S. 47 (1919); *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Shreveport Rate Cases*, 234 U.S. 342 (1914) (mem. opinion); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *United States v. Darby*, 312 U.S. 100 (1941); *Weeks v. United States*, 232 U.S. 383 (1914); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

²⁰209 U.S. 123 (1908).

possible imprisonment of their officers. The Court also noted that there might be a federal question in regard to the interstate commerce clause but did not rest jurisdiction upon it. Edward T. Young, Attorney General of Minnesota, ignored the preliminary injunction issued against him and sued in the state court for a writ of mandamus against the railroads to compel their compliance with the new rate laws. The federal court adjudged him guilty of contempt, fined him one hundred dollars, and ordered him to jail until he dismissed the state mandamus proceeding. The case came to the United States Supreme Court by a petition for a writ of habeas corpus to free Young from the custody of the United States Marshal. Despite the unusual length of the majority opinion, and the lengthy dissent of the elder Harlan, the issue was a simple one: whether the eleventh amendment prohibited the injunction issued against Young by the United States district court. The Court held that the injunction against Young was proper. Mr. Justice Peckham, for the Court, announced the rule that has since been repeatedly followed:

The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seems to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct.²¹

Thus the Court effectively "repealed" the eleventh amendment. The effect of this 1908 decision was to bring within the scope of federal judicial review state action in violation of the United States Constitution. Without *Ex parte Young* or its equivalent²² there would be today no school cases; no cases to require the states to reapportion their legislatures; no effective federal court review of state legislation to pro-

²¹*Id.* at 159-60.

²²The resurrection of § 1 of the Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. § 1983 (1970), by *Monroe v. Pape*, 365 U.S. 167 (1961), did much along these lines, but it would take more than one resurrection to equal *Young*.

tect the flag, to outlaw pornography, and to inhibit admission to the professions; et cetera, et cetera.

Ex parte Young was made up out of whole cloth. It is a fiction transparent to an intelligent high school student. It is not even plausible. For sheer audacity and utter disregard of the ordinary meaning of language, much less a literal interpretation of the Constitution, it is unmatched in the Court's history.

It has long been settled, and was in 1908, that the fourteenth amendment speaks only to the states. It was equally clear that the eleventh amendment forbade suits against the state.²³ The Court had its cake and ate it, too, by holding that the suit was one against an individual named Young rather than against the State of Minnesota and that enforcement of the Minnesota statute was merely the individual wrong of Edward T. Young for purposes of the eleventh amendment but was state action for purposes of the fourteenth amendment.

The Court might have held, but did not, that the fourteenth amendment altered or limited the effect of the eleventh amendment. Instead, the Court rejected such an approach, assuming "that each exists in full force, and that we must give to the eleventh amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant."²⁴

Professor Wright concludes that this remarkable case, "ostensibly dealing only with the jurisdiction of the federal courts, remains a landmark in constitutional law." Why? "[I]n perspective the doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law."²⁵

As an exercise in pure pragmatism, Mr. Justice Peckham's opinion in *Ex parte Young* tops them all.²⁶ In the long struggle to make a nation

²³The eleventh amendment in terms bars only suits by non-citizens against the state. The bar was made complete, to include citizens of a state, by *Hans v. Louisiana*, 134 U.S. 1 (1890), in which the Court held in effect that the eleventh amendment was supererogation, since sovereign immunity had always barred unconsented suits against the states. See *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 n.13 (1952).

²⁴209 U.S. at 150.

²⁵C. WRIGHT, *THE LAW OF FEDERAL COURTS* 186 (2d ed. 1970).

²⁶Dean Acheson, in *MORNING AND NOON* 65 (1965), tells of his inquiry to Mr. Justice Holmes about Justice Peckham:

A few of his [Justice Holmes'] opinions of people stand out in the notes or from memory. "What," I asked, "was Justice Peckham like, intellectually?"

"Intellectually?" he answered, puzzled. I never thought of him in that connection. His major premise was, "God Damn it!" But he was a good judge."

out of a loose confederation of states, it had been thought by some from the beginning that there must be a way to control state action. The eleventh amendment effectively barred the door. Whether so intended or not, it was a seemingly invincible barricade behind which state sovereignty might operate uncontrolled and without regard to national unity. The first fiction was invented by Marshall. It was that the Court would not look beyond the record in determining whether a state was party to a suit. Because a state, like a corporation, functions through its agents, the record often would show the name of the state officials involved and not the name of the state itself. *Osborn v. Bank of the United States*²⁷ is the classic illustration. The Marshall fiction broke down and was repudiated in *In re Ayers*.²⁸ The incompatibility of the literal eleventh amendment with a functioning nation required that in some way national standards of constitutionality be enforceable against the states. My dissenting panelist (who included *Ex parte Young* only in the first thirty and not the first fifteen) admits its importance, and impliedly its pragmatic base, by deriding its judicial craftsmanship:

The forthright approach would have been to recognize that the Fourteenth Amendment necessarily modified the Eleventh—or better, interpret the Eleventh as limited to nonconstitutional litigation because adopted to recall *Chisholm v. Georgia* which involved suit on State bonds and not a constitutional issue. But no, the Court only turned to another fiction which as Frankfurter later showed was ridiculous because if the official is off on a frolic and banter of his own how is there State action under the Fourteenth Amendment. To me, therefore, *Ex Parte Young* is no model of the jurist's art but only a weak pin in the constitutional structure.²⁹

I have not counted the words in Mr. Justice Peckham's opinion in *Ex parte Young*, but I estimate them to number twelve thousand. It is amazing that so many words can flow from an author's pen without the slightest disclosure of the rationale of decision, which must have been, all now agree, simply a felt necessity to apply federal constitutional standards to conduct of the states despite the prohibition of the eleventh amendment. Indeed, *Ex parte Young* is "no model of the jurist's art." In 1908 it was doubtless "a weak pin in the constitutional structure." But it has endured, acquired gloss and patina, and sixty-three years later

²⁷22 U.S. 738 (1824).

²⁸123 U.S. 443 (1887).

²⁹Letter to the author from Professor Frank Strong.

is perhaps loved for its former frailty now grown strong. It is doubtless here to stay. I think the case stands for one pragmatic constitutional principle: that the Constitution must be interpreted always so that the nation can endure.

BROWN V. BOARD OF EDUCATION

*Brown v. Board of Education*³⁰ was argued to the Supreme Court December 8-11, 1952, reargued December 7-9, 1953, and decided May 17, 1954. It overruled *Plessy v. Ferguson*³¹ and held that segregation of children in public schools solely on the basis of race deprived the children of the minority group of equal educational opportunity. This unanimous decision of a Court that included Justices Reed, Jackson, Burton, Clark, and Minton is unique for intellectual honesty. In that respect it is at the opposite end of the spectrum from the implausible deviousness of *Ex parte Young*. There were doubtless other ways by which the Court might have come circuitously to the same conclusion and with less risk of offending lawyers.³² The opinion was not written for lawyers. Admittedly an ideological value judgment, it was written for the people and has prevailed. There was no effort to support the decision by ersatz history of the fourteenth amendment.³³ The basis of decision was neither law nor precedent, but sociology and psychology of the twentieth century.³⁴ For every lawyer aggrieved by disregard of

³⁰347 U.S. 483 (1954).

³¹163 U.S. 537 (1896).

³²See, e.g., Professor Pollak's rewriting of the *Brown* decision in the more conventional equal protection terms, formulated as a response to Wechsler's assertion that no "neutral principles" could be discerned in *Brown*. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

³³The Court did not ignore the argument, but after reargument chiefly on the issue of the framers' intent the Court concluded, "This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced." 347 U.S. at 489.

For an analysis of the historical background of the Fourteenth Amendment favorable to a broad interpretation, see Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). Bickel concludes: "Thus, section 1 of the fourteenth amendment, on its face, deals not only with racial discrimination, but also with discrimination whether or not based on color. *This cannot have been accidental*, since the alternative considered by the joint Committee, the civil rights formula, did apply only to racial discrimination." *Id.* at 60 (emphasis added). But see L. BOZELL, *THE WARREN REVOLUTION* 43-48 (1966).

