THE SUPREME COURT AND AMERICAN CAPITALISM

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THE American state has developed two of its institutions to a degree never before attained—the capitalist form of business enterprise and the judicial power. At first sight the combination seems paradoxical, joining in a single pattern an exploitative type of economic behavior with the objectivity of the judicial process. But those who have studied the building of the American state know that the paradox lies only on the surface. It is no historical accident but a matter of cultural logic that a Field should grow where a Morgan does; and a Brandeis is none the less organic a product of capitalist society than is a Debs. If the contrast between the first pair and the second is precipitous, it is none the less contrast and not contradiction. Between our business enterprise and our judicial power there is the unity of an aggressive and cohesive cultural pattern. They seem of the same fibre; have, both of them, the same toughness, richness, extravagant growth; hold out at once portent and promise.

Capitalist business enterprise, while it has reached its most consummate form in the United States,[1] is generic to the whole western world. But the judicial power—or more exactly, judicial supremacy —is a uniquely American institution: [2] it could arise only in a federal state which attempts, as we do, to drive a wedge of constitutional uniformity through heterogeneous sectional and economic groupings. The core of judicial supremacy is of course the power of judicial review of legislative acts and administrative decisions.[3] And the

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† Managing Editor of the Encyclopædia of the Social Sciences. See the author's *The Social Thought of Mr. Justice Brandeis* (1931) 41 YALE L. J. 1.

The substance of this article was presented in briefer form in a paper read before the American Political Science Association, in Detroit, December, 1932.

1. An analysis of the course of American capitalism is included in section III, *infra.*

2. There have perhaps been states in the past more completely under the judicial sway than America. But that the rule of judges through their veto power over legislation is the unique American contribution to the science of government has become a truism of political thought.

3. The literature on judicial review is extensive and polemical. E. S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW (1914) is still unsurpassed for the history of the doctrine and his article on *Judicial Review* (1932) 8 ENCYCLOPÆDIA OF THE SOCIAL SCIENCES 457, is at once sane and penetrating. BOUDIN, GOVERNMENT BY JUDICIARY (1932), in the course of a vigorous attack on the institution, pro-

exercise of that power by the United States Supreme Court has made it not only "the world's most powerful court"[4] but the focal point of our bitterest political and constitutional polemics.

At the heart of these polemics is the recognition that the real meaning of the Court is to be found in the political rather than the legal realm, and that its concern is more significantly with power politics than with judicial technology. The Court itself of course, in its official theory of its own function, disclaims any relation to the province of government or the formation of public policy: it pictures itself as going about quietly applying permanent canons of interpretation to the settlement of individual disputes. If there is any truth in this position the Court's quietness must be regarded as that of the quiet spot in the center of a tornado. However serene it may be or may pretend to be in itself, the Court is the focal point of a set of dynamic forces which play havoc with the landmarks of the American state and determine the power configuration of the day. Whatever may be true of the function of private law as restricting itself to the settlement of disputes and the channeling of conduct in society, public law in a constitutional state operates to shift or stabilize the balance of social power.

There has been a tendency in some quarters to regard the power function of the Court as the result of an imperialistic expansion by which the justices have pushed their way to a "place in the sun.'[5] We still think in the shadow of Montesquieu and view the political process as an equation in governmental powers. The growth of the Court's power has, by this conception, taken place at the expense of the legislative and executive departments, and the American state has become the slave of a judicial oligarchy. The literature in which this enslavement is traced and expounded is voluminous, polemical and, even when very able, somewhat dull. It is dull with the dullness of a thin and mechanical *leitmotiv*—the theory of usurpation, of the deliberate annexation by the Court of powers never intended for it. This theory is part of the general philosophy of political equilibrium which, originating with the eighteenth century *philosophes*, was reënforced by nineteenth century physics. It holds that the safety of the individual can be assured only by maintaining a balance between the departments of the state. Whatever may have been the validity of such a phil-

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sents a valuable although overaccented examination of the sequence of Supreme Court decisions from the standpoint of the development of the judicial power.

4. The phrase is that of Felix Frankfurter, "Mr. Justice Brandeis and the Constitution," in Frankfurter, ed., MR. JUSTICE BRANDEIS (1932) at 125; but the appraisal represented is a general one.

5. For the most recent and most powerful development of this theme, see BOUDIN, *op. cit. supra* note 3.

osophy in a pre-industrial age, it has become archaic in a period when government is itself dwarfed by the new economic forces. It is as if generals in a besieged city should quarrel over precedence while the enemy was thundering at the gates.

There was, let it be admitted, a period in which the problem of judicial usurpation was a lively issue. Readers of Beveridge's volumes on Marshall[6] are struck by the bitter political tone of the early years of the Court, beginning even with its decision in *Chisholm v. Georgia.*[7] Charge and countercharge, invective and recrimination were staple, and in the din of party conflict it was no wonder that the still small voice of judicial objectivity was often completely drowned. In such an atmosphere usurpation had meaning and utility. The polity was in its formative stage, and there was little about the constitutional structure that was irrevocably settled. The Revolution had hewn out a new world but, as we who have been contemporaries of another Revolution can well understand, the task of giving that world content and precision of outline still remained. In the jockeying for political position and the general scramble for advantage, every argument counted, and much of the political theory of the day can be best understood in terms of this orientation toward the distribution of power. But what counted even more than theory was the *fait accompli.* Every new governmental step was decisive for later power configurations, and might some day be used as precedent. And the battles of the giants, Marshall's battles with Jefferson and Jackson, were the battles of men who knew how to use the *fait accompli.*

The Court has then from the very beginning been part of the power-structure of the state, acting as an interested arbiter of disputes between the branches of the government and between the states and the federal government, and with an increasingly magistral air distributing the governmental powers. But to a great extent the significant social struggles of the first half-century of the new state were waged outside the Court. Each period has its characacteristic clashes of interests and its characteristic battlegrounds where those clashes occur. In the pre-industrial period the party formations measured with a rough adequacy the vital sectional, economic and class differences in the country. The party battles of the period had some meaning, and accumulated stresses could

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6. THE LIFE OF JOHN MARSHALL (1916-20). This was of course due to some extent to the general bitterness of party polemics in a period of political realities. See also WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922) for a vivid depiction of a similar effect. Both Beveridge and Warren drew copiously upon newspaper material.

7. 2 Dall. 419 (U. S. 1793).

find release through changes of party power. The function of the Supreme Court in this scheme lay rather in settling the lines of the polity than in resolving disputes that could not be resolved outside. But when party formations grew increasingly blurred and issues like slavery and industrialism arose to cut across party lines, an attempt was made, notably in the Dred Scott case, to draw the Supreme Court into the struggle over social policy. The attempt was of course disastrous, for the slavery issue reached too deep to the economic and emotional foundations of the life of the day to be resolved by a counting of heads of more or less partisan judges. It is significant that the most direct effect of the Dred Scott decision was the sudden growth to power of a new political party, which should settle the basic question of public policy in the approved manner at the polls. The subsequent resort to war revealed that there might be some issues so basic that they could not be settled at all within the constitutional framework.

The coming of industrialism cut clear across the orientation and function of the Court as it cut across every other phase of American life. The doctrine of judicial review, whatever may have been its precedents and whatever the legalisms of its growth, had become by the middle of the century an integral part of the American political system. But it was not the dominant political institution, nor had it acquired the compelling incidence upon public policy that it has today. Before that could happen there had to be such a shift in the nature of the state that the characteristic clashes of interest would be taken out of the sphere of democratic control. In short only through the building of an extra-democratic structure of reality upon the framework of a democratic theory could the judicial power be given a real vitality or the Supreme Court attain its present towering command over the decision of public policy.

That transformation was effected by the maturing of capitalism with its strange combination of individualism as a pattern of belief and the corporation as a pattern of control. Business enterprise furnished the setting within which the Court was to operate, and in this setting the ramifications of the problems that came up for solution effected a complete change in the meaning and function of the judicial power. That power had always, when exercised, had far-reaching effects upon the process of our national life; even when in abeyance it had been a force to be reckoned with. The Court by expounding and applying the written Constitution had always constituted one of the elements that determined the shape and direction of the real constitution—the operative controls of our society. But the real Constitution became under capitalism merely the *modus operandi* of business enterprise. Between it on the one hand, and

on the other the ideals of the American experiment and the phrases in which the eighteenth century had clothed those ideals, there was an ever lengthening gulf: it became the function of the Supreme Court to bridge that gulf. Capitalist enterprise in America generated, as capitalism has everywhere generated, forces in government and in the underlying classes hostile to capitalistic expansion and bent upon curbing it: it became the function of the Court to check those forces and to lay down the lines of economic orthodoxy. For the effective performance of its purposes capitalist enterprise requires legal certainty amidst the flux of modern life,[8] legal uniformity amidst the heterogeneous conditions and opinions of a vast sprawling country, the legal vesting of interests amidst the swift changes of a technological society: to furnish it with these was the huge task which the Supreme Court had successfully to perform. The Court had of course other functions, and may be regarded from other angles. But if we seek a single and consistent body of principles which will furnish the rationale of the judicial power in the last half century, we must find in it the dynamics of American business enterprise.

