The Supreme Court

As always when a new administration settles in, there is speculation in Washington over the Supreme Court—its future direction, possible vacancies, presidential appointees. The nine Justices often surprise Presidents. As the makeup and outlook of the Court change, the Justices do not always decide constitutional cases along predictable ideological lines. The Court's decisions have shaped America's history; in no other nation is the highest court so powerful. Here, political scientist Alpheus T. Mason reviews the Court's evolution from its origins through the mid-1950s. Law professor A. E. Dick Howard examines the changing Court under Chief Justice Earl Warren and under the present Chief Justice, Warren Burger.

FREE GOVERNMENT'S BALANCE WHEEL

by Alpheus Thomas Mason

Whether by force of circumstance or by deliberate design, we have married legislation with adjudication and look for statesmanship in our courts.

WOODROW WILSON

The Constitution of 1789 and its 26 amendments can be read in about half an hour. One could memorize the written document word for word, as schoolchildren once did, and still know little or nothing of its meaning. The reason is that the formal body of rules known as constitutional law consists primarily of the gloss which United States Supreme Court Justices have spread on the formal document. Charles Evans Hughes declared that "the Con-

stitution is what the judges say it is." But Supreme Court historian Charles Warren urges us not to forget that "however the Court may interpret the provisions of the Constitution, it is still the Constitution which is law and not decisions of the Court." Myth wars with reality both within and without the Court.

Constitutional law comprises an intricate blend of history and politics of which judicial decisions are but one facet. Others include the context in which decisions are rendered and the theories used to rationalize both judicial preferences and decisions. Justice Oliver Wendell Holmes considered these "the small change of thought."[1] He preferred "to let in as much knowledge as one can of what ultimately determines decisions: philosophy, sociology, economics, and the like." Holmes ranked theory "the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house."[2]

Oracle or Wielder of Power?

Placed in the historical and political climate of their times, Supreme Court cases reflect the tortuous course of constitutional doctrine and reveal the judiciary as a participant in the governing process. Judicial decisions range widely under the impact of various pressures. They represent the selection—rather than a soulless, mechanical choice—of alternatives.

The Court has always consisted largely of politicians, appointed by politicians and confirmed by politicians, all in the furtherance of particular goals. From John Marshall to Warren Burger, each Justice has been the guardian and promoter of certain interests and values. Judicial activism, so conspicuous in the Warren Court, was not unprecedented. In 1896, seven Supreme Court Justices restricted Negro freedom with a doctrine of their own creation—"separate but equal." In 1954, nine Justices en-

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larged human freedom by rejecting their predecessors' handiwork. More often than not, advocacy flourishes beneath the benign cloak of judicial self-restraint.

Nevertheless the myth, articulated by Chief Justice Marshall in *Osborn* v. *U.S. Bank* (1824), that "courts are mere instruments of the law and can will nothing" has endured. The rationale behind the myth is that constitutional interpretation involves discovery of truths clear only to judges; to the legislative and executive branches, the Constitution's secrets are hidden and obscure.

Until 1937, the Supreme Court occupied a position vis-à-vis the public not unlike that of the British Crown. A royal personage on the throne "sweetens politics with nice and pretty events, strengthens government with the strength of religion," wrote Walter Bagehot in *The English Constitution.* The black-robed Justices in their marble sanctuary excite imagination and inspire awe. To Bagehot, Parliament was the "efficient part" of the British Government; monarchy was the "dignified part." In America these roles are blended. The Supreme Court is both symbol and instrument of power. While functioning as a vehicle of revealed truth, the Court can bring the President, Congress, and state governors and legislatures to heel. At the heart of the American system of constitutional limitations lies an intriguing paradox: while wearing the magical habiliments of *the law,* the Justices, taking sides, decide controversial public issues.

The critical role of the federal judiciary had been obvious from the beginning. During the long contest over the adoption of the Constitution, the article relating to the judicial branch of the new government provoked criticism and concern.

Drafting a Blueprint for Free Government

By 1787 it had become clear that if the inadequacies of the Articles of Confederation were to be remedied, the new American system would have to embody a coercive principle—with the central government acting on individuals rather than simply on corporate units called sovereign states. Under state constitutions framed after 1776, state legislatures enjoyed both constituent and lawmaking powers. James Madison complained that the multiplicity, mutability, and injustice of state laws had brought into question a fundamental principle of republican government—"that the majority is the safest guardian of public good and private rights."[3] Dependence on the electorate was not enough. A forum outside the states to consider and correct injustices engendered within them, especially inequities of property and

contract rights, was lacking. The creation of such a forum, together with a more energetic central authority, was the major task confronting the Constitution's framers.

In *The Federalist*, Alexander Hamilton applauded the progress made in the science of politics and listed as wholly new discoveries "the regular distribution of powers into distinct departments; the introduction of checks and balances; the introduction of courts holding their offices during good behavior." New also was the concept of federalism. Six weeks before the Philadelphia Convention assembled, Madison sent Virginia Governor Edmund Randolph a message proposing a "middle ground" between "individual independence of the states" and their "consolidation into one simple republic." Madison suggested "due supremacy of the central authority" but was for retaining the states, "so far as they can be subordinately useful." [4] An architect would hesitate to begin construction of a house with so imprecise a blueprint, but the delegates met in Philadelphia, not to build a house, but to draft the framework of a constitutional system that would combine stability and energy in government and achieve union without unity.

Liberty and Restraint

The framers called their creation free government, attempting to fuse into one coherent document the sometimes opposite, sometimes complementary elements of liberty and restraint. Crucial to the operation of the Constitution are two major principles: separation of powers and federalism. Neither is spelled out. On the contrary, lines of demarcation are not drawn with mathematical exactness. "No skill in the science of government," Madison wrote in *The Federalist*, "has been able to discriminate or define, with sufficient certainty, the three great provinces—the legislative, executive and judiciary." Even the framers most adept in political science encountered intractable difficulties in putting such new, complex, and intangible concepts into enduring language. Nor were the difficulties limited to defining the three branches of government. In delineating the boundaries between federal and state jurisdictions, members of the Convention experienced such insuperable problems that instead of "a democracy the most simple," they fashioned what John Quincy Adams described as "the most complicated government on the face of the globe."

The imponderables of politics and the imperatives of time and circumstance suggest that any effort to draw precise constitutional boundaries in 1787 would have been not only fruitless

but also undesirable. In any case, the framers considered a condition of tension normal and necessary, as did Justice Holmes, dissenting in *Truax* v. *Corrigan* (1921), when he pointed out the "dangers of a delusive exactness." Madison had already expressed doubts about the adequacy of the written word to express such imponderables: "When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated."

Judicial Review

The authors of *The Federalist* anticipated that just as the states would resent encroachments by national authority, so the central government would protect the people from the tyranny of their own state governments. They were hopeful that any differences arising in the process might resolve themselves. In *The Federalist,* neither Hamilton nor Madison had closed his eyes to the ominous possibility of "mortal feuds" or the setting of conflagrations that "no government can either avoid or control." For peaceful resolution of controversies, whether among the three branches of the national government or between the central authority and the states, the founding fathers relied on the Supreme Court.

"One court of supreme and final jurisdiction is a proposition not likely to be contested," wrote Hamilton. The Constitution could not "intend to enable representatives of the people to substitute their will to that of the constituents." Accordingly, 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." Nor would judicial review entail "superiority of the judicial to the legislative power." Ironically, judicial review would make "the power of the people superior to both." In a flash of remarkable foresight, Hamilton suggested that discharge of these responsibilities would "have more influence upon the character of our government than but few may be aware."

At the Virginia Ratifying Convention in 1788, John Marshall had inquired: "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 protection." [5]

In 1803, fourth Chief Justice of the United States John Marshall seized the first opportunity (in *Marbury* v. *Madison*) to

anchor judicial review as the supreme law of the land, relying primarily on separation of powers. But his ablest critic, Chief Justice John Bannister Gibson of the Pennsylvania Supreme Court, invoking the same principle, argued that if the framers had intended to confer such a "proud pre-eminence," they would have based it on "the impregnable ground of an express grant." It could be argued, however, that judicial review is so firmly rooted in general principles—natural law, separation of powers, federalism, natural rights—as to make specific authorization unnecessary.

Judicial review by the Supreme Court is only one among several devices for obliging government to control itself. It is not merely a matter of theory; it is also a matter of practice.