³⁴See the famous footnote 11, 347 U.S. at 394-95. For comments on the Court's use of sociological and psychological data and commentary, see Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955); Clark, *The Desegregation Cases: Criticism of the Social Scientists' Role*, 5 VILL. L. REV. 224 (1959); *Stell v. Savannah-Chatham Bd. of Educ.*, 220 F. Supp. 667 (S.D. Ga. 1963).

precedent and near contemptuous reference to *Plessy* there were tens of thousands of Americans who knew intuitively that the Court was right: separate public education by race is inherently unequal.³⁵

It has been respectable since Cardozo³⁶ to admit that judges make law, albeit interstitially. It is also true that the Constitution means what the Supreme Court says it means. But in *Brown* there was neither a need to distill new law from the penumbra of several constitutional amendments, as in *Griswold v. Connecticut*,³⁷ nor a need to twist and distort the words of the instrument or invent fictions, as in *Ex parte Young*. In this context the Court might have said, with Mr. Justice Black, that "equal means equal,"³⁸ and it just about did.

Once the Court recognized the American consciousness of 1954 that blacks are people and not second-class citizens,³⁹ *Plessy* could not survive. It is surprising that it lasted so long, or it would be except for pragmatism or plain expediency. It would be interesting to know why *Plessy* died in 1954 rather than 1944 or 1964. How many previous opportunities to appraise the health of *Plessy* had been declined by denial of certiorari? Did a Court which was often split wait for unanimity? Was it purely accidental that graduate school decisions such as *Sweat v. Paitner*,⁴⁰ which had relatively minimal impact on mores, came first? Was it sensible for the Court to put blacks in graduate schools before putting them in grammar schools? Was there a conscious decision of "ripeness," that the American people were ready to accord the Negro equality under law in implementation of the promise of the thirteenth and fourteenth amendments?

Brown's progeny are even more practical. In *Green v. County School Board*⁴¹ the Court turned to exhortation. Only a desegregation plan that promised to work and work now would suffice. The goal to

³⁵"[I]t would be the most unneutral of principles, improvised *ad hoc*, to require that a court faced with the present problem refuse to note a plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority—or the other equally plain fact that such treatment is hurtful to human beings." Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1959).

³⁶B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98-141 (1921).

³⁷381 U.S. 479 (1965).

³⁸*Cf.* Justice Matthews' statement that "[t]he equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

³⁹In *Brown* the Court was "the voice of the national conscience . . . at a time when other governmental voices were silent." A. COX, *THE WARREN COURT* 27 (1968).

⁴⁰339 U.S. 629 (1950).

⁴¹391 U.S. 430 (1968).

be attained was ringingly proclaimed: Neither black schools nor white schools, just schools.⁴²

When the Court undertook to extend the rule of *Brown* to other areas it was cryptic, deciding in per curiam opinions that public beaches,⁴³ buses,⁴⁴ golf courses,⁴⁵ and park facilities⁴⁶ must be available to all United States citizens regardless of race. In speaking so shortly, without any effort to exposit the presence of "state action," the Court obviously meant to teach that *Brown* was to be read broadly as a declaration of American policy that race relations will not be solved by apartheid.

The problem revealed by the per curiam approach is much deeper than this surface issue. It has to do with the "dilemma" posed by Archibald Cox in his book *The Warren Court*.⁴⁷ The horns of the dilemma are, on the one hand, the "rightness" of the substantive progress achieved by the decision and, on the other, the "institutional needs" of maintaining the courts as bodies wielding moral force (and the wisdom of past times and men) rather than naked political (policy-making) power. Americans do not much care to be governed by a bevy of platonic guardians. Probably the Court cannot maintain its tremendous moral force without the symbolism that the Constitution—and not merely the predilections of nine persons—controls decisions. Learned Hand put it this way: "A judge must manage to escape both horns of this dilemma: he must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant needs of his time. . . ."⁴⁸

Seventeen years after *Brown* the Court is still intentionally imprecise in its instructions to the inferior federal courts to implement the *Brown* decision. I think the reason for this is that the Court is wise enough to know that it does not know precisely what ought to be done and must be required. Like the rest of us, the Court learns from experience—the experience of the inferior federal courts. Trial balloons constantly soar aloft from the United States District Courts. Some are shot

⁴²*Id.* at 442.

⁴³*Mayor and City Council v. Dawson*, 350 U.S. 877 (1955).

⁴⁴*Gayle v. Browder*, 352 U.S. 903 (1956).

⁴⁵*Holmes v. Atlanta*, 350 U.S. 879 (1955).

⁴⁶*New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958).

⁴⁷A. COX, *THE WARREN COURT* (1968).

⁴⁸Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361 (1939).

down in flames by the United States Circuit Courts of Appeals⁴⁹ while others are allowed to orbit indefinitely. Implementing new constitutional dogma is largely a matter, I suggest, of trial and error—with the lower courts trying and the Supreme Court calling the errors. In the long run a rule of law or its implementation that does not have the support of a majority of the American people will not survive.⁵⁰ For example, eventually the noble experiment of prohibition perished with the twenty-first amendment. In my opinion, *Brown* has that support and is here to stay. Massive, long-distance busing does not have that support and, in my opinion, is a temporary expedient.⁵¹ Even in *Swann v. Mecklenburg*,⁵² the opinion of the Chief Justice notes that when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process, objections to it may be valid.⁵³ There is also in *Swann* the intimation that such extreme remedies may become inappropriate whenever a system becomes “unitary.” At some point, the Court seems to be saying, we will come to

⁴⁹*E.g.*, *Briggs v. Elliot*, 132 F. Supp. 776 (E.D.S.C. 1955), was adhered to by the Fourth Circuit Court of Appeals for many years but is now dead. *See Walker v. County School Bd.*, 413 F.2d 53, 54 n.2 (4th Cir. 1969).

⁵⁰That the courts must have the support of a majority of the American people points toward the democratic nature of judicial review. Charles Black has said, in the debate with Henry Steele Commager over the democratic character of judicial review, that:

[i]t is true in the further practical sense, less tangible and precise but no less real, that, if public opinion had rejected it, the performance by the courts of the function of judicial review would have been impossible, not only because of the clear-cut political controls over the courts but also because such an institution, founded in the end only on moral authority, could never have had the strength to prevail in the face of resolute public repudiation of its legitimacy. Judicial review is thus the creation of the American people, as definitely as is any other of the institutions they have created.

C. BLACK, *THE PEOPLE AND THE COURT* 209 (1960). *See also* Rostow, *The Democratic Character of Judicial Review*, in *JUDICIAL REVIEW AND THE SUPREME COURT* 74 (L. Levy ed. 1967). *Cf.* the following statement:

The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently, it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a law-making majority.

Dahl, *Decision-Making in a Democracy: the Supreme Court as a National Policy-Maker*, in *JUDICIAL REVIEW AND THE SUPREME COURT* 105, 112 (L. Levy ed. 1967). *But see* H. COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* (1943).

⁵¹*See* Bickel, *Where Do We Go From Here?*, *THE NEW REPUBLIC*, Feb., 1970, at 20.

⁵²402 U.S. 1 (1971).

⁵³*Id.* at 30-31. The Chief Justice in his opinion as Circuit Justice in *Winston-Salem-Forsyth v. Catherine Scott*, No. 71-274 Oct. term 1971, suggested that 3 hours bus travel-time daily would be an “extreme example of a patent violation of *Swann*.”

the end of busing. As Mr. Dooley said in the last century, even Supreme Court Justices read the election returns.

MARBURY V. MADISON

If *Ex Parte Young* stands for the principle that the Constitution must always be interpreted so that the nation can endure, *Marbury v. Madison*,⁵⁴ concededly the "greatest" case in American constitutional history, established a principle nearly as basic—that there must be a final arbiter of disputes over the meaning of the Constitution, and it might as well be the Supreme Court. Though the case can be read as an exercise in "defensive" constitutional review,⁵⁵ it seems clear not only that Marshall himself was after bigger game⁵⁶ but also that he bagged it. Because of this monumental decision the power of judicial review now exercised by the Supreme Court over legislative enactments and executive conduct is accepted today by these coordinate branches of government. It was not always so and might have been otherwise.⁵⁷

As early as 1788,⁵⁸ and certainly by 1801,⁵⁹ Marshall had made up his mind that interpreting the Constitution was for the judicial branch to the exclusion of the others. The principle was ready for a case and Marshall himself provided one. It was his negligence as outgoing Secretary of State in failing to deliver a commission to one of President Adams' "midnight" justices of the peace that provided the case and the opportunity to lay down the principle as the law of the land.