II

The steady growth in the judicial power and the increasing evidences of its economic affiliations have made the Court one of the great American ogres, part of the demonology of liberal and radical thought.[9] It has served, in fact, as something of a testing-ground for political attitudes of every complexion. The Marxist, making the whole of politics merely an addendum to capitalism, sees the Court as the tool and capitalism as the primary force. The contemporary Jeffersonian, fearful of all centralizing power and zealous for the liberties of the common man, fears Wall Street and the Supreme Court alternately, uncertain as to which is the shadow and which the substance. His cousin the liberal, if he is of a constructive turn, counts on using the machinery of the Court to control in a statesmanlike fashion a developing capitalism which it is futile

8. It is generally accepted that one of the essential elements of law is certainty, and that it is especially essential for the development of capitalism. It encourages accumulation and investment by certifying the stability of the contractual relations. But it is to be conjectured that a speculative period in capitalist development thrives equally or better on uncertainty in the law. And in periods of economic collapse the crystallized certainty of capitalist law acts as an element of inflexibility in delaying adjustments to new conditions.

9. In America the liberals have been extremely critical of the power of judicial review. In Germany, however, on the question of introducing it, the liberals supported it while the conservative parties opposed it. See C. J. Friedrich, *The Issue of Judicial Review in Germany* (1928) 43 POL. SCI. Q. 188.

to turn back; or, if he has lost faith in the efficacy of tinkering with governmental machinery and has become an ethical liberal, he refuses to regard either Big Business or the Supreme Court in themselves important, but looks to the quality of the American experience that flows through them both. The technological liberal, who thinks in blueprints and plans for state planning, regards the Court as the great technical obstruction that his plans must meet, and racks his brain for ingenious ways of avoiding the encounter.

The contemporary indictment of the Court, which furnishes the point of departure for all these shades of opinion, is in the large well known. It holds that the Court's decisions can be better explained by economic bias than by judicial objectivity, and that its trend has been to bolster the *status quo*. This indictment is itself of course far from objective. It is the expression of an attitude. And that attitude can be best studied in relation to its genesis in the Progressive movement, which ran its brief course between the turn of the twentieth century and the American entrance into the war. To that movement may be traced the current "economic interpretation" of the Court, which links its decisions with the growth of capitalism. The Marxists might of course claim this approach as deriving from their own "materialist" conception, diluted or vulgarized in the course of its transmission to our shores. But whatever the degree of logical identity with Marxist materialism, in its actual historical growth the economic interpretation of the Supreme Court is a native product. It was out of the characteristic social conflicts of the Progressive period that the economic approach to the Court emerged, and from the intellectual dilemmas of the period that it received its formulation. In fact, if one still detects in the attitude of liberal critics of the court an equivocal and confused note, it may be found not wholly alien to the irresoluteness, the divided sense of hostility and acceptance that lay at the heart of the Progressive movement.

The Progressive period was one of great ferment in thought and gallantry in action.[10] A peculiar emotional intensity surrounded the public life. From the western plains the storm of agrarian Populism had already broken, in the form of state granger legislation, an Interstate Commerce Act, and all manner of heterodox currency proposals. The trust-busting offensive, which had opened with the

10. JOHN CHAMBERLAIN, FAREWELL TO REFORM (1932) gives a brilliant survey of "the rise, life and decay of the Progressive mind." 3 PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT (1930), left incomplete by the author's death, throws out a few suggestive leads, especially in the Introduction and the last chapter. HACKER AND KENDRICK, THE UNITED STATES SINCE 1865 (1932) gives an excellent account of the period.

Sherman Act, and had startled Wall Street in Roosevelt's drive against the Northern Securities combine, was moving on to the scrutiny of the Money Trust in the Pujo investigation. In the cities the muckrakers were canvassing the tie-up between political corruption and the "Interests," [11] and more solidly the labor movement was closing up its phalanxes and pressing for social legislation. Intellectually there was a prevailing *malaise*. The confidence in the national destiny was slipping, as was the faith in the adequacy of the democratic structure. Not since the days of Emerson and John Brown had Americans been forced thus to search their hearts and inquire into the direction of the national drift. The answer of the activists was the liberal revolt in politics against the increasing entrenchment of the illiberal forces. To that revolt the political thinkers made a definite contribution.[12] Probing the principles underlying the American venture they dug beneath the political ideals to their economic basis. They emerged with the discovery that the tie-up with the economic "Interests" applied not only to current politics but to the very fabric of the state; that the august Supreme Court and the still more august Constitution [13] which it expounded and guarded were not, as had been supposed, detached and self-contained; and that between them and the realities of the marketplace there was an unlovely traffic.

This discovery was made not, as the muckrakers and the populists had discovered Corruption and the Interests, through a journalistic foray into contemporary reality, but through a vast historical research. The revaluation of American democracy was pushed back to the Founding Fathers themselves, and with explosive results.[14]

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11. C. C. REGIER, THE ERA OF THE MUCKRAKERS (1932) gives a detailed account of this movement.

12. For an interesting analysis of this contribution and the intellectual situation which evoked it, see PARRINGTON, THE BEGINNINGS OF CRITICAL REALISM IN AMERICA (1930) Introductory chapter, xxiii-xxix, and "A Chapter on American Liberalism" at 401-413. Much of the same ground is covered in Parrington's Introduction to J. ALLEN SMITH, THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT (1930). "Considered historically," he says of the progressive thinkers, "their main contribution was the discovery of the undemocratic nature of the Federal constitution."

13. For an account of the hold of Constitution-worship on the American mind, see Hamilton, *Constitutionalism* (1931) 4 ENCYCLOPÆDIA OF THE SOCIAL SCIENCES 255.

14. It should be noted that some of the Fathers themselves were attracted by the idea of economic determination. This is especially true of Madison, whose realistic awareness of the relation between economic interest and political action was striking. See BEARD, ECONOMIC BASIS OF POLITICS (1922). In fact it may be said that the contact with Madison's thought became an element which has strengthened the hold of economic determinism in American thought.

To be sure, the dynamite was already at hand, in the temper and intellectual equipment of the period. The "vague terror" which "went over the earth" when "the word Socialism began to be heard" [15] at about this time had to some extent been felt as far away from German Marxism as were the American Centers of academic thought, and the class struggle as well as the materialist interpretation of history were not unheard of. Veblen in 1904 had shown in a chapter [16] of his *Theory of Business Enterprise* that the business influence extended to American law through a carry-over of the eighteenth century natural rights philosophy in the interests of Big Business. Even Turner's theory of a moving frontier, expounded as early as 1893,[17] had suggested how important might be the economic base of political attitudes. But these stray leads of scholarship counted for less than did the felt realities of the day. The air was filled with the clash of group and class economic interests: what easier than to project this clash back to the founding of the Republic?

This was exactly what J. Allen Smith did in 1907 in his *The Spirit of American Government*.[18] It was not a great book, as Veblen's books are great or Turner's essay. There was no titanic outpouring of social analysis in it, no brilliant and clean-cut theory. But it was a courageous book and a dogged one. It hung on to its thesis that the American state had been shaped in its growth by conflicts of interest that were at bottom economic. Smith was followed and buttressed by Charles Beard. In his *Economic Interpretation of the Constitution* (1913)—a title which in itself bore witness that a new Higher Criticism had been born—Beard's search of treasury records, convention debates and contemporary journals turned up formidable evidence to the effect that the Constitution was an "economic document" and had been railroaded through by the property interests of the time who stood to gain by it.[19] The

15. HOLMES, COLLECTED LEGAL PAPERS (1920) at 295.

16. C. viii, "Business Principles in Law and Politics".

17. "The Significance of the Frontier in American History," reprinted in TURNER, FRONTIER IN AMERICAN HISTORY (1921). CHAMBERLAIN, *op. cit. supra* note 10, has an interesting analysis of the relation of Turner's thesis to the Progressive movement.