Between 1789 and 1835, the Supreme Court construed its power narrowly. Chief Justice Marshall, in *Gibbons* v. *Ogden* (1824), deferred "to the wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections as the sole restraints on which they have relied to secure them from abuse." Marshall contended that the principle of national supremacy should be the deciding factor in resolving conflicts between the Union and its member states. The principle was "safe for the states and safe for the Union." In 1819, in *McCulloch* v. *Maryland*, he wrote: "We are relieved, as we ought to be, from clashing sovereignties. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of [state] taxation is the legitimate use, and what degree may amount to the abuse of power." Chief Justice Marshall used judicial review to legitimate, not defeat, the power of the central government. To the dismay of Thomas Jefferson and his fellow advocates of states' rights, Marshall's theory of federalism was couched in the language of judicial self-restraint.

Changing Social and Political Values

Below the federal level, Marshall was an activist, safeguarding contract and property rights against invasion by local authorities. In *Fletcher* v. *Peck* (1810), he regarded Article 1, Section 10, prohibiting impairment of the obligation of contract, as "a bill of rights for the people of each state."

With the rise of Jacksonian democracy, social and political values underwent change. The Court's altered composition reflected these shifts. So did the nature and scope of judicial power. Marshall's successor as Chief Justice, Roger Brooke Taney, agreed that the rights of property must be "sacredly guarded," but he warned, in *Charles River Bridge Company* v. *Warren River Bridge*

Company (1837), that "the community also have rights and the well-being of every citizen depends on their faithful preservation."

Taney also diverged from his predecessor in his views on federalism. For Marshall, the Supreme Court was primarily an organ of national authority. Taney regarded it as an arbiter, standing outside and above both the national government and the states. Dual federalism—the theory that nation and state confront each other as equals—characterized his constitutional jurisprudence.[6] Rejecting this arbitral role as "unfit" for the judiciary, Marshall had asked one question: Does Congress have the power? Taney asked two: Does Congress have the power? and Do the states have any rights that preclude congressional action?

The effect was to elevate the judiciary, rendering it, ultimately, the final judge of such burning issues as slavery and the nature of the Union. In a reckless display of judicial pre-eminence, the Taney Court vetoed congressional policy embodied in the Missouri Compromise Act of 1820. In the name of dual federalism, its own creation, the Court annexed power beyond that claimed by Marshall. In forestalling congressional efforts to settle moral and constitutional problems, the Taney Court helped to precipitate the Civil War. After the *Dred Scott* decision of 1857, it was hard for the Supreme Court to maintain the pose of judicial impotence. Nevertheless, the myth endured. More severe tests lay ahead. *Dred Scott* proved to be only the first in a series of self-inflicted wounds.

Judging in an Industrial Age

The post-Civil War years witnessed the rapid creation of huge fortunes that threatened the fruits of Jacksonian democracy. Louis D. Brandeis was to define the issue as political democracy versus industrial absolutism. The word "socialism" was bandied about, and the affluent classes, no longer able to control legislatures, turned to the courts for protection.

In 1893, to stem the rising tide of organized labor and its influence on legislation, Justice David J. Brewer, doffing his judicial robe, made an impassioned plea for a strengthened judiciary. He sugarcoated his appeal with the traditional fiction that judges "make no laws, establish no policy, never enter into the domain of popular action . . . do not govern." He took satisfaction in sanctioning "the universal feeling that justice alone controls judicial decisions."[7] Countering Brewer's urgent call for judicial alignment with property interests, Harvard's James Bradley Thayer warned courts against stepping into the shoes of the

THE MILESTONE CASES

Marbury v. Madison (1803)
In a case arising from William Marbury's claim to be a justice of the peace, the Court firmly established the constitutional, rather than the legislative, source of Supreme Court jurisdiction and entrenched the principle of judicial review—the right of the Court to declare laws unconstitutional.

McCullough v. Maryland (1819)
The Court held that the chartering of a National Bank of the U.S. was a "necessary and proper" means of achieving the effective exercise of powers delegated to Congress by the Constitution. By its broad interpretation, the Court widened the range of actions that could be initiated by the federal government.

Dartmouth College v. Woodward (1819)
The Court ruled that a legislature may not interfere in the affairs of a private corporation unless the legislature, in granting a corporate charter, reserves the right to amend that charter at some later date. *Dartmouth College* reflected the high measure of protection 19th century judges were willing to extend to property.

Dred Scott v. Sandford (1857)
The Court held that Congress could not prohibit slavery without violating the due process clause of the Fifth Amendment and citizens' property rights. This effectively voided the 1820 Missouri Compromise, which had preserved an uneasy balance in the admission of new slave and free states to the Union.

Lochner v. New York (1905)
The Court held that a New York State law limiting bakers to a 60-hour work week was an unconstitutional abridgement of the right of contract. Thus a constitutional provision (Fourteenth Amendment) intended to secure the rights of newly freed slaves was transformed into a buttress of laissez-faire capitalism.

Schechter Poultry Corp. v. U.S. (1935)
In one of several decisions striking at New Deal measures, the Court invalidated National Recovery Administration codes established to regulate minimum wages, maximum hours, collective bargaining, and unfair competition. The Court held that the codes constituted an excessive delegation of legislative power to the executive and an unconstitutional exercise of the congressional commerce power.

U.S. v. Darby Lumber Co. (1940)
Abandoning its earlier opposition to New Deal legislation, the Court upheld the Fair Labor Standard Act of 1938, which provided for the fixing of minimum wages (for men) and maximum hours for employees in an industry whose products were shipped in interstate commerce.

Youngstown Sheet & Tube Co. v. Sawyer (1952)
The Court held invalid the action of President Truman in seizing the country's steel industry during the Korean War without statutory authority. Sole lawmaking power, the Court decided, rests with Congress, not the President, regardless of wartime emergencies.

Brown v. Bd. of Education (1954)
The Court held that in the field of public education the "separate but equal" doctrine established by *Plessy* v. *Ferguson* (1896) was not justified, because to separate schoolchildren of similar age and qualifications solely on the basis of race may inflict irreparable psychological damage. *Brown* opened an era of civil rights initiatives by the courts and by Congress.

Mapp v. Ohio (1961)
The Court held that evidence produced as a result of a search or seizure violating the Fourth Amendment must be excluded from state criminal trials. *Mapp* was the forerunner of a number of decisions imposing stricter procedural protections in state criminal proceedings.

Gideon v. Wainwright (1963)
The Court held that indigent criminal defendants in felony cases are entitled to counsel appointed by the state, discarding a 1942 dictum *(Betts* v. *Brady)* that defense attorneys must be provided only where special circumstances would make trial without counsel "offensive to common and fundamental ideas of fairness."

Reynolds v. Sims (1964)
After ruling in *Baker* v. *Carr* (1962) that federal courts could hear cases involving alleged unequal apportionment of state legislative districts, the Court held in *Reynolds* that both chambers of a state legislature must be apportioned by population—one man, one vote —and that there is a presumption of unconstitutionality for any system that deviates from the norm of equal representation.

Griswold v. Connecticut (1965)
The Court for the first time decided the merits of a constitutional challenge to state anti-birth control laws, striking down a Connecticut statute prohibiting the sale of contraceptives, on the grounds that enforcing the law against married couples violated a right of marital privacy. *Griswold* illustrates the ability of the Court to "discover" a right (e.g., privacy) not explicitly spelled out in the Constitution.

Miranda v. Arizona (1966)
The Court held that the Fifth Amendment bars the use in court of statements that stem from custodial interrogation without procedural safeguards to protect the accused against self-incrimination. These include his right to remain silent, his right to the presence of counsel, and his right to have counsel appointed if he cannot afford a lawyer. The Court also held that the prosecution bears the burden of proving that the accused waived his right to remain silent.

lawmaker and made the uncanny prediction that intervention would imperil the Court's limited, yet "great and stately jurisdiction."[8] His counsel was to no avail.

For nearly half a century (1890–1937), the Supreme Court successfully pitted its social and economic preferences against national and state attempts to regulate the excesses of a burgeoning industrialism by legislation. The judiciary vetoed congressional efforts to enact a federal income tax and to enforce antitrust legislation. The Court invalidated child labor laws and frustrated organized labor's drive to make its influence felt in the nation's expanding economic life. To protect economic interests against the zeal of social reformers, the Supreme Court became a political body, not in any narrow partisan sense, but to the extent that it played a crucial role in determining public policy, functioning as an arbiter between the forces of democracy and those of property. Judicial supremacy replaced judicial review.

