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.