18. For estimates of the place of this book in the thought of its day, see Parrington's Introduction to SMITH, *op. cit. supra* note 12; and Walton Hamilton's review of it (1930) 40 YALE L. J. 152.

19. Beard analyzed the "personality interests" as "money, public securities, manufactures, and trade and shipping." BEARD, ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913) at 324. See also chapter V, "The Economic Interests of the Members of the Convention." His last chapter contains a clear and forceful statement of his theses, which have the uncompromising ring of Luther's and were doubtless intended to be nailed up on all the academic doors of the day. See

reverberations of these books were considerable,[20] but whatever the anathema or discipleship that they stirred up, the venture in historical research had done its work. Through the attack on the Constitution a flank attack had been delivered on the Supreme Court.

But the analysis was now extended further, by a host of scholars and publicists.[21] It was not enough to show that the Constitution which the Court expounded had not the stainless objectivity which was claimed for it: the charge was now made that whatever the origins of the Constitution, the Court was not really expounding it but that the justices were reading their own class interests into it. Granted the validity of the historical thesis of Smith and Beard this was indeed a logical consequence, for it was not to be supposed that a process operative in the creation of the Constitution should cease to be operative in its interpretation. Bentley's *Process of Government* (1908), which made an impression on the scholars of the day, had shown government not as a formal structure but as a dynamic process twisted and turned in various directions under the pressure of group interests. This theory of pressures Bentley had applied to the judicial process as well, and it fitted in with the prevailing pluralist attack on nineteenth century Austinianism and the new emphasis given to the reality of economic groupings.[22] The result was a general assumption among the students of the Court that the decisions of the justices could be explained by their economic interests and sympathies—an assumption which rarely went as far as Gustavus Myers did in his uncompromising *History of the Supreme Court* (1912), but was often present as a preconception even where it was not avowed. Most of the discussion in the years immediately preceding the war was concentrated on judicial review.[23]

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for a similar analysis of the first decade of the new state, BEARD, ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY (1915) especially chapter VI, "Security-Holding and Politics."

20. It is perhaps not without significance that this period represented the impressionable intellectual years of the present generation of American constitutional scholars.

21. Much of the literature about the judicial power appeared in the decade after publication of Smith's book, and the writers (Beard, Goodnow, Corwin, McLaughlin, Hadley, Farrand, Boudin, Davis, Haines, Weyl, Warren and others) used as their point of departure, on one side or the other, the thesis of economic interest.

22. The fusion of these two strains—pluralism and the emphasis on economic realities—in the political thought at the beginning of the war is illustrated in Charles Beard's survey of tendencies, *Political Science in the Crucible* (1917) 13 NEW REPUBLIC, Nov. 17, part II, 3.

23. The discussion of judicial review of course dates back in a sense to the beginning of the Court's work. In its intense form it may be traced back to the

Its incidence and its historical validity were hotly debated, and the issue was even projected into the political campaigns in the form of proposals to strip the Court of its power, or at least determine the conditions under which the power could be exercised.[24]

We can see now that this entire Progressive critique of the connection of the Court with capitalism was itself a phase of capitalist development. It came at the crucial turn in the history of American business when it began to be clear that the system of controls set up by a democratic pre-industrial society were futile under the new conditions of life, and it marked the awakening of the middle class to that fact. Little Business felt itself being crowded out by Big Business, and for a brief moment the farmers, the traders, the unions, and the small bourgeoisie huddled together to check its further career. But as Walton Hamilton has put it, "their best wisdom was the product of a social experience that was passing." [25] Their anti-trust legislation, armed to cope with a situation produced by an exhausted individualism, continued to use the technique of that same individualism. When even that technique was burked by the decisions of the Court, and when more positive attempts at social legislation and government control met with an equal fate,[26] the relation between the Court and Big Business took on an unmistakeable clarity for the thinkers who expressed the world of little business.

Perhaps too great a clarity. The intellectual phase of the Progressive movement suffered from the populist tendency of the period toward the personal identification of villainy. Myers, fresh from his investigations of the direct personal corruption of the Tammany braves,[27] and of the unscrupulous careers of some of the builders of great American fortunes,[28] carried over the same mechanical

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furore that followed the decision in Dred Scott v. Sanford, 19 How. 393 (U. S. 1856) and later in Julliard v. Greenman, 110 U. S. 421 (1884). It was the latter case that called forth George Bancroft's fiery pamphlet, A PLEA FOR THE CONSTITUTION OF THE UNITED STATES WOUNDED IN THE HOUSE OF ITS GUARDIANS (1886).

24. The issue was most clearly drawn in La Follette's program.

25. *The Control of Big Business* (1932) 134 NATION 591, 592.

26. The stripping of the Sherman Act of much of its significance, the crippling of the Federal Trade Commission, and the attempts to qualify the powers of the Interstate Commerce Commission are important chapters in American administrative history. See SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931); HENDERSON, THE FEDERAL TRADE COMMISSION (1924); Myron Watkins, *The Federal Trade Commission* (1932) 32 COL. L. REV. 272; KEEZER AND MAY, THE PUBLIC CONTROL OF BUSINESS (1930); THE FEDERAL ANTI-TRUST LAWS, A SYMPOSIUM (1932).

27. THE HISTORY OF TAMMANY HALL (1901).

28. HISTORY OF THE GREAT AMERICAN FORTUNES (1910).

approach to the very different sphere of the judicial process,[29] and tried to show how a reactionary majority opinion might rest on the stock-holdings of the justice who had written it, or on his previous associations as a corporation lawyer. Beard too, on his mettle perhaps against academic hostility, tried to prove more than he had to; and while his investigations into the direct "personality interests" of the framers of the Constitution are a *tour de force* of historical research, the very concreteness of his approach did much to pave the way for a too mechanical economic interpretation of the Court. The search has been throughout for light on direct pressures and the personal motives of the judges. Even those who are averse to the economic interpretation tend to resolve the whole problem of the judicial process to a matter of personal judicial whim. How unfruitful both these approaches are—the mechanical economic interpretation and the atomistic personal interpretation —I hope to show in the last section of this paper. But before that it will be necessary to inquire to what extent a developing American capitalism did represent an impinging force upon the Court, and how the Court — as a whole and through its various ideological groups — reacted to that impact.

III

In itself capitalism is merely the name we give to a system of free individualist enterprise which allows and fortifies the accumulation of wealth.[30] It is thus in essence a scheme of economic organization going back to the beginning of modern times and resting upon legal institutions, the most important of which are private property and contract. Within these limits capitalism has more recently developed on the one hand a set of technological methods and on the other a set of working rules [31] which we call respectively industrialism and business. Both these lines of growth have wrought vast changes in the character of capitalist society. Industrialism in production has brought the factory, the machine process, the

29. HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1912).

30. In addition to Marx's classic analysis of capitalism, see SOMBART, DER MODERNE KAPITALISMUS (4th ed. 1921-27), and DER BOURGEOIS, Eng trans., (The quintessence of capitalism, 1915); HOBSON, THE EVOLUTION OF MODERN CAPITALISM (1926 ed.); and the writings of Thorstein Veblen, especially THE THEORY OF BUSINESS ENTERPRISE (1923), and ABSENTEE OWNERSHIP (1923). The point of departure for Veblen's work is the form that capitalism has taken in America. The emphasis of the present article is therefore rather on the Veblenian analysis than on the Marxist.

31. I take the phrase "working rules" from the suggestive analysis in COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924).

large city and the working class, and has given our world the characteristic outer stamp that it bears. Business enterprise has brought the corporation, the credit structure, the investment banker and the marketing mechanism, and has given our world its inner living spirit.[32] In both realms the working rules have changed so rapidly and with such fateful consequence as to merit the designation of "revolution." [33] But these revolutions, however drastic, have not shattered the outlines of the capitalist system. They have merely realized its inherent trends and possibilities.

It is obvious that the large movements of modern law can be understood best in relation to this development of a capitalist society. The ways of life and the property attitudes of this society while it was still rural and bourgeois have written themselves into the Anglo-American common law. They have written themselves also into American constitutional law, as embodied first in the written document drawn up by a group of "men of substance" acting as spokesmen for the more or less property-conscious American society of the late eighteenth century, and as interpreted by a property-conscious Supreme Court. In all societies the historical function of law has been to elaborate, rationalize and protect the dominant institutions and the accredited ways of life, and the function of public law has been to apply ultimately the coercion of the state toward maintaining the outlines of those dominant institutions.[34] American constitutional law, whatever may be its unique modes of operation and principles of growth, is not exempt from this function.