Justice Holmes's famous quip of 1905 (dissenting in *Lochner* v. *New York*) that the Constitution "does not enact Mr. Herbert Spencer's *Social Statics*" was no idle protest. Holmes's particular target was Justice Rufus Wheeler Peckham. Asked for an appraisal of his colleague, Holmes replied: "You ask me about Peckham. I used to say his major premise was 'God damn it.' Meaning thereby that emotional predilections somewhat governed him on social themes."[9]

Stalling the Power to Govern

By 1936, the Supreme Court had seriously impaired the ability of both federal and state governments to govern. The number of acts declared unconstitutional had risen to an all-time high. In two terms, 13 congressional statutes were set aside, all but nullifying President Franklin D. Roosevelt's legislative program. To destroy a state minimum wage law for women, the Court invoked the liberty-of-contract concept. After joining in numerous dissents, a discouraged Justice Harlan Fiske Stone observed at the end of the 1935–36 term, "We seem to have tied Uncle Sam up in a hard knot."[10]

Among the Court's most deadly and tenacious restraints on governmental power has been the doctrine of dual federalism. It had played a decisive role in the slavery issue and was later to ban congressional regulation of manufacturing in *U.S.* v. *E. C. Knight* (1895), employer-employee relations in *Hammer* v. *Dagenhart* (1918), and agriculture in *U.S.* v. *Butler* (1936). The dual-federalism concept had created a dreamland of laissez faire,

a power vacuum in which so-called free enterprise could roam almost at will. To do this the Court turned the Tenth Amendment upside down, in effect, by inserting a single word: "The powers not *expressly* delegated to the United States . . . are reserved to the States, or to the people."*

At the very moment when politico-judicial power reached its peak, the Court portrayed its role as that of a grocer weighing coffee or a dry goods clerk measuring calico. Justice Owen J. Roberts declared for the majority in *U.S.* v. *Butler* (1936) that constitutional interpretation required merely to lay "the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

Court-Packing

During his entire first term, President Roosevelt did not have an opportunity to make a single Supreme Court appointment. Emboldened by a huge popular mandate in the 1936 presidential election, he proposed enlarging the membership of the Court by appointing additional Justices of his own political persuasion. His plan was promptly dubbed "court-packing."

Initially, efficiency was the professed issue, not unfavorable decisions. The President's plan was to give any Supreme Court Justice past the age of 70 six months in which to retire. If he failed to do so, he could continue in office, but the President would appoint an additional Justice, presumably younger and better able to carry the heavy load. Since six Justices, including Brandeis, were in this category, the President could make six appointments almost immediately, thus raising the Court's membership to 15.

Although the Court ruled by a narrow margin and seemed vulnerable to political attack, the judicial robe continued to cast a spell. Heedless of Flaubert's warning, "Idols should not be touched lest their gilt stick to one's fingers," the President's persistence stirred stormy opposition. Overnight Supreme Court Justices were again pictured as demigods far above the sweaty crowd, abstractly weighing controversial public issues on the delicate scales of the law.

*Marshall regarded the Tenth Amendment as a constitutional tranquilizer, "framed for the purpose of quieting the excessive jealousies which had been excited"—*McCulloch* v. *Maryland*, 4 Wheat, 316 (1819), 406. In 1940 Justice Stone described the Amendment as "a truism that all is retained which has not been surrendered"—*U.S.* v. *Darby*, 312 U.S. 100 (1941), 124.

The need for a Court "under the Constitution, not over it" (Roosevelt's phrase) was demonstrated by the growing number of dissenting opinions, and FDR exploited them to the limit. Even as the court-packing battle raged, the Court began to discredit its own precedents by upholding state and federal legislation that had recently been disallowed on constitutional grounds.

The first bastion to fall was *Morehead* v. *Tipaldo,* which in June 1936 had set aside the New York minimum wage law for women, holding that the state was powerless to fix a pay scale for women, even if it was less than a living wage. Ten months later, faced with President Roosevelt's landslide victory of 1936 and his court-packing threat, the Justices reversed themselves in effect (in *West Coast Hotel* v. *Parrish,* 1937), by sustaining the Washington State Minimum Wage Law, whose main features were indistinguishable from those of New York's. Still hanging in the balance was the fate of the Wagner Labor Disputes Act.

In 1936, the Court had invalidated the Bituminous Coal Act, designed to create order in the nation's most chaotic industry. Chief Justice Hughes, voting with a majority of six, agreed that though coal mining affected interstate commerce, it did so indirectly, and was therefore not subject to congressional regulation (*Carter* v. *Carter Coal Company,* 1936). A year later, the Court, speaking through the Chief Justice, endorsed the National Labor Relations Act. Curtly dismissing arguments that had proved effective in Commerce Clause cases of 1935 and 1936, Hughes observed, "We are asked to shut our eyes to the plainest fact of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum." The Supreme Court commentator and wit Thomas Reed Powell called it "the switch in time that saved nine."

The Genius of Free Government

In the historic court-packing conflict, both sides won and both lost. The Justices defeated the President, and the President, thanks to the Court's abrupt about-face, won judicial endorsement of the New Deal.

The Court did not abdicate. It merely relinquished a self-acquired role. If either Congress or the Court had scored an outright victory, free government would have suffered a well-nigh fatal blow. Demonstrated was the genius of free government that Hamilton called "vibrations of power"—rooted in the conviction, as John Randolph of Roanoke expressed it, that "power alone can limit power." Madison was resigned to free government's inevita-

ble risks. "It is a melancholy reflection," he wrote, "that liberty shall be equally exposed to danger whether the government have too much or too little power, and that the line that divides these extremes should be so inaccurately defined by experience."[11]

The impasse created by *Dred Scott* in 1857 and the court-packing conflict of 1937 need not have occurred if Jefferson's recipe for avoiding constitutional crises had been heeded: "The healing balm of our Constitution is that each party should shrink from all approach to the line of demarcation, instead of rashly overleaping it, or throwing grapples ahead to haul to hereafter."[12]

Distrust of Power

The 1937 deadlock had been resolved by the Justices themselves, but not without revealing a capricious element in the judicial process. In 1936, the Court had stood for judicial activism in defense of property and contract rights. A year later it was championing judicial self-restraint. Tarnished was America's burnished symbol of divine right. With engaging candor, Justice Robert H. Jackson confessed in *U.S.* v. *Brown* (1953): "We are not final because we are infallible, but we are infallible only because we are final."

Distrust of government in all its branches and at all levels is free government's dominant characteristic. Courts are the exception, but even the judiciary is sometimes the target of distrust. In a trenchant dissenting opinion, Justice Harlan F. Stone, a knowledgeable and sophisticated jurist, made one of the most astonishing comments in the annals of the Supreme Court when he wrote, "While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." There are, in fact, various formal and informal restraints on the high court, including impeachment and the threat of court-packing. When the Court's self-restraint fails to function in vital issues of the day, as under Jefferson, Lincoln, and the two Roosevelts, the Supreme Court faces restraint from without, inspired by that all-important element in our constitutional tradition—distrust of power.

By 1938, Justice Stone had been leader of the drive for judicial self-restraint for more than a decade. When he pondered the future, he decided that if the judicial baby was not to be thrown out with the bath, the Justices would have to find new interests to protect. In an obscure case of 1938 (*U.S.* v. *Carolene Products*), Stone penned the now famous *"Carolene Products*

Footnote 4," in which he did not go so far as to say that economic regulations would never transcend constitutional limits but did suggest confining the Court's role in this area within narrow bounds. Footnote 4 singled out for more searching judicial scrutiny: specific provisions such as those in the first 10 amendments; government actions impeding or corrupting the political process; and official conduct affecting adversely racial, religious, or national minorities.

In April 1938, Harvard Law Professor Felix Frankfurter endorsed Stone's Footnote as "extremely suggestive, opening up new territory," but when the Court proceeded to implement it, certain Justices, including Frankfurter, who had been appointed to the high court later in 1938, launched heated opposition.*

In *Minersville School District* v. *Gobitis* (1940), the Court upheld a state act requiring all schoolchildren to salute the flag. To win Stone's support, Frankfurter wrote his colleague at length. "It is relevant," he pleaded, "to make the adjustment we have to make within the framework of present circumstances and those that are clearly ahead of us."