⁵⁴5 U.S. (1 Cranch) 137 (1803).

⁵⁵See Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 111, 249 (1967).

⁵⁶In the critical struggle for ratification of the Constitution by the Virginia Constitutional Convention in 1788, Marshall declared to that body: "To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 452 (1916). Cf. the following statement in *Marbury*:

"Could it be the intention of those who gave this power [the judicial power of article III], to say that in using it the Constitution should not be looked into? . . .

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it all, what part of it are they forbidden to read or obey?

5 U.S. (1 Cranch) at 179.

⁵⁷"This decision [*Marbury*] 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." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁵⁸See note 56 *supra*.

⁵⁹3 A. BEVERIDGE, *supra* note 56, at 109.

In the election of 1800 the Federalist political grip upon the nation was destroyed by the Democratic-Republican party under the leadership of Thomas Jefferson. Federalist lame-duck officeholders, before relinquishing the reins of the legislative and executive branches of government, were determined to salvage what they could. Among their chief aims was to strengthen the federal judiciary, which, as Hamilton had feared, had been the weak sister of the three branches since its inception.⁶⁰ Retiring President Adams moved to replace Oliver Ellsworth, who had resigned as Chief Justice because of poor health, with a strong-minded man dedicated to the creation of a strong judicial branch of government. After John Jay refused to accept the position again,⁶¹ Adams named his Secretary of State, John Marshall, to the office of Chief Justice. Meanwhile, in the Congress Federalists sought to lighten the Court's burden and at the same time to increase the effectiveness of the judiciary by the creation of six new circuit courts. The Supreme Court Justices would, therefore, no longer be required to ride circuit; in addition, the change gave Adams sixteen new judgeships to be filled with loyal Federalists. The Circuit Court Act⁶² also reduced the number of Justices from six to five in order to prevent Jefferson from appointing a successor to the ailing Justice Cushing. Finally, the Federalists made provision for President Adams to appoint forty-two justices of the peace for the District of Columbia.⁶³ On March 2, 1801, the Senate completed confirmation of the new circuit judges, and by March 3 the justices of the peace had been confirmed. The next day Jefferson assumed the Presidency. His new Secretary of State, James Madison, found on his desk several undelivered commissions for the new justices of the peace. One of those belonged to William Marbury.

Marbury's commission was not delivered, and he sought a writ of mandamus against Madison to compel delivery. Meanwhile, the new Republican Congress proceeded to repeal the Circuit Court Act⁶⁴ and, in order to delay the Court's consideration of the Repeal Act, eliminated the August 1802 term of the Supreme Court.⁶⁵ Thus, not until February

⁶⁰See THE FEDERALIST No. 78, at 538 (Univ. ed. 1865) (A. Hamilton).

⁶¹"John Jay had declined reappointment as Chief Justice because, among other things, he was 'perfectly convinced' that the National Judiciary was hopelessly weak." 3 A. BEVERIDGE, *supra* note 56, at 120-21 n.2. (1919).

⁶²Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

⁶³Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 107.

⁶⁴Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

⁶⁵Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156.

1803 did Marshall get the opportunity to consider the Repeal Act and William Marbury's writ.

The rest of the story is contained in Marshall's ingenuous opinion. Instead of testing the theory of judicial review at the point at which the Republicans expected to do battle, the Repeal Act, and issuing a mandamus against Madison, which certainly would have been disobeyed and might have ended forever the courts' assumption of the power to review the acts of coordinate branches of government, Marshall turned weakness into strength. Necessarily he refused to issue the writ against Madison—but not on the ground that the Court lacked power over the Executive Branch (and perhaps, by implication, over the Legislative Branch as well).⁶⁶

Marshall's approach was to tell Jefferson that he did not have to do that which he had no intention of doing anyway—deliver Marbury's commission. His reason, however, was not that the Court lacked the power to issue a writ of mandamus against the Secretary of State⁶⁷ but that section thirteen of the Federal Judiciary Act of 1798,⁶⁸ which purported to give the Court original jurisdiction to hear Marbury's case, was an unconstitutional delegation of authority to the Court. Thus no one had to obey the Court's decision except the Court itself.

Marshall's reasoning in *Marbury* has been severely criticized by numerous writers. One has commented, "The learned Justice really manufactured an opportunity to declare an act void There is nothing in the Judiciary Act indicating any *express* intention to extend the original jurisdiction of the court beyond the limits set down in the Constitution. There is nothing, moreover, distinctly *implying* such an intention" ⁶⁹ Thus Marshall, quoting only the last fragment of section thirteen, interpreted it as conferring original jurisdiction on the Supreme Court in matters concerning issuance of writs of mandamus. Without ever raising the possibility that section thirteen referred to issuance of writs in cases properly on appeal to the Supreme Court or

⁶⁶For a good account of the theoretical expressions of the concept of judicial review before *Marbury*, see E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 1-65 (1914). For a general account of opposition to the theory of judicial review, see C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 232-55 (1932).

⁶⁷Indeed, Marshall made it clear that the Court did possess such a power. 5 U.S. (1 Cranch) at 166-67.

⁶⁸Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 80.

⁶⁹McLaughlin, *Marbury v. Madison Again*, 14 A.B.A.J. 155, 157 (1928). *Accord*, Grant, *Marbury v. Madison Today*, 23 AM. POL. SCI. REV. 673, 676 (1929); Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 14-16.

that it granted the power to issue the writ only in cases as to which the Constitution gave the Court original jurisdiction, Marshall accepted the broader interpretation that it was, in itself, a grant of original jurisdiction. Saying that he feared that if Congress had the power to add to the Court's original jurisdiction, it might assume the power to take away from the grant of original jurisdiction as well, Marshall found the relevant part of section thirteen unconstitutional.

Although not implausible (compare *Ex parte Young*), the constitutional issue obtained by a broad interpretation of section thirteen seems a bit strained and runs counter to the maxim that the courts will always interpret legislation to avoid constitutional issues. If it seems too much to say that Marshall manufactured the issue, certainly it is fair to say he reached for it.

The great Chief Justice cannot be blamed for failure to support his rationale of the power of judicial review by citation of adequate precedent, for there was little or none. Thus, Professor Corwin has said that "we are driven to the conclusion that judicial review was rested by the framers of the Constitution upon certain general principles which in their estimation made specific provisions for it unnecessary" ⁷⁰

Where should one look for such general principles? An obvious place, and one with which Marshall surely was familiar, was *The Federalist*—especially numbers Seventy-eight and Eight-one, which were authored by Alexander Hamilton. In Number Seventy-eight Hamilton began with Montesquieu's concept of the courts as the "least dangerous" branch of government and, therefore, in need of considerable independence in order to prevent domination by the other two

⁷⁰E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 17 (1914). See also C. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 118 (1912); C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 88-231 (1932); A. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 310 (1936). Looking for early state court precedent for judicial review advances Corwin's thesis little, if at all. Haines asserts that judicial review "had taken such a firm hold upon the minds of lawyers and judges that decisions were rendered in rapid succession in which was maintained the authority of courts, as guardians of a fundamental law, to pass upon the acts of coordinate departments" C. HAINES, *supra*, at 73. However, he can point to only seven such decisions. Apart from the spurious or entirely mythical cases, only two legitimate precedents remain, both of which can be viewed as limited to instances in which the legislature of the state "had interfered with the normal jurisdiction of the courts of the trial procedures by which they normally did business." Levy, *Judicial Review, History, and Democracy: An Introduction*, in *JUDICIAL REVIEW AND THE SUPREME COURT* 11 (L. Levy ed. 1967). The state court assertions of a right to judicial review in cases in which the legislature impinged upon the judicial process itself can hardly be considered legitimate precedent for Marshall's sweeping language in *Marbury*.

branches.⁷¹ After establishing this basic principle, Hamilton dealt with the argument that to give courts the power to declare legislative acts void "would imply a superiority of the Judiciary to the Legislative power."⁷² In denying this charge, Hamilton first noted that in a system of limited government "[n]o Legislative act . . . contrary to the Constitution can be valid";⁷³ consequently, one branch—either the legislature itself or the courts—must have the power to say when legislative acts contravene the Constitution. Next, Hamilton asserted that "[t]he interpretation of the laws is the proper and peculiar province of the Courts,"⁷⁴ the Constitution being only a higher form of law to be interpreted along with and in preference to the acts of the legislature. Thus, Hamilton, concluded, "the Courts were designed to be an intermediate body between the People and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority."⁷⁵ The logic of Hamilton's argument is hardly inescapable, but, as an examination of *Marbury* readily reveals, it was compelling enough to persuade Marshall. Recall, however that *The Federalist* was not a political treatise in the ordinary sense; it was a conscious effort to point up the strengths of the new Constitution during the ratification struggle. By relying upon *The Federalist* for his arguments in support of judicial review, Marshall was relying upon political propaganda, albeit of the highest and most well-reasoned sort. The use of political science was probably as startling in 1803 as the use of sociology and psychology proved to be in 1954.⁷⁶ However, both served a result-oriented purpose.