But here as everywhere the large historical generalization conceals great dangers. To say that American constitutional law rationalizes and gives sanction to American capitalist society is of little value unless the relation between the two is traced historically

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32. It is in this contrast between the matter-of-factness of industrialism and the sophisticated and devious business structure imposed upon it, that Veblen finds the central contradiction of capitalism. See his THEORY OF BUSINESS ENTERPRISE (1923); THE INSTINCT OF WORKMANSHIP (1914); ABSENTEE OWNERSHIP (1923).

33. The revolution in technology has been called the Industrial Revolution; the more recent technological developments have been called by Meakin the "Second Industrial Revolution"; BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) speak aptly of the drastic changes in the scale and methods of business as the "corporate revolution."

34. Maitland's remark, that "our whole constitutional law seems at times to be but an appendix to the law of real property" (THE CONSTITUTIONAL HISTORY OF ENGLAND (1908) at 538) was probably intended mainly to express his sense of the erratic logic of development in history. But it is significant also in showing how the line of development in public law is the legal elaboration and protection of the dominant institutions—in this case property.

and with an eye to the evolving character of each. As with all words that have grown to be symbols and are moved about as counters in argument, capitalism has taken on for us a singleness of meaning that beclouds more issues than it illumines. Actually of course it is not only an exceedingly complex institution, reaching out into many domains of what men do and how they think, but it is also a rapidly shifting one. Its tremendous importance for the Supreme Court flows from this fact of its change. For to a static capitalism, however baleful or beneficent, the Court and the nation could eventually work out a harmonious adjustment, balancing somehow the demands of constitutional rules with the interests of constituent groups. But a changing capitalism is continually undoing what is done even before it has been entirely done. Being a growing thing it creates conflicts of interest, problems of control, disorders in the "economic order" while the ink is scarce dry on the statute or decision which attempted to heal the ravages of some previous change. Its superior mobility over previous systems of economic organization, such as the feudal or slave systems, derives from the fact that it rests on a rapidly moving technological base and appeals to the free and even reckless flow of individual energy. We have as a consequence the characteristic transitionalism of modern western society and that instability of institutional arrangements which gives it its vitality. And in the United States the pace of capitalist development has been extraordinarily rapid, abbreviating the earlier stages upon which the European societies lingered for centuries, and setting the pace for the entire world in the latest stages.

The history of American capitalist development falls roughly into four periods. With due awareness of the danger of schematism, and with an eye especially to their impact upon the problem of legal control, the periods may be described as (1) pre-industrial capitalism, (2) industrial capitalism, (3) monopoly capitalism, and (4) finance capitalism.[35] Pre-industrial capitalism is a catch-all for the

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35. Periodization in modern economic history has varied of course with the point of view adopted (see, for example, works by the Hammonds, Clapham, Weber, Gras, Cunningham). Since capitalism is a Marxist concept, periodization from the point of view of capitalist development has been attempted by the Marxist writers or those deriving from them, and has been tied up intimately with the general development of Marxist theory. Werner Sombart's division of capitalism into *Frühkapitalismus, Hochkapitalismus* and *Spätkapitalismus* is well known. SOMBART, *op. cit. supra* note 30; also Sombart's article on *Capitalism* (1930) 3 ENCYCLOPÆDIA OF THE SOCIAL SCIENCES 195. Marx's own division was between pre-industrial capitalism, industrial capitalism and monoply capitalism. JOHN A. HOBSON, THE EVOLUTION OF MODERN CAPITALISM (1894) follows similar lines. Largely as a result of Hobson's analysis of imperialism in his book of that name, and also as a result of HILFERDING FINANZKAPITAL (1910) and the logic of events

various phases of development lying in European history between the commercial Revolution and the early decades of the nineteenth century;[36] in America, between colonization and the first railroad network in the eighteen forties. It was an economy still basically agricultural, with a growing superstructure of trade and small manufacture. In America as in Europe the juristic importance of this period lies in its having laid the foundations for the capitalist state, hewn out the institution of property, and fashioned the master ideas, such as individualism and natural rights, which were to exercise so tenacious a hold upon the modern mind.

What the pre-industrial period seems so neatly to have settled, industrial capitalism proceeded to unsettle. In America we may block out the four decades from the eighteen forties to the eighties as marking the rise of an industrial society. The machine-process,[37] large-scale industry, a far-flung system of transportation and communication, and an urban way of life represented the principle lines of development. The growth of monopoly, and of a financial structure was not at all absent in this period, but it was accompaniment rather than main theme: its possibilities, scarcely dreamt of, awaited later phases of capitalism. The sectional distribution of industrial development was uneven: until the Civil War it was so completely identified with the northern states to the exclusion of the southern that an only mildly heterodox theory of the Civil War attributes it to this antimony rather than to a struggle over human rights.[38] Large stretches of the West also have remained agrarian to this day. The main drift however toward the creation of an industrial state meant a vast displacement of pre-industrial institutions. The actual meaning and social incidence of property were radically

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at the outbreak of the war, the Marxists, especially LENIN, THE STATE AND REVOLUTION (1919), added another stage which they called variously and by its respective aspects "imperialistic capitalism" and "finance capitalism". In American economic history there has been little attempt to lay out a broad analysis of stages, other than that involved in the concept of industrialism. See for representative classifications, FAULKNER, AMERICAN ECONOMIC HISTORY (1924) and KIRKLAND, HISTORY OF AMERICAN ECONOMIC LIFE (1932). COMMONS, HISTORY OF LABOR (1926), divides American developments into the custom-order period, the merchant-capitalist or job-capitalist period, the middleman period and the corporation period; his point of view is that of the dependence of the laborer upon shifting entities with the extension of markets and of bargaining power over wider areas.

36. See for a good account of the European development, J. L. AND BARBARA HAMMOND, THE RISE OF MODERN INDUSTRY (1925).

37. See VEBLEN, *op. cit. supra* note 30.

38. 2 CHARLES AND MARY BEARD, THE RISE OF AMERICAN CIVILIZATION (1927) C. XVIII, "The Second American Revolution," which interprets the war as a revolution of the non-industrial South against the industrial north.

shifted. The gap between the propertied and the propertiless was widened and given significance, and the general lines of economic distribution and social stratification were drawn with the emergence of a capitalist entrepreneur class, a middle-class trading and professional class, and a class of workers of varying degrees of skill. Where the pre-industrial period had laid the property foundations of capitalist society, the industrial period laid its class foundations. But perhaps the outstanding achievement of the period was its fulfillment of the philosophy of individual initiative and competition as the organizing principles of economic society. The idea of a triumphant capitalism—the strongest force in American history—received here its decisive impetus. Despite the intensifying of class lines, this capitalist myth—and "myth" is used here neutrally to mean any evocative idea that patterns men's lives—stirred the energies of rich and poor and created a united front in the interests of capitalism.[39] There was as yet relatively little hostility manifested toward the propertied class by the propertiless: there could scarcely be hostility toward what every man hoped some day to attain.[40] The whole of American society was turned into an open state in which capitalist enterprise was given free movement and bidden Godspeed.

The period of monopoly capitalism, from the eighties to the decade before the World War, offers to the historian a striking dual visage. It was marked by a rapid concentration of economic power, but also by a disenchantment with capitalism.[41] The period witnessed not only the heightening of the movement for industrial consolidation, but also the building of a credit and banking structure, a technique of salesmanship and a set of business mores that all attested to the continuing vitality of capitalism.[42] But the united front was gone. In its place was the "independent" entrepreneur confronting the invincible aggression of the trusts. The competitive ideal, however neat had been the conception of it as the dominant control in the

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39. The concept of the "myth" as used here derives from SOREL, REFLECTIONS ON VIOLENCE (1912). Sorel used it of the myth of revolution, but it can be used of other master-ideas in the history of civilization.

40. See HADLEY, UNDERCURRENTS IN AMERICAN POLITICS (1915) lecture II, "The Constitutional Position of the Property Owner." The common man, says Hadley, "was not ready to declare war against an industrial society that offered him so many inducements to become one of its members."

41. For an analysis of this disenchantment, written just before the War by one of the Progressives, and couched in political rather than economic terms, see WALTER WEYL, THE NEW DEMOCRACY (1912) c. I.

42. For the classic statement of the outlines of the American business structure at the end of this period, see VEBLEN, ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE: THE CASE OF AMERICA (1923).

economic mechanism, had failed practically in organizing economic life. The open state was found to be a dangerous program, and some of the legislatures now began to throw up barricades against its further extension. Agrarianism, populism, trust-busting, muck-raking and progressivism grew to alarming strength. They represented, as we have seen, an inner cleavage in the forces that formerly had fought side by side in the advance of capitalism.