With the endorsement of eight Justices, judicial activism now paraded under the banner of judicial self-restraint—but not for long. Two years later, in *Jones* v. *Opelika* (1942), Black, Douglas, and Murphy recanted in a remarkable about-face. Encouraged by these dramatic shifts and the appointment of two new Justices—Robert H. Jackson and Wiley Rutledge—Walter Barnette, a Jehovah's Witness, brought suit to enjoin enforcement of the flag salute required of his children (*West Virginia State Board of Education* v. *Barnette*, 1943). Voting 6 to 3, the Court reversed itself holding that First Amendment freedoms may be abridged only to prevent grave and immediate dangers.

Cementing National Unity

Chief Justice Hughes had resigned in 1941. As his successor, President Roosevelt elevated Harlan Fiske Stone, to the center chair. Appointment of a New Hampshire Republican as Chief Justice not only seemed a fitting reward for the uphill battle Stone had waged in behalf of the power to govern, but it was thought at the time that the appointment would help to cement national unity in the midst of a world in the throes of World War II—an

*A decade later, Justice Frankfurter, dissenting in *Kovacs* v. *Cooper* (1948), denounced Stone's prophetic Footnote as a "mischievous" way of "announcing a new constitutional doctrine."

expectation that failed to materialize.

Between 1937 and 1943, President Roosevelt had been fortunate enough to name one Chief Justice and eight associates. Paradoxically, this so-called Roosevelt Court inaugurated the most quarrelsome period in the annals of the judiciary. When Justice Owen J. Roberts resigned in disgust after 15 years on the bench, his colleagues could not even agree on the wording of the letter customarily sent a departing Justice. The shifting positions of the Court and the individual Justices were reflected in Stone's vacillating leadership. The Chief Justice found himself pitted against judicial activists Black, Douglas, Murphy, and Rutledge. A year before his death in 1946, he lamented: "My more conservative brethren in the old days enacted their own economic prejudices into law. The pendulum has now swung to the other extreme, and history is repeating itself. The Court is now in as much danger of becoming a legislative constitution-making body, enacting into law its own predilections, as it was then."

Igniting Controversy

After Stone's death, a Truman crony, Fred M. Vinson, was appointed Chief Justice. One of the most notable decisions during Vinson's seven-year tenure called a halt to presidential aggrandizement in the 1952 steel seizure case (*Youngstown Sheet & Tube Company* v. *Sawyer*). In a labor dispute during the Korean War, President Truman issued an order authorizing the Secretary of Commerce to seize and operate the steel mills. The President's action was based on the national emergency allegedly created by the threatened strike in an industry vital to national defense. Moving with rare speed, the Court granted certiorari on May 3, 1952, heard arguments on May 12, and handed down its decision on June 2. In ordering that the mills be returned to their owners, Justices Black and Jackson underscored America's cherished principle that ours is a government of law and not of men. Chief Justice Vinson dissented.

By 1953, the separate-but-equal formula, as applied in public schools, was hanging by a constitutional hair. Yet, when *Brown* v. *Board of Education* was first argued, the Chief Justice's colleagues realized that the weight of his authority favored its continuance. Vinson's death, just prior to reargument under his successor Earl Warren, evoked Frankfurter's pointed reaction: "This is the first indication I have ever had that there is a God."

Once again the judicial fat was in the fire. Once again the Court had become a major political issue in Congress and in the

hustings. Just as the judicial activism of the 1930's in defense of economic rights embroiled the Court in partisan politics, so judicial decisions on behalf of civil rights (the new "preferred freedoms") stirred bitter political and constitutional controversy.

In 1938, judicial activism old-style was dead; in 1953, judicial activism new-style was just around the corner.

1 James Bishop Peabody, ed. *The Holmes-Einstein Letters,* O. W. Holmes to Lewis Einstein, June 24, 1911. New York: St. Martin's, 1964, p. 59.

2 Oliver Wendell Holmes. *Collected Legal Papers.* New York: Harcourt, 1920, p. 200.

3 Gaillard Hunt, ed. *The Writings of James Madison.* New York: Putnam's, 1901, vol. 2, p. 361.

4 Ibid., p. 336.

5 Jonathan Elliot, ed. *The Debates of the Several Constitutional Conventions on the Adoption of the Federal Constitution.* Washington, D.C., 1836, vol. 3, p. 503.

6 *Groves* v. *Slaughter,* 15 Peters (1841), 449; *License Cases,* 5 Howard, 504; *Ableman* v. *Booth,* 21 Howard (1859), 506.

7 David J. Brewer. "The Movement of Coercion," an address before the New York State Bar Association, Jan. 19, 1893. In *Proceedings of the New York State Bar Association,* vol. 16, pp. 37–47.

8 James Bradley Thayer. "Origin and Scope of the American Doctrine of Judicial Review," an address before the Congress on Jurisprudence and Law Reform, Aug. 9, 1893. *Harvard Law Review,* vol. 7 (1893), p. 129.

9 Quoted in: Alexander M. Bickel. *The Unpublished Opinions of Mr. Justice Brandeis.* Cambridge: Harvard, 1956, p. 164.

10 Alpheus T. Mason. *Harlan Fiske Stone: Pillar of the Law.* New York: Viking, 1956, p. 426.

11 *The Writings of James Madison,* op. cit., vol. 5, p. 274.

12 Paul L. Ford, ed. *The Works of Thomas Jefferson.* New York: Putnam's, 1904-05, vol. 12, p. 203.

FROM WARREN TO BURGER: ACTIVISM AND RESTRAINT

by A. E. Dick Howard

When Earl Warren stepped down as Chief Justice of the United States in 1969, an era ended. Anthony Lewis of the *New York Times* referred to the 16 years of Warren's tenure as years of legal revolution. "In that time," he wrote, "the Supreme Court has brought about more social change than most Congresses and most Presidents."

Appraisals of the work of the Warren Court varied sharply. Harvard's Archibald Cox was confident that historians would find the decisions of the Warren Court "in keeping with the mainstream of American history—a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire and in the long run essentially pragmatic—in short, in keeping with the true genius of our institutions."

Alex Bickel and Harry Wellington, of the Yale Law School were more critical. They were disturbed by the many instances in Warren Court opinions "of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree."

Historian Alfred H. Kelly of Wayne State University approved the liberal thrust of the Court's opinions, but was made uneasy by what he called the Court's Marxist-flavored assumptions that "history can be written to serve the interests of libertarian idealism." Conservative newspaper columnist Jack Kilpatrick was

especially acerbic. He referred to the Warren years as "a trail of abuses, usurpations, and invasions of power. One pursues the departed Chief Justice along a littered road of fallen landmarks and abandoned precedents. Here every principle of jurisprudence lies discarded. It is as if gypsies had passed through, leaving a bad picnic behind."

The era of the Warren Court began in 1953 when the former Governor of California was appointed to the bench by President Eisenhower—who later called the appointment "the biggest damnfool mistake I ever made." Warren came to a Court characterized by self-imposed restraints. Having reversed its opposition to Roosevelt's New Deal measures, the Court showed little disposition to stand in the way of decisions made by other branches of the government. The Vinson Court, it is true, had ruled against Truman in *Youngstown Sheet & Tube Company* v. *Sawyer* (1952), when the President had sought to settle a strike by seizing the steel mills during the Korean War, and it had suppressed some of the manifestations of a racially segregated America, such as the white primary; but, for the most part, it had not seen fit to challenge the evils of McCarthyism. In the early 1950s a majority of the Justices were not disposed to challenge the prevailing passion for loyalty, security, and the persecution of persons accused of seditious speech and guilt by association.

The Court did not change overnight when Warren became Chief Justice. The balance of power on the bench did not tip toward activism until 1962, when Arthur Goldberg, a former labor lawyer and Secretary of Labor, replaced Felix Frankfurter, the great champion of judicial restraint. Goldberg's vote proved decisive. In his first term on the Court, the Justices split 5 to 4 in ten civil rights or civil liberties cases. One such case, for instance, reversed the contempt conviction of the president of a local chap-

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ter of the NAACP who had refused to surrender the chapter's membership list to a Florida state legislative investigating committee.