Charles Beard has concluded that judicial review by the Court over acts of Congress must have been intended as a safeguard to property interests: "This very system of checks and balances, which is the undeniably essential element of the Constitution, is built upon the doctrine that the proper branch of the government cannot be allowed full sway, and least of all in the enactment of laws touching the rights of property."⁷⁷ Whether or not the much discussed "Beard thesis"⁷⁸ is correct is less

⁷¹THE FEDERALIST No. 87, at 539-40 (Univ. ed. 1865) (A. Hamilton).

⁷²*Id.* at 541.

⁷³*Id.*

⁷⁴*Id.* at 542.

⁷⁵*Id.*

⁷⁶See the discussion of *Brown v. Board of Education* in text accompanying notes 30-53 *supra*.

⁷⁷C. BEARD, THE SUPREME COURT AND THE CONSTITUTION 95-96 (1912).

⁷⁸See generally C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 152-88 (1913).

important to the "intention of the framers" analysis than what Marshall himself *thought* their intention to be. That Marshall shared the Beardian point of view can hardly be questioned when his later opinions in *Fletcher v. Peck*⁷⁹ and *Dartmouth College v. Woodward*⁸⁰ are taken into account. And the conclusion that Marshall viewed the intention of the framers with the result-orientation of a Federalist is even clearer when *Marbury* is considered in light of the Virginia Resolutions⁸¹ of James Madison, the "Father of the Constitution" and the party from whom *Marbury* sought his commission. That Marshall wrote *Marbury v. Madison* with a Federalist view of the Constitution clearly in mind and without any express statement by the framers that judicial review was to be exercised by the Court over acts of the other branches of government should not detract from the greatness, perhaps even the necessity of the decision in the life of a new nation. But it should alert one to the mistake of assuming that judicial review was a well-accepted theory that needed only a concrete case to make it part of the law of the land.

Justice Holmes once remarked, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void."⁸² Without considering whether the power of judicial review which Marshall made a part of the American system of government in *Marbury v. Madison* was either "necessary" or "right," one must nevertheless conclude that his resolution of the case was essentially pragmatic. There was something for everyone. Madison won the case and lost the battle. The power of judicial review was asserted without the need or even the occasion for executive acquiescence. More importantly, *Marbury v. Madison* comes out as something of a compromise—a compromise between the Jeffersonian idea of the people as the final arbiters

⁷⁹10 U.S. (6 Cranch) 87 (1810).

⁸⁰17 U.S. (4 Wheaton) 518 (1819).

⁸¹I. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 1787-1800 452-71 (1950). Brant quotes Madison as follows: "In case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states, who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights and liberties appertaining to them." *Id.* at 461. Clearly, a doctrine of judicial review such as Marshall entertained could have no place under the "compact" theory envisioned by Madison and Jefferson. Jefferson's Kentucky Resolutions were an even more extreme assertion of state power in that "each state was declared to have a right to judge for itself of infractions of the federal compact and the mode of redress." *Id.* at 462. See also Madison's reply to the Federalists' answers to the Virginia Resolutions in E. CORWIN, COURT OVER CONSTITUTION 60-61 (1938).

⁸²O. HOLMES, COLLECTED LEGAL PAPERS 296 (1920).

of the meaning of the Constitution⁸³ and the Federalist desire for an immutable document not subject to the "whims" of the masses.⁸⁴ The result of the compromise is a unique "American contribution" to jurisprudence—judicial review by the Supreme Court as the final arbiter of the meaning of the Constitution.⁸⁵ As the architect of judicial review, "Marshall did more than seize his chance. He made it."⁸⁶ That he knew the result which he sought to reach before the case of *Marbury v. Madison* arose would seem almost certain. One almost wonders if William Marbury's commission really was *accidentally* left on the desk of the Secretary of State.

NEBBIA V. NEW YORK

From an enigmatic remark by Justice Bradley in the *Slaughter-House Cases*,⁸⁷ the concept of substantive due process of law grew through the course of some sixty years into an instrument so powerful that five men could wield it to control the economic destiny of the nation.

As the nineteenth century came to a close, the industrial giants began to emerge. The contracts clause was not quite enough to bar state economic regulation and to prevent interference by Congress⁸⁸ with the burgeoning economic oligarchies.⁸⁹ The debatable question of when sub-

⁸³See Jefferson's proposal for a Constitution for Virginia drafted in 1783. T. JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 294 (J. Boyd ed. 1952). Jefferson's opposition to the concept of judicial review of legislative acts should not be considered as an indication that he saw no role whatsoever for the Court in the system of checks and balances. As Edmond Cahn points out, "Far from objecting to judicial review of constitutionality, [Jefferson] frequently proposed that the judiciary share with the executive in exercising the veto power. . . . It was not judicial review that he opposed, but the assumption that its results would be final and beyond further appeal." Cahn, *An American Contribution*, in SUPREME COURT AND SUPREME LAW 21-22 (E. Cahn ed. 1954).

⁸⁴Note especially Marshall's statement in *Marbury* that the people "can seldom act." 5 U.S. (1 Cranch) at 176.

⁸⁵Cahn, *supra* note 83, at 1-25.

⁸⁶C. CURTIS, LIONS UNDER THE THRONE 13 (1947).

⁸⁷"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." 83 U.S. (16 Wall.) 36, 122 (1873) (dissenting opinion).

⁸⁸The Congresses, long silent in matters of economic regulation, began to awaken with the passage of the Interstate Commerce Act in 1887 (Act of Feb. 4, 1887, ch. 104, 24 Stat. 379) and the Sherman Anti-Trust Act in 1890 (Act of July 2, 1890, ch. 647, 26 Stat. 209).

⁸⁹See B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 174-200 (1942).

stantive due process did in fact emerge⁹⁰ is less important than an understanding of the economic and human forces that called it forth. The nation had prospered since the Civil War, and since industry had flourished in the absence of governmental regulation, many believed that laissez-faire was (or at least should be) constitutional doctrine. The ideological roots for economic individualism sprang from Adam Smith, but it was Thomas M. Cooley's contribution that turned economic theory into constitutional dogma. In *Constitutional Limitations*, he declared:

[I]f the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances . . . , or in any other way to make such use of their property as were permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express Constitutional provision could be pointed out with which it would come in conflict.⁹¹

Upon this basis Bradley rested his dissent in the *Slaughter-House Cases*,⁹² but not until 1905 was it clear that Cooley's theory had attained the rank which he had envisioned for it. Justice Peckham, relying on his earlier statements in *Allgeyer v. Louisiana*,⁹³ declared in *Lochner v. New York*⁹⁴ that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." *Lochner* invalidated New York's law setting minimum hours for bakers, and the *Lochner* precedent was established, though the decision itself had elicited one of Justice Holmes' most famous dissents.⁹⁵ During the next twenty years the Court used substantive due process as its chief weapon

⁹⁰A case can be made for substantive due process in *Chicago, M. & St. Pt. Ry. v. Minnesota*, 134 U.S. 418 (1890), which invalidated a state law providing for railroad rate regulation by an administrative agency without setting up means for judicial review of the reasonableness of the rates. Such action was held "in substance and effect" to be a deprivation of property without due process of law. More often cited as a beginning point is *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). Though, narrowly interpreted, the case raised only an issue of territorial due process, Justice Peckham's broad language instilled the doctrine of "liberty of contract" into due process considerations.