The final period—that of finance capitalism, covering the last quarter-century—was marked by a shift of axis in the economic world from industrial organization to financial control. The growth of the giant corporation found its significance not so much in the matter of magnitude as in the separation that it effected between the ownership and the management of industrial enterprise, and the opportunity it gave for the subtleties of corporation finance.[43] Investment banking became the central activity of the higher reaches of economic behavior, and such investment houses as that of Morgan, the symbol of economic power. The attempt to check the monopolistic trend came to seem increasingly hopeless, and attention was transferred to the dangers of financial concentration and banking control of industry.[44] The capitalist myth, so far from receding, received an accession of strength from two decades of mounting prosperity, but its type-figure was now cast not in the image of the entrepreneur but in that of the speculator or the financial promoter. The *bloc* that had been formed in the previous period to stem the growth of the large corporation and the money power found that their task had become archaic, and that the principal concern of the community lay in a fair distribution of profits and risks *within* the corporate and pecuniary structure. The failure of the old controls seemed established by the crisis of 1929, and the search for new controls began along the line of economic planning by the government or some form of autonomous rationalization within the business structure.[45]

These successive shifts of focus in American economic reality have done much to determine the large sweep of American constitutional law. They have done so in a threefold way: by setting the characteristic problems that have appeared for decision before the Supreme Court; by creating the conflicts and the clashes of interests which have given those problems importance for the community;

43. See BERLE AND MEANS, *op. cit. supra* note 33.

44. BRANDEIS, OTHER PEOPLE'S MONEY (1914), especially c. IX, "The Failure of Banker-Management."

45. For the relation of the Supreme Court to the trend of these developments, see E. S. Corwin, *Social Planning under the Constitution* (1932) 26 AMERICAN POLITICAL SCIENCE REVIEW.

and by fashioning the ideologies which have to a large degree influenced the decisions. Put in another way the impact of American capitalistic development on the Court has been at once to pose the problems and to condition the answers.

The increasing push and thrust of economic problems upon the business of the Supreme Court has been noted by Professors Frankfurter and Landis.[46] Within this larger trend it is interesting to analyze by what dynamics of the economic process the varied range of problems are brought into the area of decision. The ordinary groupings around legal subject matter, or the groupings around clauses in the Constitution or around devices in the Court procedure are not entirely revealing. To know that a case is an injunction case, or that it came under a writ of certiorari, or that it appealed to the due process clause of the Fourteenth Amendment conveys little of the context of emotion and belief that might give it meaning. The groupings might more realistically be built around those clashes of interests within the economic system or clashes of attitude about it out of which the cases proceed.

These clashes of interest are as varied of course as the economic life that they mirror. They are at once evidences of maladjustment and challenges to control. Some are concerned with the organizational aspects of capitalism, others with the incidence of its functioning, still others with the distribution of its flow of income. Thus one may find clashes of interest between workers and employers over wages or hours or working conditions or plans for social insurance; between groups of business-men over trade practises (in the sphere of business mores) or the maintenance of competition (in the sphere of economic ideology); between consumers and public utility groups over rates and services; between consumers and other business groups over prices and standards; between ownership and control groups within the corporate structure over the division of profits; between agricultural and industrial groups, Big Business and Little Business groups, groups being taxed and the government as taxer; between all sorts of groups who would stand to gain from a particular government policy, such as a grant of direct relief or an issue of legal tender paper, and those who would stand to lose;[47] between the

46. THE BUSINESS OF THE SUPREME COURT (1927) c. VIII.

47. The clash of interest between debtor and creditor groups is clearly expressed in the Legal Tender cases, especially in Mr. Justice Bradley's concurring dissent, 12 Wall. 457, 554, 564 (U. S. 1870): "The heart of the nation must not be crushed out. The people must be aided to pay their debts and meet their obligations. The debtor interest of the country reperesent its bone and sinew, and must be encouraged to pursue its avocations. . . But the creditor interest will lose some of its gold! Is gold the one thing needful? Is it worse for the

interests of autonomous business control and those of state-enforced competitive enterprise; between the interests of individual enterprise and those of collective control; between those who have a property interest in the *status quo* and those who have a humanistic interest in changing it.

In short, capitalism pushes ultimately before the Court the clashes of interest that are attendant on the growth of any economic system, with the displacement in each successive phase of elements that had been useful in previous phases, with the antagonisms it generates among those who are bearing its burdens and the rivalry among those who are dividing its spoils, and with the inherent contradictions that it may possess. If it be added to this that modern capitalism is perhaps the least organic system of economic organization the world has seen—"often, though not always, a mere congeries of possessors and pursuers," J. M. Keynes has called it[48]—and that the American social and political structure within which it operates is perhaps more sprawling and heterogeneous than that of any other major capitalist society, some notion may be had of the confusion of interests and purposes out of which it is the task of the Court to bring certainty and uniformity.

The dimensions of the task must however be qualified in several respects. Not every case that comes before the Court involves grave conflicts of interest or broad issues of public policy; it is only the exceptional cases that do. Moreover the pressures and interests summarily analyzed above apply to the entire governmental process in a capitalist state, and not merely to the Court. In fact, the Court does not fight on the front lines but must be considered a reserve force. The brunt of the attack and the task of reconciling the conflicts is met by the legislatures and the administrative agencies, which are more amenable to democratic control than is a small tribunal holding office for life. It is only what survives the legislative barriers and also the jurisdictional exclusions of the Court,[49] that comes finally to pose its issues. And even of this group not every case involving an important conflict of interests will exact from the Court that intense absorption with its social values and implications which creates the nexus binding the judicial process to the economic system. Many a case which, if it had come later or earlier in the country's development might have been decided differently or constituted a

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creditor to lose a little by depreciation than everything by the bankruptcy of his debtor"?

48. Quoted in TAWNEY, RELIGION AND THE RISE OF CAPITALISM (1926) at 286.

49. For the substantive importance of many of these procedural exclusions, see FRANKFURTER AND LANDIS, *op. cit. supra* note 46; and their annual reviews of the same subject in the HARVARD LAW REVIEW.

leading case fails at the time to call into play the entire concentration of the Court's social philosophy.[50] For at any period neither the Court nor the country can focus its energies on more than a few dominant issues. It is the area that includes these issues—let us call it the "area of vital conflict"—that determines the path of growth in the judicial process and fashions the outlines of constitutional law.

IV

When we turn to the sequence of decision in the history of the Supreme Court do we find in it any of the movement and stir that have marked the growth of American capitalism? To most the question would seem to call for a definite answer in the negative. There is a tendency, whenever economics and the judicial process are brought into relation, to regard the first as the active and the second as the passive element, the first as marking the line of growth and the second as adjusting itself—or rather, failing to adjust itself—to that growth.[51] There is so much in legal history which seems to verify this view that our great danger lies in being tempted to regard it as true. The sociologists have built a theory of the "legal lag" on the assumption of its validity,[52] and much of the "liberal" criticism of the Court's decisions attributes to that tribunal a distressing medley of imperviousness and ferocity toward economic reality. The conception is often extended to include the backwardness and inertia of the whole of legal science.

In reality this view embodies only a half-truth, and at present the more dangerous half. We may guess that it had its origin and perhaps found its validity in the attempt to bolster the fighting re-

50. It has been noted that the Court in its present composition is likely to be liberal with regard to cases affecting personal liberties, but conservative with regard to the protection of property rights: see Shulman, *The Supreme Court's Attitude toward Liberty of Contract and Freedom of Speech* (1931) 41 YALE L. J. 262. An explanation for this might be sought in the fact that issues of personal liberty are not at present as squarely in the area of vital conflict as are property issues. In time of war or of war hysteria we should expect that inconsistency to be ironed out.

51. For a clear statement of this theme, see HENDERSON, THE POSITION OF THE FOREIGN CORPORATION IN AMERICAN CONSTITUTIONAL LAW (1918) at 3-9, where he speaks of economic change as the "dynamic element" in constitutional development, and formal doctrine as the "state element."