The Warren revolution began well before 1962 in one area. In 1954 a unanimous Court ruled against racial segregation in the nation's public schools in *Brown* v. *Board of Education.* That landmark decision constituted a testament to Warren's leadership. It was followed by a series of other rulings, frequently in brief per curiam opinions, applying the principle of *Brown* to other areas, such as public buildings and facilities.

The Warren Court at Full Tide

The legal revolution of the Warren Court reached full tide in the 1960s. Over the impassioned protest of Justice Frankfurter, the Court decided in 1962 that judicial relief was available to voters who claimed their vote was diluted by the malapportionment of America's state legislatures. Two years later, Warren wrote the Court's decision requiring that state legislatures be apportioned on the basis of population—one man, one vote.

Criminal defendants were also the beneficiaries of the Warren Court's rulings. Ever since 1947, Justice Hugo L. Black—in many ways the intellectual leader of the Court—had argued that the Fourteenth Amendment, which guarantees all persons due process of law against actions of the several states, should be interpreted by the Court so as to enforce against actions of the states all of the guarantees that the Bill of Rights provides against actions of the federal government. Black was never able to secure his colleagues' approval of his notion for incorporating the provisions of the Bill of Rights, wholesale, into the Fourteenth Amendment. After 1962, however, the Court embraced a process whereby individual rights were made binding upon the states on a selective basis.

A notable case in point was that of Clarence Earl Gideon, charged with breaking into a poolhall in 1961. In *Gideon* v. *Wainwright* (1963), the Supreme Court affirmed the right of an indigent defendant in a felony case to have counsel appointed for him if he could not afford to hire a lawyer. Much more controversial was *Miranda* v. *Arizona* (1966), which requires the police to warn a suspect, prior to his interrogation: that he has the right to remain silent; that what he says may be used against him; that he has the right to the presence of a lawyer; and that a lawyer will be appointed for him if he cannot afford one.

The Warren Court moved also to expand the protection

afforded free speech. Justice Black had long been a stout advocate of such protection. Sophisticated observers ridiculed him as an "absolutist." Other Justices were more inclined to balance First Amendment values against competing interests, such as keeping order, but with the emergence of the Warren Court came clear evidence of what Justice William J. Brennan, Jr. called "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." The Court handed down a number of First Amendment decisions, limiting the scope of obscenity prosecutions and libel judgments, giving more protection to speech in public places (the public forum concept), striking down vague or overbroad laws that tended to inhibit free speech, and otherwise giving greater breathing space to freedom of expression.

A Trend Toward Activism

These decisions—in regard to racial segregation, legislative apportionment, criminal procedure, freedom of expression—are by no means a complete representation of the innovative work of the Warren Court, but they serve to suggest some of the principal themes reflected in that tribunal's opinions. To begin with, there was a trend toward activism. Where Justice Frankfurter had counseled against the notion that every social ill has a judicial remedy, the Warren Court was less willing to defer to legislative judgments and to the political process and more ready to be an engine of reform. It had what University of Chicago law professor Harry Kalven, Jr. called an "appetite for action." As Chicago's Philip B. Kurland put it: "If, as has been suggested, the road to hell is paved with good intentions, the Warren Court has been among the great roadbuilders of all time."

Professor Kurland identified another theme of the Warren Court: its tendency to favor an "egalitarian society." The Court's predilection for egalitarianism was evident not only in race and reapportionment decisions but in cases where the equal protection clause was applied to economic inequalities. Many of the Court's most significant criminal justice opinions rested on a premise articulated by Justice Black in his 1956 opinion in *Griffin* v. *Illinois*—that in criminal trials "a state can no more discriminate on account of poverty than on account of religion, race, or color." In *Griffin,* the Court ruled, a state must provide a trial transcript or its equivalent to any indigent criminal defendant who appeals his conviction.

Another characteristic of the Warren era was a mistrust of

those wielding official power, such as police and prosecutors. As a result, the Justices created prophylactic rules, as in *Miranda,* based on the underlying assumption that wherever power can be abused, it will be.

A Court as activist as the Warren Court could not help but play to mixed reviews. Law professors and journalists were by no means the only critics. Politicians wounded by the one man–one vote rulings or sensitive to constituents' reactions to the outlawing of prayers in public schools tried to amend the Constitution, but without success. At the 1958 Conference of State Chief Justices, a committee report complained that "the Supreme Court too often has tended to adopt the role of policymaker without proper judicial restraint."

Richard Nixon made the Warren Court a political issue in his 1968 bid for the presidency. His response to outcries over rising crime rates was a "law and order" campaign. In accepting his party's nomination, Nixon declared that judicial decisions had "gone too far in weakening the peace forces as against the criminal forces in this country." A Gallup poll found that a majority of those questioned thought the Court too soft on criminals, a finding exploited by Nixon, who said, "Today, all across the land guilty men walk free from hundreds of courtrooms. Something has gone terribly wrong in America."

A Change of Direction

As President, Nixon sought to change the complexion of the Court through his choice of nominees. "I happen to believe that the Constitution should be strictly interpreted," he stated and expressed the hope that his first appointment, Warren Burger as Chief Justice, would affect the direction of the Court. After Justice Abe Fortas resigned, Nixon's efforts to fill that seat foundered when the Senate rejected two of his nominees in turn—Clement F. Haynsworth, Jr. in 1969 and G. Harrold Carswell in 1970. The latter was thought by many to be both incompetent and a racist. Nixon then nominated Harry A. Blackmun, a judge of the Eighth Circuit Court of Appeals, who won easy confirmation in the spring of 1970.

Before Nixon's first term had run its course, a third and fourth vacancy occurred on the Court. In the summer of 1971 both Hugo Black, who died shortly thereafter at the age of 85, and John Marshall Harlan retired. In nominating Lewis F. Powell, Jr. and William H. Rehnquist in November 1971, Nixon once again recalled his campaign pledge "to nominate to the Supreme Court

THE SUPREME COURT

WARREN E. BURGER, 69, appointed Chief Justice by President Nixon (1969). A native of St. Paul, Minnesota, Burger has been a law professor, assistant U.S. attorney general, a federal appeals court judge, and a persistent advocate of court reform. He is also a talented amateur sculptor.

WILLIAM J. BRENNAN, JR., 70, an Eisenhower appointee (1956). Brennan was a brilliant student at the University of Pennsylvania and Harvard Law School, later serving as a New Jersey superior court judge and state supreme court justice. He is an Irish Catholic from Newark, a Democrat, and a moderate.

POTTER STEWART, 61, an Eisenhower appointee (1958). A graduate of Yale (1937) and Yale Law School (1941), Stewart is a native of Cincinnati, where he served two terms as city councilman during the early 1950s. A Republican, he was a federal appeals court judge before joining the Supreme Court.

BYRON R. WHITE, 59, a Kennedy appointee (1962). A native of Colorado and a former college and pro football star, White excelled academically at the University of Colorado, at Oxford, and at Yale Law School. He practiced corporate law in Denver, campaigned nationally for Kennedy in 1960, and served as deputy attorney general under Robert F. Kennedy.

THURGOOD MARSHALL, 68, a Johnson appointee (1967). As chief counsel for the NAACP, Marshall argued 32 civil rights cases before the Supreme Court and won 29. A native of Baltimore, he graduated from Lincoln University (1930) and Howard

individuals who shared my judicial philosophy, which is basically a conservative philosophy."

Since George Washington appointed the original members of the high court, only four Presidents had had Nixon's opportunity to change the face of the Court (Taft nominated six Justices, Lincoln five, and Harrison and Harding, four each). With the Nixon appointments, pundits expected a dramatic shift in the Court's direction. They were soon talking about a "Nixon Court" —a break with the traditional practice of referring to a Court by the name of its Chief Justice. In the 1970s, as in New Deal days, the Court was amply provided with opportunities to indicate

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University Law School (1933). He served four years as a federal appeals court judge and was the first black U.S. solicitor general and the first black Supreme Court Justice.

HARRY A. BLACKMUN, 68, a Nixon appointee (1970). He was born in Nashville, Illinois, but has lived most of his life in Rochester, Minnesota. A lifelong friend of Chief Justice Burger, Blackmun was a scholarship student at Harvard (1929) and Harvard Law School (1932), a practicing attorney specializing in tax and estate work, and a U.S. circuit court judge.