⁹¹T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 393 (1st ed. 1868).

⁹²83 U.S. (16 Wall.) 36 (1873).

⁹³165 U.S. 578 (1897).

⁹⁴198 U.S. 45, 53 (1905).

⁹⁵"[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." *Id.* at 75.

in a rearguard action against state and federal proposals for social reform.⁹⁶ But the use of economic due process was by no means consistent, largely because of the development of the "Brandeis Brief" technique that succeeded in overwhelming the Court with a massive collection of data to back up the state's claim that its legislation was reasonably related to a permissible objective under its police power.⁹⁷ Nevertheless, the spectre of *Lochner* and economic due process pervaded every state legislature that was contemplating economic regulation.

Economic due process did not spring full-blown from the pen of Justice Peckham. It began as economic theory and was transformed into constitutional dogma only after a tortuous history.⁹⁸ But though it was nurtured by the favorable atmosphere of industrial growth and expansion, it was clearly the work of men with a specific point of view—men like Cooley, Bradley, Field, Peckham, and Sutherland. That it was the product of a particular result-orientation cannot be doubted. It was the kind of result-orientation that is ever-present in the Court's decisions, establishing itself from precedent to precedent until its full logical development has unfolded. In a period of just four years (1934-1937) the developments of the previous sixty years were completely discredited. The forces that dislodged economic due process were as pragmatic as those that created it—the political and economic pressures of a nation trying to escape the depths of depression.

The opening barrage was fired in *Nebbia v. New York*.⁹⁹ Leo Nebbia, a small grocer in Rochester, New York, challenged the Milk Control Board's¹⁰⁰ power to set the price of milk in the state. Basing its decision largely on the voluminous findings of a joint legislative commit-

⁹⁶See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915) and *Adair v. United States*, 208 U.S. 161 (1908), invalidating state and federal legislation, respectively, aimed at outlawing "yellow dog" contracts. Thus we get the phrase "the Allgeyer-Lochner-Adair-Coppage constitutional doctrine," with which a later Court referred to the then-discredited concept of substantive economic due process. *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949).

⁹⁷See *Muller v. Oregon*, 208 U.S. 412 (1908), sustaining a state law setting minimum hours for women, and *Bunting v. Oregon*, 243 U.S. 426 (1917), which validated a 10-hour day for manufacturing work. See generally A. MESON & W. BEANEY, *THE SUPREME COURT IN A FREE SOCIETY* 238-42 (1959); Biklé, *Judicial Determinations of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924).

⁹⁸For a good account of this entire development, see Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269 (1938).

⁹⁹291 U.S. 502 (1934).

¹⁰⁰The Milk Control Board was established by Chapter 158 of the Laws of 1933, which gave it the power, among others, to "fix minimum and maximum . . . retail prices to be charged by . . . stores to consumers for consumption off the premises where sold." 291 U.S. at 515.

tee,¹⁰¹ the Court voted five-to-four to uphold the legislation. Though the "Brandeis Brief" technique was employed successfully, the ramifications of *Nebbia* went far beyond the earlier cases of *Muller v. Oregon*¹⁰² and *Bunting v. Oregon*,¹⁰³ in which the Brandeis Brief was first employed. The Court in *Nebbia* was not merely refusing the economic due process approach in this specific instance, only to apply it at another point in the states' regulatory scheme. The Court had permitted a host of measures to pass the due process test unscathed—maximum hours legislation, workmen's compensation schemes, health and safety measures, to mention only a few. But *Nebbia* involved price control, and, along with wages, prices were thought to be the essential element in the laissez-faire formula that should be protected at all costs. As a result, a special doctrine that safeguarded the hallowed position of prices in the laissez-faire economy had been established in the prior decade, largely as a result of Justice Sutherland's initiative. The "public interest" doctrine, as it had come to be known, was dismantled in *Nebbia* as the first step in the decline of economic due process.

In a treatise published in 1787 and written over a hundred years earlier, Lord Hale, the distinguished English Chief Justice, described the power of the Crown to regulate prices charged by certain wharves as resting on the fact that they were "affected with a publick interest."¹⁰⁴ In 1876, the phrase was seized by Chief Justice Waite, who restated the principle behind it in language broad enough to cover any form of private property.¹⁰⁵ Waite made the mistake of translating the specific particulars to which Hale had referred into the generic term "private property," and in so doing "he transformed the whole course of the American law of price regulation."¹⁰⁶ Waite's broad principle was fol-

¹⁰¹The so-called "Pitcher Report" was based on the testimony of 254 witnesses and comprised some "473 closely printed pages" of findings and recommendations. 291 U.S. at 516.

¹⁰²208 U.S. 412 (1908).

¹⁰³243 U.S. 426 (1917).

¹⁰⁴Hale, *De Portibus Maris*, in 1 COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 77-78 (F. Hargrave ed. 1787).

¹⁰⁵Looking then, to the common law, from whence came the right which the Constitution protects, we find that when *private property* is "affected with . . . only a public interest, it ceases to be *juris privati* only." . . . When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good . . .

Munn v. Illinois, 94 U.S. 113, 125-26 (1876) (emphasis added).

¹⁰⁶McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759, 768 (1930).

lowed by Justice McKenna in *German Alliance Insurance Co. v. Kansas*,¹⁰⁷ but the negative implication of "affected with a public interest" became apparent after the Harding appointees of 1921-23¹⁰⁸ gained control of the Court. Beginning with the 1923 decision in *Wolff Packing Co. v. Court of Industrial Relations*,¹⁰⁹ the newly constituted Court began its campaign of protective reaction by seeking a standard by which to define narrowly what businesses were affected with a public interest. Chief Justice Taft delineated in *Wolff* a three-pronged test that generally limited price-fixing to businesses with a franchise from the state, businesses long recognized as subject to state control, and businesses that had been voluntarily devoted by the owner to a known public use.¹¹⁰ The standard was hardened into constitutional doctrine throughout the next decade in a series of three opinions by Justice Sutherland.¹¹¹ The Taft Court's understanding of "affected with a public interest" clearly excluded any interference with the prices of the private sector of the American economy. Private ownership meant no price regulation (except in the three instances recognized in *Wolff*) regardless of how great the effect that such business might have on the well-being of the public. Thus it was that "a phrase brought into constitutional law to sanction price-fixing [was] consistently used to outlaw price-fixing."¹¹²

No one predicted the result in *Nebbia*. One writer had contended that the New York law's only chance of getting by the Supreme Court was upon a finding that the gathering and distribution of milk and milk products is a public utility.¹¹³ The "public interest" doctrine seemed firmly entrenched. The following statement by Justice Roberts in

¹⁰⁷233 U.S. 389 (1914). McKenna sought to broaden the concept even further by declaring that "[i]t is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest." *Id.* at 408. By recognizing that the relationship of the business to the public and not the nature of the business as a public utility, manufacturing, or retail outlet was the "heart of the matter," the Court seemed to extend an invitation, though clearly an indefinite one, to the states to extend price control wherever public concern demanded it. Hamilton, *Affectionation with Public Interest*, 39 YALE L. J. 1089, 1099 (1930).

¹⁰⁸In a period of three years, President Harding appointed William Howard Taft, George Sutherland, Pierce Butler, and Edward T. Sanford to the Court.

¹⁰⁹262 U.S. 522 (1923).

¹¹⁰*Id.* at 535.

¹¹¹*Tyson v. Banton*, 273 U.S. 418 (1927), invalidated a New York regulation aimed at controlling the resale price of theatre tickets. *Ribnik v. McBride*, 277 U.S. 350 (1928), prohibited New Jersey from regulating employment agency fees. *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929), overturned a Tennessee law fixing gasoline prices.

¹¹²Hamilton, *supra* note 107, at 1100.

¹¹³Manley, *Constitutionality of Regulating Milk as a Public Utility*, 18 CORNELL L.Q. 410 (1933).