52. The entire conception of the legal lag, which owes much to DICEY, LECTURES OF THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (1905); OGBURN, SOCIAL CHANGE (1923); and to American sociological jurisprudence; needs to be re-examined more thoroughly than the limits of this paper will allow.

formist faith of the Progressive movement by building a somewhat ramshackle sociology for legal thought. It dates from the period when a sociological jurisprudence had considerable intellectual appeal, and it seemed to receive confirmation whenever the Court definitely placed obstacles in the path of social legislation. But it tends to obscure the important fact that law is as much a growth as is economics. The principle of growth of a legal doctrine is undoubtedly not that of an economic technique. It is likely to be more tortuous and elusive, and to attain its results rather by indirection than by a steady processional sequence. But legal doctrines do have their life histories.[53] The very fictions they embody are, by the fact of being fictions, vehicles of change. Instead of positing an antithesis between a dynamic economic activity and a static law, it is truer to see the growth of each interwoven with the other and conditioning the other. Just as the meaning of American constitutional law emerges best from the dynamics of American capitalism, so the meaning of capitalism is most securely found in the developing legal institutions of property, liberty and contract, and their aggrandizement through the doctrine of due process.

The course of Supreme Court decision when viewed thus falls, like the course of capitalist development itself, into fairly well defined periods. It will be well in blocking them out to abstrain from ethical designations such as "liberal," "conservative" and "reactionary" which are confusing because of the continual shift of criteria as new forces and alignments come into play.

The line of judicial growth in the first half century of the court lay in a pronounced nationalism as expressed in the subordination of the state legislatures and the protection of vested property rights.[54] Of these the limitation of state power was probably more in the forefront of Federalist consciousness than the protection of property, although the two motives were often fused. But it was more than an article of Federalist faith; it was already a constitutional tradition holding over from the ideology and temper of the Constitutional Convention. There was a prevailing distrust of anything that the states might do in a new society, a distrust which was part of that fear of the people that pursued Federalist thought throughout. State legislatures were deemed dangerous because they had yielded basely to the

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53. For a general theory of the life history of legal doctrines, see Walton Hamilton's article on the *Judicial Process* (1932), 8 ENCYCLOPÆDIA OF THE SOCIAL SCIENCES 450. See also by the same author, *The Ancient Maxim Caveat Emptor* (1931) 40 YALE L. J. 1133; and *Affectation with Public Interest* (1930) 39 YALE L. J. 1089.

54. C. G. HAINES, REVIVAL OF NATURAL LAW CONCEPTS (1930) c. IV is especially full on the growth of judicial doctrine in this early period.

pressures of the multitude, cutting debts, issuing paper money, cancelling obligations. To prevent such irresponsibility a line of cases, of which *Fletcher v. Peck* [55] and *Dartmouth College Trustees v. Woodward* [56] were the most notable, interpreted the "obligations of contract" clause of the Constitution in a way that has made it of far-reaching economic importance. The Court evidenced thus at the very beginning a concern for property that was to grow in intensity, and incorporated it in a doctrine of vested rights which Professor Corwin has noted as one of its first doctrinal creations.[57]

Of course, it is quite easy to read our own property conflicts into the phrases of the day, and make an identification where there is room only for a comparison. Private property was not on the defensive in the America of Marshall as it was to be in the successive America's of Field, Peckham, Pitney, and Sutherland. It was part of the rising society and connected with the future of the new state, and the judicial support of it was an expression of the prevailing ideology.[58] It is noteworthy that on the issue of the desirability of social protection of property rights—as distinct from the issue of whether the task was a fit one for the judiciary to perform, and the issue of states rights that was involved—there was little disagreement between the Federalist and Democratic administrations before Jackson. Even the early "populist" outbreaks, like Shays' Rebellion, were not organic revolts against the ominous features of an economic system as was the Populist movement a century later, but were part of the revolutionary unsettlement and the post-war economic impoverishment. And the Jacksonian revolution, with its extension of the suffrage and its frontier democracy, did not materially change the constitutional position of property.[59] On the frontier, as President Hadley has pointed out, property rights had greater sanction and more immediate protection than human rights.[60] One of the striking mélanges of the period, incidentally, is to be

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55. 6 Cranch 87 (U. S. 1810).

56. 4 Wheat. 518 (U. S. 1819).

57. E. S. Corwin, *The Basic Doctrine of American Constitutional Law* (1914) 12 MICH. L. REV. 247, 275. See for a good general treatment of this period, with an eye to its economic development as well, C. G. HAINES, *op. cit. supra* note 54, especially c. IV.

58. HADLEY, *op. cit. supra* note 40.

59. HADLEY, *id.* at 27.

60. "The small protection given to the rights of man, as compared with that which was accorded to the rights of property, is a salient feature in the history of the early American state—and continues in its later history as well"—HADLEY, *ibid.* He speaks in the same place of the "democratic concern for the interests of the property owner and the democratic unconcern for the interests of humanity."

found in the manner in which Federalist jurists conscripted the Jeffersonian ideology of natural law in the service of a doctrine of vested rights which restricted the powers of Jeffersonian state legislatures at the same time that it protected property dear to both parties. That Marshall's motivation throughout was national unity in the interests of the smooth functioning of the increasing commercial activity of the country[61] is shown further in his decision in *McCulloch v. Maryland*,[62] in which Congressional control of monetary affairs was upheld, and the decisions interpreting the Commerce Clause,[63] especially *Gibbons v. Ogden*[64] and *Brown v. Maryland*.[65]

The period of judicial nationalism had coincided roughly with the pre-industrial period and expressed its ways of thought and life tolerably well. The second period of the Court's history, extending from the eighteen thirties to the Civil War reflected to a degree the coming of industrial capitalism. It was in its juristic ideas a definitely transitional period, marked by no consistent drive except a disinclination to place obstacles in the way of the forging of an industrial society. The relatively tolerant attitude of the Court toward state legislation in the first two decades of Jacksonian democracy (1830-1850) was followed in the next decade by a reaction against the reckless land and currency activities of the western legislatures.[66] The idea of implied constitutional limitations on the state power was used as a convenient doctrine; but although it followed logically from the sanction that natural law gave to vested rights, and although there was vigorous agitation for it by Story and Kent and later by Cooley, the Court in this period gave only a hesitating allegiance to it.[67] Its attitude was on the whole

61. BOUDIN, *op. cit. supra* note 3, c. XII, "John Marshall and the Rise of Nationalism," speaks of Marshall as being one of the real leaders of the "Young America" movement, and therefore more closely identified with Madison and Clay than with the elder statesmen of the Federalist Party. Mr. Boudin also contends that there is an ideological break in Marshall's career between his earlier and his later opinions, conditioned by this new development. Although Mr. Boudin intends it to show that Marshall was important despite *Marbury v. Madison*, and that he was not the founder of the modern doctrine of Judicial review, the chief importance of this lead for the present discussion lies in its fortifying the view that Marshall, like Clay, Webster and the rest of the nationalist group, was interested in clearing the field for the extension of commerce and industry.

62. 4 Wheat. 316 (U. S. 1819).

63. Frankfurter and Freund, *Interstate Commerce* (1932) 8 ENCYCLOPÆDIA OF THE SOCIAL SCIENCES 220, traces incisively the course of interpretation of the commerce clause in American constitutional law in relation to our economic development.

64. 22 U. S. 1 (1824).

65. 25 U. S. 419 (1827).

66. HAINES, *op cit. supra* note 54, at 97, 98.

67. HAINES, *id.* at c. IV.

pragmatic. Industrialism, with its introduction of a system of transportation and a marketing area that cut across state boundaries and shattered the validity of the state-nation concept as a dichotomy, was bringing problems that could not be solved by a single formula. In the interpretation of the commerce clause a series of decisions which, despite the prevalent confusion of purpose, had since *Gibbon v. Ogden* clung to a pragmatic insistence on defining state power in regulating interstate commerce by examining its consequences, was summed up in *Cooley v. Board of Wardens* [68] which in effect opened the way for sustaining state regulation where that would facilitate the progress of industrialism.[69] The slavery issue was the great jarring note of emotional absolutism. It was an unavowed participant in many of the opinions, and by polarizing the emotions of the country it introduced into the decisions of the Court a more marked political bias. But the Dred Scott decision may itself be interpretated in terms of the "sweep of economic forces".[70] It marked a crucial recognition by a land-owning capitalism that the industrial capitalism that was rising in the northern states was more than a principle of economic organization but reached to the fabric of the state, and would have to be combatted with the weapons of constitutional law.