LEWIS F. POWELL, JR., 69, a Nixon appointee (1971). After receiving his B.A. and LL.B. from Washington and Lee (1929, 1931) and his LL.M. from Harvard (1932), he became an attorney in Richmond, Virginia. As a member of President Johnson's national crime commission, he sought to redress the imbalance between "rights of the accused" and "rights of citizens."

WILLIAM H. REHNQUIST, 52, a Nixon appointee (1971). A native of Phoenix, Arizona, he received his B.A. and M.A. from Stanford (1948), an M.A. from Harvard (1949), and his LL.B. from Stanford (1952). He served as law clerk to Supreme Court Justice Robert H. Jackson and gained a reputation for legal brilliance as assistant U.S. attorney general.

JOHN PAUL STEVENS, 56, a Ford appointee (1975). A former federal appeals court judge in his native Chicago, Stevens is a graduate of the University of Chicago (1941) and Northwestern Law School (1947). He served as law clerk to Supreme Court Justice Wiley B. Rutledge and is an antitrust specialist.

its direction. Would it preserve the Warren legacy or break new ground?

By January 1977, the four Nixon appointees had been together on the Court for five years. They had been joined in 1975 by John Paul Stevens, appointed by President Ford to replace William O. Douglas, the most "liberal" Justice. Although classifying the Court into ideological blocs can be highly misleading, it is fair to say that the number of "liberals," who had called the tune in the 1960s, had dwindled to two: William J. Brennan, Jr. and Thurgood Marshall.

Those who once talked of a "Nixon Court" now speak of a

"Burger Court." The dire predictions heard at the outset of the Burger era, of a wholesale dismantling of the Warren Court's decisions, are more muted. It is now clear that the landmarks of the Warren years—racial desegregation, legislative reapportionment, expanded rights for criminal defendants—while not untouched, remain fundamentally intact. There is much continuity between the Warren and Burger Courts, especially in matters of race. The new majority seems as generous in its interpretation of Congress's power to enact civil rights statutes as was the Court in the 1960s. At the same time, the Burger Court has begun to set its distinctive stamp on constitutional interpretation.

Drawing Lines, Relaxing Standards

The present Court has called a halt to much that the Warren Court began, but without squarely overruling Warren precedents. There have been occasional exceptions, as in *Hudgens* v. *NLRB* in 1976, when the Burger Court overturned the Warren Court's ruling (in *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 1968) that pamphleteers have First Amendment rights in privately owned shopping centers. More often, the Court's technique has been to distinguish, to limit, to confine. For example, in 1961 the Warren Court held in *Mapp* v. *Ohio* that state judges trying criminal cases must exclude evidence produced by unreasonable search or seizure. Soon after he came to the Court, Chief Justice Burger lamented the price society pays for this exclusionary rule, which can be instrumental in overturning otherwise valid convictions. Other Justices have joined in the chorus. Without throwing out the rule, they have found ways to limit its impact. For example, the Court has ruled that state prisoners who have had a fair opportunity to raise Fourth Amendment claims in a state court may not have those claims reexamined by a federal court. The Court has found even more ways to limit the reach of the Fourth Amendment itself, sometimes by holding that there was simply no search or seizure in the first place, more often by widening exceptions to the requirement for a search warrant, as when the search is incident to a lawful arrest. The cumulative effect is such that the Fourth Amendment appears to be quite a different amendment now than when Warren left the bench.

Sometimes, the Burger majority will interpret a Warren precedent narrowly, refusing to extend its essential premise. For instance, while *Miranda* (which so far has not been overruled) could easily be read as barring the admission for any purpose of

a statement obtained without the requisite warnings, Chief Justice Burger, in a 1971 opinion, ruled that a statement inadmissible under *Miranda* may nevertheless be used to impeach the credibility of a defendant's trial testimony. Technically *Miranda* was upheld, but the animating philosophies of the 1971 ruling and the original *Miranda* decision are obviously at odds. Another example is the new majority's handling of 1967 Warren Court precedents (*U.S.* v. *Wade* and *Gilbert* v. *California*) holding that a post-indictment, pretrial lineup at which an accused is exhibited to identifying witnesses is a critical stage of the criminal proceedings at which the defendant is entitled to have counsel present. Showing its ability to draw a fine line, the Burger Court (*Kirby* v. *Illinois*, 1972) refused to apply that ruling to a situation where a police station lineup had been conducted *before* the defendant had been indicted or otherwise formally charged.

Waning Egalitarianism

In like fashion, with respect to the Fourteenth Amendment, the Burger Court by and large has refused to add to the applications of the equal protection clause that characterized the Court in the 1960s. The Warren Court embarked on strict judicial scrutiny of a statute whenever it decided the statute embodied a "suspect" classification, such as race, or impinged upon a "fundamental" right, such as the vote. Traditionally, the equal protection clause has been held to require only that a statutory classification rest on some "rational" or "reasonable" basis—an easy requirement to satisfy. But when the Warren Court began to talk about suspect classifications and fundamental rights, few statutes were able to pass muster under the demanding standards of the strict scrutiny cases.

The Burger Court, by contrast, has generally declined to recognize additional suspect classifications or fundamental rights for the purposes of Fourteenth Amendment litigation. It has been impossible, for example, to find five Justices who will agree to treat sex-based classifications as inherently suspect. In an opinion by Justice Powell, the Burger Court likewise refused to classify education as fundamental under the Fourteenth Amendment, with the result that the Court rejected a challenge to the Texas system for financing public schools—a system that created a wide disparity between wealthier and poorer school districts by relying heavily on local property taxes (*San Antonio Independent School District* v. *Rodriguez*, 1973).

Frequently the Burger Court, while reaffirming a Warren prin-

ciple, has relaxed the governing standards. Thus, seats in state legislatures must still be apportioned on the basis of population, but the Burger Court has approved deviations of up to 16.4 percent from perfect apportionment. Similarly, standards applied to First Amendment cases have been relaxed, so that obscenity prosecutions are easier to maintain and libel suits are less likely to be aborted by a First Amendment objection.

Underlying these shifts in doctrine are important value judgments and attitudes that distinguish the Court's new majority. The Burger Court is markedly less egalitarian. At one time it appeared as though an indigent's right to appointed counsel, established by the Warren Court in criminal cases, might be extended to civil cases, but the Burger Court stopped that development cold. An eloquent contrast between attitudes of the two Courts toward egalitarianism is demonstrated by a 1971 decision in which a five-man majority headed by Justice Blackmun rejected an indigent petitioner's argument that he should be allowed to file for bankruptcy without paying $50 in filing fees. Blackmun noted that the $50 fee could be paid in weekly installments which would be "less than the price of a movie and little more than the cost of a pack or two of cigarettes." Justice Thurgood Marshall, dissenting, considered that remark the height of insensitivity toward the poor. "A pack or two of cigarettes," he wrote, "may be, for them, not a routine purchase but a luxury indulged in only rarely." The dissenters found it outrageous that Congress should be permitted to decide that some of the poor were, in the words of the dissenters, "too poor even to go bankrupt."

A Less Interventionist Court

The Justices of the Burger Court are more apt to defer to the legislative process than their predecessors and to leave the solving of social problems to the political process. In 1976 when a majority of the Justices rejected the argument that capital punishment was necessarily cruel and unusual punishment, Justices Brennan and Marshall dissented. They were unmoved by the fact that most state legislatures had re-enacted capital punishment statutes in the wake of the Court's 1973 decision to invalidate the death penalty as it was then being imposed, and they displayed a Warrenesque willingness to abolish it on the grounds of "evolving standards." The majority, on the other hand, were more willing to defer to the judgments of the state legislatures. Burger argued that "in a democracy the legislative judgment is presumed to embody the basic standards of decency in the society." Rehnquist,

in agreement, thought that the fundamental issue in the death penalty cases was that the Supreme Court in a democratic society should not exercise too freely its power to strike down legislative acts.

A recurring, closely related theme in Burger Court opinions is the notion that judges should limit themselves to doing what they are competent and have a warrant to do. Justice Powell, in the *Rodriguez* school financing case, argued that judges should not try to make judgments about educational policy that are better made by school boards and educators.