Nebbia, after a decade of antipathy for state price-fixing schemes, came as a shock to representatives of the industrial and business interests, such as the Liberty League, and as a favorable sign to Roosevelt and the New Dealers:

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory The phrase "affected with a public interest" can, in the nature of things, mean no more than an industry, for adequate reason, is subject to control for the public good

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 welfare¹¹⁴

The decision in *Nebbia* was a return to the ad hoc approach suggested by Waite and McKenna. Though the Court retained the "reasonable relation" test of determining whether the legislation was within a "proper legislative purpose," the negative implication was put to rest.¹¹⁵ No longer, Roberts declared, would the Court seek a standard by which it could say, by looking at the nature of the business involved, that price-fixing per se was unconstitutional. Constitutional doctrine—the "public interest" doctrine—was thus replaced by an expressly ad hoc approach with no formal guidelines other than the circumstances of the particular case. As one writer commented in assessing the Stone dissent in *Ribnick v. McBride*,¹¹⁶ "[T]he question of the necessity for governmental price regulation is an economic question. It can be answered only after a pragmatic study of the particular problem."¹¹⁷

Even if the Court's approach to price-fixing, as seen in *Nebbia*, is pragmatic, a further question presents itself: Why did the Court opt for the ad hoc approach in the teeth of the precedents of the previous decade? No answer is completely satisfactory in light of the events of 1935 and 1936, when the Court blocked the New Deal programs of

¹¹⁴291 U.S. at 536-37.

¹¹⁵See Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York*, 34 COLUM. L. REV. 401 (1934).

¹¹⁶277 U.S. 350 (1928).

¹¹⁷McAllister, *supra* note 106, at 780.

President Roosevelt, but the change in Court personnel seems to be the most indicative factor. Upon the death of Justice Sanford and Chief Justice Taft, President Hoover nominated former Justice and Secretary of State Charles Evans Hughes and North Carolina Circuit Judge John J. Parker. Republican insurgents and Democratic liberals of the Seventy-first Congress recognized the importance of the narrow majority that had succeeded in upholding the Republican tenets throughout the preceding decade. Mirroring the unrest of their constituents at a time of economic depression, they sought to upset the Republican stronghold on the Court. Hughes was confirmed only after an unexpectedly difficult fight in the Senate, and Parker's nomination was rejected. In his place, Hoover quickly proposed Owen J. Roberts, the chief prosecutor of the Teapot Dome Scandal, and he was easily confirmed. But the meaning of the Senate's opposition to Hoover's nominees could not possibly have escaped the two men who joined the Court in 1930. As Alpheus T. Mason concluded, "The lawmakers of 1930 had raised a warning flag, making it clear that in the years ahead any wanton disregard of the enlightened principle of judicial self-restraint would inevitably make the Court the focus of political controversy and thus jeopardize its power and prestige"¹¹⁸ Owens, Hughes, and the dissenters remaining from the Taft Court—Brandeis, Stone and Cardozo—comprised the majority that carried the day in *Nebbia* and in *Home Building & Loan Association v. Blaisdell*,¹¹⁹ which greatly reduced the effectiveness of the contracts clause as a barrier to state economic regulation. The call for self-restraint was heard; the states were given greater leeway in dealing with the pressing issues of the great depression. But though the door was opened wider, it soon became apparent that it was not wide enough to permit the sweeping legislation of the New Deal to pass through. Indeed, in 1935-36 it seemed as if the Court took its powers of judicial review to mean a license to close the door altogether.

The Court's chief weapons in scuttling the New Deal were its restrictive interpretations of the commerce¹²⁰ and spending¹²¹ powers of

¹¹⁸A. MASON, SECURITY THROUGH FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE 68-69 (1955) [hereinafter cited as MASON].

¹¹⁹290 U.S. 398 (1934).

¹²⁰See, e.g., *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (declaring § 3 of the National Industrial Recovery Act unconstitutional); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (overturning the Bituminous Coal Conservation Act).

¹²¹See, e.g., *United States v. Butler*, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act).

article I, section eight, but economic due process also played a significant role, as the Court refused to depart from its earlier holding in *Adkins v. Children's Hospital*¹²² that state minimum wage laws were unconstitutional. The major case was *Morehead v. New York ex rel. Tipaldo*,¹²³ in which Justice Butler, speaking for the majority of five (including Justice Roberts), asserted that "[t]he decision [in *Adkins*] and the reasoning upon which it rests clearly shows that the State is without power by any form of legislation to prohibit, change or nullify contracts between employees and adult women workers as to the amount of wages to be paid."¹²⁴ There was no mention of *Nebbia*. And though Butler tried to take account of the Taft-Sanford dissent in *Adkins*, he failed to discuss Justice Holmes' observation that there was no distinction between fixing a minimum for wages and fixing a minimum for hours of work. One was the multiplier, the other the multiplicand. "The bargain," Holmes had contended, "is equally affected whichever half you regulate."¹²⁵ Thus the Court was holding on to at least one of the two essential elements of competitive capitalism. The regulation of prices was allowed in *Nebbia*, but the Court would not budge on the issue of the minimum wage, despite the impossibility of finding a rational basis for its intransigence.

The most curious element of the Court's stand was the position of Justice Roberts. His vote was decisive, and after his sweeping language in *Nebbia*, his alignment with the Sutherland-McReynolds-Butler-Van Devanter group is all the more troubling. Perhaps Justice Stone foresaw the reason most clearly in 1930 when he wrote to Felix Frankfurter: "I think one aspect of the matter which is not understood is that [the struggle within the Court] is not a contest between conservatism and radicalism, nearly so much as it is a difference arising from an inadequate understanding of the relation of law to the social and economic forces which control society"¹²⁶ Roberts himself seemed to echo the same sentiments when fifteen years after his vote in *Morehead* he said: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."¹²⁷ Whatever the reasons

¹²²261 U.S. 525 (1923).

¹²³298 U.S. 587 (1936).

¹²⁴*Id.* at 611.

¹²⁵261 U.S. at 569.

¹²⁶H.F. Stone to Felix Frankfurter, April 4, 1930, *quoted in* MASON 67.

¹²⁷O. ROBERTS, *THE COURT AND THE CONSTITUTION* 61 (1951).

for Justice Roberts' switch in 1935-36, the lessons of 1930 were forgotten. The events of the next two years not only marked the end of economic due process but also spelled out in unequivocal terms the major influence of pragmatic factors on the Court's decision-making process.

In 1936, Roosevelt was elected for a second term in office by an overwhelming majority. The mandate of the people was clear, and the critical need for action was becoming ever more apparent as labor-management disputes erupted into violence. Roosevelt then came forward with the now-famous "Court-packing" plan. He proposed that as each Supreme Court Justice reached the age of seventy, either he should retire or the President should be given the power to appoint an additional Justice to the Court.¹²⁸ He concluded his Fireside Chat of March 9, 1937, as follows:

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.¹²⁹

The threat was clear. The Court's answer was not long in coming. On April 12, 1937, the Court upheld the National Labor Relations (Wagner) Act by a five-to-four decision in *NLRB v. Jones & Laughlin Steel Corp.*¹³⁰ Only two weeks prior to the *Jones* decision the Court began the final assault against economic due process in *West Coast Hotel Co. v. Parrish*,¹³¹ overruling *Adkins* and upholding Washington's minimum wage law. In *Parrish* Chief Justice Hughes, speaking for the five-man majority, declared: "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty."¹³² "Liberty of contract" and substantive economic due process were thus

¹²⁸At this time six Justices were past the age of seventy—Sutherland (75), Butler (71), McReynolds (75), Brandeis (81), Van Devanter (78), and Hughes (75). Thus, approval of the plan would have given Roosevelt six new appointments and would have assured the passage of the New Deal measures.

¹²⁹F. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES 116 (1937 vol.), quoted in MASON 101.

¹³⁰301 U.S. 1 (1937).

¹³¹300 U.S. 379 (1937).

¹³²*Id.* at 391.

dropped from the realm of constitutional doctrine. They were displaced not by another, more rational principle but by the pragmatic forces of political and economic necessity. As Mason so tellingly points out, "[T]he Court made clear to others what it had long sought anxiously to conceal—that judicial decisions are, in fact, born of the travail of economic and political conflict."¹³³

The parties in 1937 were the same as in 1801—the propertied minority versus the popular majority. Once again the Court became the last stronghold of the monied interests, but this time its role was to prevent further governmental interference in economic affairs rather than to place greater power in the hand of the central government. The Court was wielding in 1935-36 the very powers that Marshall and his predecessors had so carefully and painstakingly accumulated during the previous century. But while Marshall successfully avoided a direct clash with the other branches of government in *Marbury*,¹³⁴ the Hughes Court, through its obstructionist decisions, brought about a head-on collision not only with the President and the Congress but also with the people. The power of judicial review and the independence of the judiciary were saved only by the unprincipled retreat of Justice Roberts.¹³⁵ The pragmatic lesson is clear: In the long run, the decisions of the Court must be in accord with the dominant opinion of the people and with the social and economic necessities of the time.