The period of constitutional interpretation that extended from the end of the Civil War to the middle of the eighties presents as interesting and challenging a sequence of decision as any in the Court's history. Since it measures the transition from a competitive industrialism to a monopolistic capitalism, it contains the genesis of many of the problems of regulation that dominate the subsequent history of the Court. Coming also immediately after the Civil War, it marks the convergence of a set of attitudes relating to business enterprise with a set of attitudes relating to Reconstruction—to the confusion of both. Thus in the early part of the period, while the Reconstruction issue was still fresh, the economic influences which would otherwise have helped shape the course of judicial decision are qualified and confused; and in the latter part, when the economic ideologies reassert themselves, a constitutional amendment intended primarily as a guide for the problem of reconstruction is increasingly pressed into service to bolster a theory of economic statesmanship. Not only do the cases smell of powder but often of the powder of two different battles.

68. 53 U. S. 299 (1851).

69. Frankfurter and Freund, *supra* note 63, at 222.

70. The phrase is from CHARLES AND MARY BEARD, *op. cit, supra* note 38. Chapter XVII contains a good account of the economic and emotional setting of the Dred Scott decision.

The Fourteenth Amendment, which has laid its hand so heavily upon American constitutional law, seems to have come into being with less attendant innocence than had until recently been believed. Professor Kendrick's edition of the Journal of the committee [71] which prepared the amendment indicates that the notion of using a negro rights amendment to restrict state legislative raids upon business interests was not wholly absent from the minds of the members. It did not receive definite expression before the Court, however, until Roscoe Conkling's argument in the *San Mateo* case.[72] But even clearer was the intent on the part of the Radical Republicans to use the amendment as an entering wedge to effect a complete constitutional subordination of the states to the nation, not so much in the interests of property as in the interests of northern control.[73] The first test of the amendment in the Slaughterhouse case [74] was therefore not a clear-cut decision on the economic issue of regulation that was involved but was oriented toward the political issue, which was more directly in the area of vital conflict of the day. But the most important parts of the decision are the brief of ex-Justice Campbell and Justice Field's dissenting opinion [75] that was based on it. Campbell's line of reasoning, by which the due process clause could be interpreted to support property rights against legislative restriction, was subsequently hammered away at the Court in a series of powerful dissenting opinions by Field [76] and his supporters until their triumph in *Allgeyer v. Louisiana.*[77] Whatever the orientation of the majority in the case, the Field orientation was economic. It is as if he had a prevision of the future needs of capitalist enterprise and how those needs would be supplied. The second and more crucial test of the Fourteenth Amendment, in *Munn v. Illinois,*[78] was, because of its setting in the Granger revolt [79] rather than the Reconstruction

71. B. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865-1867 (1914).

72. County of San Mateo v. Southern Pacific Ry. Co., 116 U. S. 138 (1885). For a discussion of this case, see KENDRICK, *op. cit. supra* note 71, at 28-36.

73. KENDRICK, *id.* at c. VII, VIII.

74. Slaughterhouse Cases, 16 Wall, 36 (U. S. 1872).

75. *Id.* at 83.

76. Walter Nelles' review of SWISHER, STEPHEN J. FIELD (1930) in (1931), 40 YALE L. J. 998, is a remarkable analysis of the relation between Field's opinions and the forces active in the developing society in which he lived. An adequate treatment of the relation between the Supreme Court and American capitalism must wait upon the publication of such other analytic studies of the other Supreme Court justices.

77. 165 U. S. 578 (1897).

78. 94 U. S. 113 (1876); also the Granger cases, 94 U. S. 155 (1876).

79. See SOLON J. BUCK, THE GRANGER MOVEMENT (1913), and THE AGRARIAN CRUSADE (1920); also HACKNER AND KENDRICK, *op. cit. supra* note 10, part I.

issue, fought on new ground. The incidence of the monopolistic trends upon the farmers, whose position in a capitalist society is at best anachronistic, had led to the passage of regulatory state legislation. The reaction of the business community to the Waite opinion, with its attitude of judicial toleration of the state acts, and Justice Field's dissent as the expression of that reaction, marked the beginning of a *grand peur* which seized the property interests and scarcely abated for several decades until they had arrived within the secure confines of *Allgeyer v. Louisiana* and *Lochner v. New York*.[80] It was scarcely a coincidence that this epidemic of fear coincided with the publication of Cooley's *Constitutional Limitations*.[81] But the most significant phase of the campaign for a new conception of due process lay in the steady insistence of the counsel for the corporations that the justices owed a duty to the society they lived in to conserve its most sacred institution even in the face of the strict constitutional logic of the situation.[82] This was the first important manifestation of the social animus of the new corporation lawyers and of the effects of their association with the ideology of business.

This period in the Court's history from the Civil War to the first victory of the Field cohorts in the mid-eighties was thus one of the fateful periods in our national life. It marked a parting of the ways between a policy of judicial tolerance and one of the further extension of judicial review. The Court stood poised between the agrarian revolt, which had been stirred by the growth of monopolist capital-

80. 198 U. S. 45 (1905).

81. HAINES, *op. cit. supra* note 54, at 122; see also William Seagle, "Thomas M. Cooley" (1931), 4 ENCYCLOPÆDIA OF THE SOCIAL SCIENCES 356.

82. A rather remarkable example is contained in Choate's argument in Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 532, 534, 553 (1895). "I believe that there are rights of property here to be protected; that we have a right to come to this court and ask for this protection, and that this court has a right, without asking leave of the Attorney General or of any counsel, to hear our plea. The act of Congress we are impugning before you is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic—what shall I call them—populistic as ever have been addressed to any political assembly in the world. . . I have thought that one of the fundamental objects of all civilized government was the preservation of the rights of private property. I have thought that it was the very keystone of the arch upon which all civilized government rests. . . If it be true . . . that the passions of the people are aroused on this subject, if it be true that a mighty army of sixty million citizens is likely to be incensed by this decision, it is the more vital to the future welfare of this country that this court again resolutely and courageously declare, as Marshall did, that it *has* the power to set aside an act of Congress violative of the Constitution, and that it will not hesitate in executing that power, no matter what the threatened consequences of popular or populistic wealth may be."

ism, and the business interests whose new militancy concealed their uneasiness. We know of course which policy eventually prevailed and what a difference that has made in our national life. It is relatively easy from the vantage ground of the present to say that a real choice never existed, and that the development of monopoly capitalism made the outcome for the Supreme Court an inevitable one. But inevitability is a summary word that solves too many difficulties. Capitalist development certainly weighted the scales. It set the wider limits outside of which no choice was possible. But within those limits the country had a chance at a choice—and took it.

The doctrine which came to the fore in the mid-eighties and dominated the court for a quarter century was on the economic side a militant expression of *laissez-faire* and on the legal side a no less militant extension of the economic scope of due process. It seems at first sight surprising that a period which was seeing the individualistic ideal of competition gave way to monopoly should call for a *laissez-faire* policy in its Court decisions. But *laissez-faire* is to be distinguished from individualism; the latter is a philosophy, the former a mandate.[83] *Laissez-faire* may conceivably proceed from a cherishing of individualist values, but since it would in such an event have to qualify its imperative claims for freedom from legislative interference by a recognition of the individualist values which are injured by such freedom, its relations are likely to be solely empirical. The change from the individualism at the basis of the previous period of judicial toleration to the *laissez-faire-ism* of the new restrictive period measured the difference between the two intellectual climates. There was of course a new alignment in the Court; the old minority had become a majority. But it was a new Court in a new society. It was not a sport, but an organic part of a period which has come down in the history of American life as thin in its cultural fibre and crass in its political morality. One may hazard that much of the responsibility is to be laid to the disillusioning effect of the competitive breakdown under the pressure of new and unscrupulous business mores.

The period of judicial toleration had, we have noted, been a crucial period, hesitant and divided when confronted by bewildering problems of a new industrialism. The period of judicial restriction was, when confronted by a dangerous revolt against the incidence of the new forms of capitalist enterprise,[84] decisive and militant. And it

83. For the connection between the program of *laissez-faire* in the American situation, and the theory of natural rights of which it makes use, see VEBLEN, THE VESTED INTERESTS AND THE COMMON MAN (1920).

84. Not least among the causes for the militancy of the possessing classes, reflected in the militancy of the Court, was the influx of immigration and the

was in its own way remarkably creative. On every important front of public policy it transformed the existing dictrine with considerable ingenuity[85]—in the field of railroad regulation (*Santa Clara County v. Southern Pacific Rr.;*[86] *Chicago, Milwaukee and St. Paul v. Minnesota;*[87] *Smythe v. Ames*),[88] business control (*Allgeyer v. Louisiana*), federal taxation (*Pollock v. Farmers Loan and Trust*),[89] regulation of hours (*Lochner v. New York*), social legislation (*Employers' Liability Cases*),[90] and anti-trust cases (*United States v. E. C. Knight Company*).[91] It was in this period that the powerful conceptions of contemporary constitutional law—due process,[92] police powers,[93] liberty of contract[94] and the rule of reasonableness[95]—received their real impetus and elaboration.