In the 1973 capital punishment case (*Furman* v. *Georgia*), Powell placed himself squarely in the tradition of judicial self-restraint by citing Frankfurter's admonition that Oliver Wendell Holmes's 30 years on the Court should serve as a constant reminder against the misuse of the Court's "power to invalidate legislation as if . . . it stood as the sole bulwark against unwisdom or excesses of the moment." This is not to say that the Burger Court never second guesses legislatures and never acts like a legislative body itself. The Blackmun opinions in the 1973 abortion cases *Roe* v. *Wade* and *Doe* v. *Bolton* make clear that this is not always so. Still, a sense of judicial intervention as the exception, rather than the norm, is more characteristic of the Court in the 1970s than in the Warren years.

Federalism, a stepchild in the Warren era, is again in favor. The Tenth Amendment, which reserves to the states—or to the people—powers not delegated to the federal government, had lain dormant since the 1930s. It came to life in 1976, when Justice Rehnquist wrote the majority opinion in *National League of Cities* v. *Usery*. By placing state and local government employees under the minimum wage and maximum hour requirements of federal law, Rehnquist concluded, Congress had exceeded its powers under the clause of the Constitution authorizing it to regulate interstate commerce. Not since 1937 had the Court ruled against congressional misuse of the commerce power.

Trusting the System

Whereas the Warren Justices tended to be suspicious of government power, the Burger Court is more willing to trust the system to work with fairness and regularity and to assume that policemen and other officials try most of the time to observe the Constitution in the execution of their duties. In 1972 when the Court, in *Apodaca* v. *Oregon*, upheld a state law permitting juries to convict in certain cases by a less than unanimous vote, Justice

Byron R. White was unwilling to assume that a jury's majority would simply override the views of the other jurors. The dissenters, in the tradition of the Warren Court, were more concerned with "serious risks of jury misbehavior" and labeled the majority's assumptions of regularity as facile. Similarly, in cases involving grand juries, prosecutors, policemen, and trial judges, the Burger majority is apt to be less skeptical about the workings of government systems than the Warren Court.

Continuity and Change

A comparison of the Warren and Burger Courts, therefore, yields evidence of both continuity and change. Where the Warren opinions were more at odds with the national consensus, as in the criminal justice cases, the Burger Court has felt free to strike out on its own. Hence we see the marked shift of direction in search and seizure cases. In areas such as the dismantling of racial segregation in the public schools, the Warren legacy is more enduring. Although the new majority has been unwilling to sanction a judicial remedy for de facto segregation, as in racial imbalance arising from housing or other demographic patterns, the Justices continue to give the lower courts ample power to put an end to vestiges of racial segregation arising from official acts.

The Supreme Court, in some measure, both induces and reflects changes in social values. During the 1960s, the Warren Court took the lead in furthering racial equality, in reapportioning political power, and in broadening the rights of criminal defendants. In the first two instances, the country—and Congress—agreed with the Court. In the Civil Rights Act of 1964 and the Voting Rights Act of 1965, Congress enacted the first major civil rights legislation since Reconstruction. As to reapportionment, politicians who objected to legislative redistricting were unable to convince the man in the street that the old system of malapportionment was best. Broadening the rights of criminals, however, was another matter. The lack of a national consensus supporting decisions like *Miranda* made it possible for Nixon to make a campaign issue of such rulings in 1968, and the Court's criminal-justice opinions have subsequently moved in new directions.

Does this mean that the Supreme Court, as it is only too easy to assume, follows the election returns? The evidence simply does not support a positive answer. It is closer to the mark to recall the comment of Harvard law professor Paul A. Freund—that the Supreme Court is attuned, not to the weather of the day, but to the climate of the age. Thus a President, through his appoint-

ments, can have a significant effect on the Court's direction, as Nixon clearly did in making four appointments to the bench. Yet a President's subsequent influence is greatly limited, as was revealed when the "Nixon Court" took positions in important cases markedly different from those of the President. Examples must include the Burger Court's striking down of state laws infringing the right of a woman to an abortion and the series of decisions invalidating legislative efforts to channel public funds to parochial schools. Nor should one overlook the unanimous decision rejecting Nixon's claim of executive privilege in the case of the Watergate tapes—an opinion written by Nixon's own appointee to the nation's highest judicial office.

There is an inner integrity to the workings of the Supreme Court that defies all efforts of behaviorists to reduce the Court's decisions to the attitudes and prejudices of those who sit on the bench. The Justices, like other people, are conditioned by experience, but they operate within powerful constraints. Court watchers are often so bemused by points of contention—call it the "fuss fallacy"—that they overlook the vast areas of agreement that survive changes in personnel. A new majority rarely sets out to build a new temple of justice, though it may do extensive redecorating.

Charles Evans Hughes once said that "the Constitution is what the judges say it is." His remark was not made cynically, as is popularly supposed, but it is true that one of the most important functions of judges is to pour new life and meaning into words and phrases—such as "due process of law" and "equal protection of the laws"—whose meaning is often far from self-revealing. To that continuing task the Justices of the Burger Court have brought insights markedly different from those of the men who preceded them.

BACKGROUND BOOKS

THE SUPREME COURT

The Supreme Court of the United States has inspired a vast body of literature, some of it ill-informed and much of it useful only to specialists. But the broader, more thoughtful studies represent a wide variety of approaches used by scholars to examine the Court's intricate workings.

Three writers have successfully attempted major historical assessments of the Court. Charles Warren, a lawyer with unusual narrative skills, produced a two-volume treatment after World War I that remains a standard reference work. **THE SUPREME COURT IN UNITED STATES HISTORY** (Little, Brown, 1922–60) is a lively, comprehensive account of the high tribunal from its 18th century origins to the 1920s, with special emphasis on constitutional law cases. Warren quotes liberally from news and editorial columns of the partisan newspapers that carried word of the Court's doings to the public. He notes that "while the Judges' decision makes law, it is often the people's view of the decision which makes history."

THE AMERICAN SUPREME COURT (Chicago, 1960, cloth & paper) by Robert McCloskey, a Harvard political scientist, provides a briefer chronicle, again with a focus on constitutional issues. Like Warren, McCloskey is struck by the impact of popular opinion on the Justices, noting "it is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."

Although not a history of the Court per se, Edward Corwin's masterful **THE CONSTITUTION AND WHAT IT MEANS TODAY** edited by Harold Chase and Craig Ducat (Princeton, rev. supp. ed., 1962, cloth & paper) is an annotated history of the Court's varying interpretations of the Constitution.

Some writers have sought to assess the Court in its role as an American governmental institution, like Congress or the Presidency; many of them fail to understand how cases come before the Court, or the special internal relationships that influence its decision-making. One study that escapes this weakness is **THE LEAST DANGEROUS BRANCH** (Bobbs-Merrill, 1962, cloth & paper) by the late Alexander Bickel, a professor of law at Yale. Sensing that the Court is "second only to the presidency in having effectively at its disposal the resources of rhetoric," Bickel argues for a carefully limited role for the Court in "political" affairs. In a later book, **THE SUPREME COURT AND THE IDEA OF PROGRESS** (Harper, 1970, cloth & paper), he renews this theme with a critique of the activist Warren Court.

Studies of individual Courts are surprisingly rare, but Oliver Wendell Holmes, Jr.'s $263,000 bequest to the nation has resulted in the Holmes Devise Fund's sequential, multivolume **HISTORY OF THE SUPREME COURT OF THE UNITED STATES.** Three installments have appeared: Columbia law professor Julius Goebel's **Antecedents and Beginnings to 1801** (Macmillan, 1971), covering the formative period from colonial times through the 18th century; Harvard law professor emeritus Charles Fairman's two-volume **Reconstruction and Reunion** (Macmillan, 1971), portraying the Court between 1864 and 1888; and Johns Hopkins politi-

cal scientist Carl Swisher's **The Taney Period** (Macmillan, 1974), which covers the years 1835 to 1864. The editors of the Holmes Devise series opted for close narrative detail rather than broader thematic coverage. Only Swisher thus far has attempted to generalize about the Court's character in a given historical period.

Other valuable studies of individual Courts include historian Arnold Paul's **CONSERVATIVE CRISIS AND THE RULE OF LAW** (Cornell, 1960). Although written as a study of late 19th century legal thought rather than as an analysis of the performance of any one Court, it nonetheless casts light on the workings of the Court under Chief Justices Morrison R. Waite and Melville W. Fuller. Political scientist C. Herman Pritchett's **CIVIL LIBERTIES AND THE VINSON COURT** (Chicago, 1954) is a provocative treatment of the Court in the 1940s and '50s, which argues that the Vinson Court was too deferential to widespread public fears of Communist subversive activity in the McCarthy era. Harvard law professor and former special prosecutor Archibald Cox's **THE WARREN COURT** (Harvard, 1968, cloth & paper) attempts to comprehend and justify the Court's intense activism of the late 1950s and '60s.