BAKER V. CARR—REYNOLDS V. SIMS

"The Supreme Court," Robert McCloskey has written, "like the American political system of which it is a part, proceeds by impulse rather than by design, pragmatically rather than foresightedly."¹³⁶ The nature of constitutional government in this nation is largely attributable

¹³³MASON 111.

¹³⁴Justice Roberts' switch to the other camp in *Jones and West Coast Hotel* is similar to Marshall's actions at the height of the controversy centering around the impeachment of Justice Samuel Chase. Fearing that if Chase were impeached, as seemed likely, he would be next, Marshall wrote to his brother suggesting that judicial review be scrapped in favor of appeals from the Supreme Court to Congress in cases in which a majority of the House of Representatives disagreed with the Court's decision. Such a proposal was in "direct contradiction" to his reasoning in *Marbury* and could be explained only on the basis that Marshall was "seriously alarmed" at the Jeffersonian threat of impeaching members of the National Judiciary one at a time. 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 176-79 (1919).

¹³⁵Justice Roberts' actions were once described as "the switch in time that saved the nine."

¹³⁶McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 62 (1962).

to the scarcity of immutable principles and, conversely, to the flexibility which such a lack of basic premises gives to governmental institutions in meeting the one requirement that the future is certain to demand—change. The Supreme Court, as a political institution, cannot reason deductively, at least not for long periods of time. The “principles” which a Court may derive for one age, as the rise and decline of economic due process shows us, cannot be allowed to harden into constitutional doctrine. A new age is always upon us.

The heart of the matter may lie in the fact that the Court fulfills two distinct functions. On the one hand, the traditional judicial function of interpreting or making law interstitially is apparent. But the Court is also a political institution, a third branch of government, and as such it plays an essential (though often muted) role in shaping the social, economic, and political destiny of the nation. In exercising the power of judicial review of the actions of Congress and the President and the states, the Court sometimes becomes policymaker—which is troubling to many who see the limits of judicial power in the older, common law conception of the Court as law-interpreter and not law-maker. Whatever our impressions of the proper scope of judicial review, the reality of the Court as policy-maker can hardly be denied. In fulfilling that role, the Court's actions have been, on the whole, pragmatic—proceeding “by impulse rather than by design”—and, as McCloskey clearly indicates, such a process has not been unlike the other institutions of the American political system.

Usually the Court speaks negatively: thou shalt not deny counsel to one accused of crime. At first *Brown* itself was thought to be in the traditional negative: thou shalt not force segregation by law. When the Court undertakes to speak affirmatively it gets into trouble. It is easier to deny water to a horse than to make it drink and easier to outlaw segregation than to compel integration. It is also easier to deny the validity of elections in grossly malapportioned electoral districts than it is affirmatively to require precisely equal reapportionment. In *Baker v. Carr*¹³⁷ and *Reynolds v. Sims*¹³⁸ the Court successfully entered a political thicket. In later cases, notably *Kirkpatrick v. Preisler*¹³⁹ and *Wells v. Rockefeller*,¹⁴⁰ it became caught in the brier patch. When the Court

¹³⁷369 U.S. 186 (1962).

¹³⁸377 U.S. 533 (1964).

¹³⁹385 U.S. 450 (1967).

¹⁴⁰389 U.S. 421 (1967).

formulates general standards and states general principles it performs its highest function; when it attempts precision it often bites off more than it can chew.

Baker v. Carr laid to rest previous doubts about the Court's jurisdiction, specifically the "political question" obstacle. *Reynolds v. Sims* attempted to outline the substantive principle that would guide the lower courts in their task of deciding whether specific apportionment schemes were constitutional.

"The ultimate rationale to be given *Baker v. Carr* and its numerous progeny," Robert Dixon has written, "is that when political avenues for redressing political problems become dead-end streets, some judicial intervention in the politics of the people may be essential in order to have any effective politics."¹⁴¹ Other writers have echoed this same explanation.¹⁴² It seems sufficient to justify *Baker v. Carr*. Such constitutional decisions, like *Brown*, have their own momentum compounded of popular understanding and acceptance and moral authority. In an egalitarian society it may be enough to say that *Baker* seems "fair."

An examination of Justice Brennan's majority opinion in *Baker v. Carr* reveals a number of pragmatic considerations in addition to the "ultimate rationale" already mentioned. Chief among these is the explaining away of the "political question" doctrine, which up until *Baker* had been thought to be the primary barrier to the Court's consideration of malapportionment.¹⁴³ In his restatement of the political question doctrine, Justice Brennan would find no political question unless there were involved a separation of powers issue, a risk of embarrassing the government abroad or creating "grave disturbance" at home, or the necessity of entering "upon policy determinations for which judicially manageable standards are lacking."¹⁴⁴ Though *Colegrove v. Green*¹⁴⁵ can be distinguished in accordance with Justice Brennan's understanding of "political question" in that it involved a petition for the redistricting of Congressional seats in Illinois rather than the state legislative body itself, the hurdle which was overcome in *Baker* required no small leap.

¹⁴¹R. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 8 (1968).

¹⁴²See, e.g., A. COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 118 (1968); Tyler, *Court Versus Legislature: The Socio-Politics of Malapportionment*, 27 *LAW & CONTEMP. PROB.* 390 (1962).

¹⁴³See *Colegrove v. Green*, 328 U.S. 549 (1964).

¹⁴⁴369 U.S. at 226.

¹⁴⁵328 U.S. 549 (1964).

Justice Frankfurter's warning in *Colegrove* that "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people"¹⁴⁶ and that "[c]ourts ought not to enter this political thicket"¹⁴⁷ had been heeded through most of two decades. Justice Brennan's reasoning in support of his departure from precedent is not nearly so convincing as the sociological necessity for the departure is clear.

Malapportionment was a serious problem across the nation. As rural America became urban America, the balance of power within state governments did not shift. As a result, the crisis of the cities was being dealt with largely direct relationships between cities and the federal government; the state legislatures were by-passed because of the rural stranglehold.¹⁴⁸ The plaintiffs in *Baker* were seeking a voice in the Tennessee legislature, which had not been reapportioned since 1901 (a violation of an express state constitutional requirement of reapportionment every ten years). The necessity was further apparent because there was no "built-in" check on the state legislatures. Neither Congress nor the legislatures had any intention of acting to upset the political system which kept incumbents in power. Justice Frankfurter's contention that Congress had "exclusive authority" under article I, section four to determine the question of "fair representation"¹⁴⁹ proved an empty guarantee. Dixon's "ultimate rationale" thus becomes clear; "either the Court must act or nothing would be done."¹⁵⁰ The practical necessity for action meant that the strictures of the political question doctrine must be removed, even if that meant, as has been contended, that the doctrine was "impaired beyond recovery."¹⁵¹

In seeking to overcome the chief obstacle to its intervention, the Court completely obscured the more fundamental question of just what type of relief, if any, could be fashioned to meet this completely new problem. The third point made by Brennan in his discussion of the political question issue was that the Court should undertake policy determinations only where "judicially manageable standards" could be utilized. In dismissing this possible objection to the plaintiffs' claim, Justice Brennan noted: "Judicial standards under the Equal Protection

¹⁴⁶*Id.* at 553-54.

¹⁴⁷*Id.* at 556.

¹⁴⁸Tyler, *supra* note 142, at 390.

¹⁴⁹328 U.S. at 554.

¹⁵⁰*A. Cox, supra* note 142.

¹⁵¹McCloskey, *The Supreme Court 1961 Term Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 64 (1962).

Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."¹⁵² However "well developed and familiar" the judicial standards were to Justice Brennan, they certainly were far from clear to the lower federal courts that were to apply them after 1962. *Baker* was a decision that something had to be done and that the Court was willing to act. As to *what* was to be done the Court at first wisely recognized its own limitations: that it did not know and would allow inferior court experimentation. Immediately after the *Baker* decision, the trail balloons began to soar.

Two years after the "procedural gambit"¹⁵³ was overcome in *Baker*, the first wave of cases growing out of orders for reapportionment by the lower courts came to the Supreme Court on appeal. In the meantime, the Court had faced the question of malapportionment in Congressional districts in *Wesberry v. Sanders*,¹⁵⁴ and, overcoming its final doubts regarding *Colegrove*, the majority concluded that "construed in its historical context, the command of Article I, § 2, that Representative be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."¹⁵⁵ Though Justice Black "mangled constitutional history"¹⁵⁶ to get to the result, the basis for the "one man-one vote" principle was laid. All that remained was for the Court to find the same principle applicable to the state legislative bodies under the fourteenth amendment as it had "discovered" for Congressional apportionment under Article II, section one. This time it was for Chief Justice Warren to "imagine the past."¹⁵⁷ The case was *Reynolds v. Sims*.¹⁵⁸

The pragmatic nature of the *Reynolds* decision is evident from the dissents of Justices Harlan and Stewart. First, the historical underpinnings of the majority position—the "intention of the framers" argument—is exploded. Summarizing his extended and seemingly accurate

¹⁵²369 U.S. at 226.

¹⁵³McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223, 226 (1968).

¹⁵⁴376 U.S. 1 (1964).

¹⁵⁵*Id.* at 7-8 (footnotes omitted).

¹⁵⁶See Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 135.

¹⁵⁷Lewis Namier, *quoted by* A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 13 (1970).

¹⁵⁸377 U.S. 533 (1964).

analysis of the historical background, Harlan concludes:

The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit. Moreover, the history demonstrates that the intention to leave this power undisturbed was deliberate and was widely believed to be essential to the adoption of the Amendment. . . .¹⁵⁹

Perhaps the Chief Justice's answer would be, as in *Brown*, that "we cannot turn the clock back to 1868 when the Amendment was adopted" ¹⁶⁰

The more serious charge was made explicit by Stewart, with clear reference to *Lochner* and economic due process, in his dissent in the companion case of *Lucas v. Colorado General Assembly*: "[T]hese 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. . . ." ¹⁶¹ One can hardly question the fact that in *Reynolds* the Court made a value judgment in favor of egalitarianism as "wise political theory." Chief Justice Warren's oft-quoted declaration that "[l]egislators represent people, not trees or acres," ¹⁶² can be read in no other way. In a sense, then, Stewart is correct. The idealist core of the opinion—the assertion that there is one overriding principle on which to base the apportionment of state legislatures—is undeniable. In *Reynolds* the Court came down hard for people power (one man-one vote), just as in *Lochner* it had come down hard for economic power. Economic due process lasted sixty years; political equal protection will likely last much longer.

Without denying this ideological orientation, we should return to the first part of Justice Stewart's statement. Is this a "long step backward" to the *Lochneresque* philosophy? Numerous writers have criticized the *Reynolds* opinion not on the basis that it expresses a philosophy but because of "its one-man, one-vote simplicities." ¹⁶³ In

¹⁵⁹*Id.* at 595.

¹⁶⁰347 U.S. at 492.

¹⁶¹377 U.S. at 747-48.

¹⁶²*Id.* at 562.

¹⁶³BICKEL, *supra* note 157, at 174. See also DIXON, *supra* note 141, at 261-89 (1968).

adopting an equal population standard the Court is said to have ignored numerous other factors—geographical, economic, racial, and social—which cannot realistically be ignored. The fault with this analysis is that the equal population standard espoused by *Reynolds* has been read as unchangeable, unchallengeable constitutional doctrine. But this is to overlook the essential, pragmatic feature of *Reynolds*. The Court said, “Population is, of necessity, the *starting point* for consideration and the controlling criterion for judgment in legislative apportionment controversies.”¹⁶⁴ In *Reynolds* the Court did not give *the* answer; it merely indicated the “starting point” for a lengthy dialogue concerning the meaning of “fair representation.” This point is apparent also from the Court’s disclaimer that “[m]athematical exactness or precision is hardly a workable constitutional requirement”¹⁶⁵ and from its recognition that some deviation from the equal population standard would be allowed where “a State may legitimately desire to construct districts along political subdivision lines”¹⁶⁶ Pointing up these considerations leads us to doubt the truth of Dixon’s assertion that “[t]he essence of *Reynolds* may be its simplistic, narrow, humorless quality. . . . [I]t has no trace of pragmatism which also has been said to be [Chief Justice Warren’s] pre-eminent quality.”¹⁶⁷ The error of Dixon’s assessment was in expecting too much. One who looks to a single case for the “larger and politically realistic vision”¹⁶⁸ seeks that which American political institutions, including the Court, have very rarely provided. In short, *Reynolds* must be viewed as what it was—the first word on how to chart the unknown paths of reapportionment, not the last.

As early as 1966 it became clear that the equal population standard was not all the Court had to say about reapportionment. In *Fortson v. Morris*¹⁶⁹ the Court upheld a Georgia constitutional provision which allowed the state legislature to choose the governor when no candidate received a majority of the popular vote. This procedure was upheld even though the legislature chose the candidate who did not have a plurality in the election. And in three recent cases¹⁷⁰ the Burger Court has indi-

¹⁶⁴377 U. S. at 567 (emphasis added).

¹⁶⁵*Id.* at 577.

¹⁶⁶*Id.* at 581.

¹⁶⁷DIXON, *supra* note 141, at 273.

¹⁶⁸*Id.* at 288.

¹⁶⁹385 U. S. 231 (1966).

¹⁷⁰*Whitcomb v. Chavis* 403 U. S. 124 (1971); *Abate v. Mundt*, 403 U. S. 182 (1971); *Gordon v. Lance*, 403 U. S. 1 (1971).

cated an even greater willingness to depart from the *Reynolds* standard.

Despite surface similarities between economic due process and political equal protection, I think *Baker* and *Reynolds* are not a return to the "unhappy era" feared by Mr. Justice Stewart. It is true that neither doctrine finds strong support in the history of the intent of the framers. But courts traditionally go to the intent of the framers only when the words lack clarity, and every day Americans use the word "equal." One does not have to be a lawyer to grasp the concept of equality. It would not be hard to explain to a high school student that there is something unequal about his vote for classroom president counting only one-half or one-tenth as much as the vote of his fellow student. Economic due process is another matter. It would be hard to explain to the same high school student how the words "due process" could have anything to do with whether he can work after school and his minimum wage or maximum hours. Indeed, it not easy to grasp as a lawyer, and with hindsight we now universally declare it not to be so. In short, the *Lochner* Court made up economic due process out of whole cloth, just as Mr. Justice Peckham created his *Ex parte Young* fiction. Contrastingly, in *Baker* and *Reynolds* the Court was furnished a ready-made bolt of cloth obviously suited *at that time* for the purpose, whatever may have been the original intent. Since Americans have customarily applied "equal" to every other facet of life, it was not hard for the Court to apply it to voting. *Lochner*, then, was always implausible; by comparison, the application of equal protection to voting seems not only plausible but entirely sensible and in accord with the plain meaning of words. If the Warren Court did in *Baker and Reynolds* what the earlier Court did in *Lochner*, it seems fair to say that it was a much easier job to accomplish and better done.

CONCLUSION

By way of conclusion, I would like to put what I have written in perspective. I do not sit in the seat of the scornful and hurl the cynic's ban. I deeply believe in the personal integrity of ever federal judge I have ever known and in the integrity of the judicial process, and I deeply respect and admire the ongoing institution of the United States Supreme Court. I believe the moral force and authority of the Court is now so great, despite some occasional disenchantment, that it no longer need be propped up by appeals to the mystic. I believe the government—including the Third Branch—is now so firmly established and the

nation sufficiently mature that we can afford to see things as they are without fear of losing respect for the institution. For me, it does not detract one whit from the beauty of the goddess of justice to discover that she has feet of bone and flesh—and I deny that they are made of clay.

What I have said in this article was succinctly put by Mr. Justice White in his dissenting opinion in *Miranda v. Arizona*:

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.¹⁷¹

¹⁷¹384 U.S. 436, 531 (1966).