The better biographies of Supreme Court Justices provide insights into the inner workings of the high tribunal. Albert J. Beveridge, a U.S. Senator from Indiana, produced a lively four-volume **LIFE OF JOHN MARSHALL** (Houghton Mifflin, 1916, 1975), which opens with Marshall's birth in rural Virginia in 1755, describes his role as the first great Chief Justice, and ends with his death at Philadelphia in 1835.

Journalist Leonard Baker's modern biography, **JOHN MARSHALL** (Macmillan, 1974), is comprehensive and readable but gives Marshall's decisions only surface treatment, perhaps because of the author's lack of legal training.

Carl Swisher has written two impressive biographies, **ROGER B. TANEY** (Archon, 1935, 1961) and **STEPHEN FIELD: CRAFTSMAN OF THE LAW** (Brookings, 1930; Archon, 1963). Each is a full account of its subject's career and a model of balance and insight. Charles Fairman's **MR. JUSTICE MILLER AND THE SUPREME COURT** (Russell & Russell, 1939, 1966) is a revealing study of a colorful Justice, whose well-crafted opinions failed to resolve completely the sharp conflicts over property rights and civil rights that prevailed in his day. The book is based largely on Fairman's access to correspondence between Miller and his friends and relatives while Miller sat on the Court from 1872 to 1890.

Law professor and former banker Gerald T. Dunne's **JOSEPH STORY AND THE RISE OF THE SUPREME COURT** (Simon & Schuster, 1970) began as an account of the origins of Story's ideas on the law of money, banking, and commerce but became a study of the Court's role in America's expansionist period prior to the Civil War. A just-published biography by Dunne, **HUGO BLACK AND THE JUDICIAL REVOLUTION** (Simon & Schuster, 1977) assesses Black's judicial posture in the context of the Court's expanded role after World War II.

Mark De Wolfe Howe's two-volume **MR. JUSTICE HOLMES** (Harvard, 1957, 1963) sets a new standard of excellence for judicial biography. Howe's first volume, **The Shaping Years,** covers Holmes's life between 1841 and 1872 and includes vivid descriptions of Civil War action from Holmes's own diaries. The second volume, **The Proving Years,** covers the intensely intellectual period Holmes spent as a lecturer and writer between 1872 and 1881. Howe, a law

professor at Harvard and a former clerk to Holmes, died before he could complete additional volumes.

Alpheus T. Mason has written comprehensive biographies of Justices Brandeis and Stone, **BRANDEIS: A Free Man's Life** (Viking, 1946, 1956) and **HARLAN FISKE STONE** (Shoe String, 1956, 1968). The latter book contains especially valuable information about the internal workings of the Court (e.g., the process of drafting and revising opinions to make them acceptable to fellow Justices), based on Mason's access to Stone's Court papers. Journalist Merlo Pusey's authorized two-volume **CHARLES EVANS HUGHES** (Columbia, 1951, 1963) is overly sympathetic but still thorough, informative, and well written. Helen S. Thomas's **FELIX FRANKFURTER: Scholar on the Bench** (Johns Hopkins, 1960) covers Frankfurter's judicial career from 1939 through the late 1950s. Thomas had inadequate access to her subject, but her portrait is nonetheless revealing as she explores Frankfurter's "intellectual debts, his own intellectual development, and the culmination of these factors in his Supreme Court opinions."

As yet there have been no outstanding studies of Justice William O. Douglas and Earl Warren, but Douglas's autobiographical **GO EAST, YOUNG MAN** (Random, 1974; Delta, 1975, cloth & paper) should be of interest to anyone eager to understand Douglas's liberal perspective as a Justice, although his narrative ends prior to his appointment to the Court in 1937. Two other volumes, neither of them full-length biographical studies, are worth mentioning here: **SERVING JUSTICE: A Supreme Court Clerk's View** (Charterhouse, 1974), by Virginia law professor J. Harvie Wilkinson, describes the author's tenure as law clerk to Justice Lewis F. Powell, Jr., offering an "insider's" glimpse of how the Court works; and political scientist David Danelski's **A SUPREME COURT JUSTICE IS APPOINTED** (Random, 1964, paper) is an incisive account of how Chief Justice William Howard Taft lobbied for the appointment of his friend, Pierce Butler, to the Court in the 1920s.

Hard cases are said to make "bad law," but they often make good reading. The "great" Supreme Court decisions in American history have often involved the resolution of sharply conflicting values or principles. Jethro Lieberman's recently published **MILESTONES** (Oxford, 1976) provides brief histories of 14 significant Supreme Court cases. Lieberman is a skilled writer who understands the peculiar contradictions in American culture, including the penchant for lawlessness and civil disobedience in a society based on a system of law.

Anthony Lewis's **GIDEON'S TRUMPET** (Random, 1964, cloth & paper) is a chronicle of the Warren Court's *Gideon* case, which makes mandatory the appointment of counsel for indigent felony defendants. It is both a helpful mini-history of Supreme Court adjudication and a vivid account of the personalities involved in *Gideon*.

Perhaps the single most impressive study of a Supreme Court decision is Richard Kluger's monumental **SIMPLE JUSTICE** (Knopf, 1976), a history of the Warren Court's *Brown* v. *Board of Education* decision outlawing segregation in the public schools. Kluger's purpose is to dramatize the *Brown* decision, and he succeeds admirably, combining portraits of the various characters involved in the litigation with the atmosphere of the civil rights movement in the 1950s.

Justices have been conspicuously reluctant to write memoirs. This shyness stems in large measure from a tradi-

tion of confidentiality that has continually surrounded the business of the Court. Public expectations of impartiality also have caused judges to be reticent about disclosing the personal aspects of their tenures. Nonetheless, a few Supreme Court Justices have written memoirs.

The two most readable are **THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES** edited by David Danelski and Joseph Tulchin (Harvard, 1974) and Douglas's **GO EAST, YOUNG MAN,** noted earlier. The following memoirs are primarily for specialists: John Marshall's **AUTOBIOGRAPHICAL SKETCH** edited by John S. Adams (Michigan, 1937; Da Capo, 1973); Roger Taney's "Early Life and Education" in Samuel Tyler's **MEMOIR OF ROGER BROOKE TANEY** (Murphy, 1872; Da Capo, 1970); Stephen Field's **PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA** (Da Capo, 1968) and **FROM THE DIARIES OF FELIX FRANKFURTER** (Norton, 1975). Earl Warren's autobiography was close to completion at his death in 1974, but publication is still uncertain.

Finally, a useful reference work on the Court and its members, past and present, is **THE JUSTICES OF THE UNITED STATES SUPREME COURT: Their Lives and Major Opinions, 1789–1969** (4 vols.) edited by Leon Friedman and Fred L. Israel (Chelsea House, 1969).

—G. Edward White

EDITOR'S NOTE. *Mr. White, professor of law at the University of Virginia Law School, is the author of* **THE AMERICAN JUDICIAL TRADITION** *(Oxford, 1976), a series of interpretive profiles of several leading Supreme Court Justices, which focuses attention on the Court's changing institutional role.*

The Supreme Court of the United States (SCOTUS) is the highest court in the federal judiciary of the United States. It has ultimate (and largely discretionary) appellate jurisdiction over all federal and state court cases that involve a point of federal law, and original jurisdiction over a narrow range of cases, specifically "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party". The Court holds the power of judicial review, the ability to The Supreme Court is the final court of appeal in the UK for civil cases, and for criminal cases from England, Wales and Northern Ireland. It hears cases of the greatest public or constitutional importance affecting the whole population. We are open on weekdays from 0930 to 1630. The supreme court is the highest court within the hierarchy of courts in many legal jurisdictions. Other descriptions for such courts include court of last resort, apex court, and high (or final) court of appeal. Broadly speaking, the decisions of a supreme court are not subject to further review by any other court. Supreme courts typically function primarily as appellate courts, hearing appeals from decisions of lower trial courts, or from intermediate-level appellate courts.