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growth of a labor movement which, while in the main a "business unionism" variety, was often engaged in violent clashes with employers. The fear of the immigrant worker, and the contempt for him, have been influential in American history not only in heightening the clash between capitalists and laborers, but in putting behind the former a united body of opinion representing middle class respectability. The Court in its decisions in this period reflected the prevalent Catonian attitude toward the labor movement, which called for its extirpation. I COMMONS, *op. cit. supra* note 35, at 9, points out however that the courts by blocking labor's way toward reform probably made the trade union movement even more aggressive.

85. The sequence of steps by which the Fourteenth Amendment was pressed into use for the protection of business interests against legislative regulation seems to have been somewhat as follows: 1) The decision that corporations are "persons" within the meaning of the Amendment; 2) the decision that equal protection of the laws applies to foreign corporations as well as to individuals from outside states; 3) the decision that the due process clause applies to legislative and administrative attempts to regulate rates and other matters connected with the conduct of business enterprise; 4) the decision that liberty of contract is a right of liberty (or of property) within the meaning of the Amendment; 5) the decision that the police power and the public interest doctrine must be narrowly and urgently construed in determining exemption from the due process clause; 6) the decision that the reasonableness of state legislation is not a matter of presumption by the fact that the legislation passed the gauntlet of the legislative process, but is open to examination by the Court.

86. 118 U. S. 394 (1886).

87. 134 U. S. 418 (1890).

88. 169 U. S. 466 (1898).

89. 157 U. S. 429 (1895).

90. 207 U. S. 463 (1908).

91. 156 U. S. 1 (1895).

92. See HAINES, *op. cit. supra* note 54, at c. VI; Hough, *Due Process of Law—Today* (1919) 32 HARV. L. REV. 218.

93. See FREUND, POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904).

94. See Walton Hamilton, *Freedom of Contract* (1931) 6 ENCYCLOPÆDIA OF THE SOCIAL SCIENCES 450; Roscoe Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454; Shulman, *op. cit. supra* note 50.

95. See BOUDIN, *op. cit. supra* note 3; HAINES, *op. cit. supra* note 54, at c. VII.

In the last quarter century the trend of judicial decision has again become vacillating for lack of some decisive movement within capitalist enterprise itself to give it firmness and direction. The second decade of the century is generally considered to have been "liberal," and *Muller v. Oregon* [96] was hailed as a significant turning-point; the third decade is regarded as a "reactionary" return to normalcy; during the last several years liberals with their ears to the ground have again detected pulsations of hope. A closer analysis, however, of these three phases of the period fails to reveal any striking contrasts.[97] Nor do they show a unified line of growth. At the basis of their failure to achieve direction lies the character of the finance-capitalist society in which they have been working. Its pace of change in the field of both corporate and human relations has been too rapid to leave the earlier legal rules untouched, but too insecure to furnish a means of transforming them. It has ceased to be merely a monopoly capitalism, but it has not yet articulated a technique to control its new creatures, the giant corporation and the expanding credit structure. It has outgrown its complete imperviousness to the plight of the underlying classes, but has not yet found a way of meeting either their demands or their requirements. The old individualistic controls are clearly a thing of the past: to cling to them would involve drastic results for the entire economic structure. But pending a discovery of controls that will replace them the Court has waited for a crystallization of capitalist attitudes.[98] The tentativeness of this period has of course furnished the able and decisive minority group with a golden opportunity to influence the trend of decision. But a minority can work only interstitially,[99] and never against the grain of current economic development. Whether capitalist enterprise can crystallize its new purposes and perfect its techniques sufficiently to give the Court again a clear faith and an articulated ideology remains to be seen.

96. 208 U. S. 412 (1908).

97. For such an analysis, see BOUDIN, *op. cit. supra* note 54, at c. XXXVIII, XXXIX. The basis of Boudin's skepticism is partly the failure of the decisions to evidence any intention on the part of the Court to declare any self-denying ordinances, with regard to the judicial power; partly that even in the "liberal" decisions, the Court—as regards the larger trends of the rule of reasonableness, or any *rule* for future cases—was timid and even reactionary.

98. The critics of the Court have in one respect uniformly done it an injustice. They have not recognized sufficiently the tremendous task that devolves upon the Court—once it is agreed that legislation is to be scrutinized at all—to make the legislation harmonize with the fundamental purposes of a capitalist economy. For these purposes are not always clear, even to industrialists and bankers. And in the confusion of council that characterizes present trends within business, the task of the Supreme Court is all the more difficult.

99. That is, only within the limits set by the dominant institutions.

V

The nexus between the course of Supreme Court decision and the realities of American capitalism[100] poses some crucial problems as to the nature of the judicial process. It is upon this broader question that all our current theoretical interests in American constitutional law converge, for it is here that one approaches the dynamics of growth in the law. Contemporary American thought on this question is in the transitional stage attendant upon having shattered the old absolutes without having yet arrived at new formulations. It has rejected the rhetoric and the traditional mumbo-jumboism with which the reverent generations had invested the fundamental law. It finds it no longer possible to regard the judicial utterances as Delphic,[101] and takes an almost irreverent delight in uncovering the bonds that link Supreme Court justices to other human beings. The myths have fallen away. But the absence of myths does not constitute theory; it is at best merely preparation for it.

It will be well to distinguish two aspects of contemporary thought on the Supreme Court and its economic relations. One has to do with the function that the Court decisions perform, the other with the forces determining them. The prevailing view of the function of the Court is thoroughly realistic. It sees the Court as a definite participant in the formation of public policy, often on matters of far-reaching economic and social importance. Viewed thus the Court through its power to veto legislation has also the power to channel economic activity. In that sense it has been often called a super-legislature, exercising powers tantamount to the legislative power, but more dangerously since it is not subject to the same popular control. The main contention here is sound, although the particular formulation it is given is often overstressed. Whether we shall call the Court a super-legislature or a super-judiciary has in reality only a propagandist relevance. Except from the standpoint of a separation-of-powers ideal or a shattering of intellectual myths it is of little import. But what is of great import is the fact that the Court has become, through its exercise of the judicial power in the intricate context of contemporary capitalist society, a crucial agency of social control. As such it is part of our fabric of statesmanship

100. This brings us back to the problem of the legal lag touched on *supra*. As a matter of fact, it might be said—if it were not so paradoxical—that there is less lag in the conservative decisions than in the liberal criticism of them—lag, that is, with regard to economic reality, and not with regard to enlightened opinion. It is often difficult for liberal minds to understand that the reality does not necessarily conform to their view of it.

101. For the "discovery theory" of law, see Corwin, *The "Higher Law" Background of American Constitutional Law* (1928) 42 HARV. L. REV. 149, 153.

and should be judged in terms of its incidence upon American life.

The second aspect of the problem relates to an adequate theory of judicial decision. The contemporary trend is to regard each judge as acting upon his own economic beliefs and his own preferences as to social policy, and as rationalizing or deliberately manipulating his legal views into conformity with his social views. This represents of course an extreme revulsion against the traditional view of the judge as objectively expounding a body of law that has some superior truth-sanction. It looks toward a complete and perhaps unfruitful atomism: *tel juge, tel jugement.* It would hold that the course of judicial decision is the sum of the personal choices of the judges, and that the policy of the Court is determined at any time by the chance concatenation of nine arbitrary wills. Side by side with this there is another trend toward a sort of environmentalism or economic determinism. While holding to the atomistic view of the judicial process, it emphasizes in each judge not the volitional and whimsical elements but the non-volitional and determined. It examines his early life, education, economic affiliations and property interests, and by a selective process with which every biographer is acquainted it shows the inevitable flow of what he is from what he has been. Both these approaches stress the compelling reality of the judge's views of social policy as over against his adherance to legal rules in determining his decision; in this respect they mark a change from the tendency a decade or more ago to make the antithesis one between logic and experience, between a mechanical adherance to *stare decisis* and a realistic awareness of the changing needs of the day.

Such a theory of the judicial process obviously contains much that is sound and fruitful along with elements that tend to be merely impressionistic. Its atomism derives probably from influences similar to those which led Justice Cardozo to focus his analysis of the Nature of the Judicial Process on the individual judge and the individual decision. Cardozo's discussion of the various intellectual procedures open to the judge comes dangerously close to a new Benthamism by which the isolated judge balances the compulsions of logic against the claims of philosophy and both against the persuasions of sociology. By a similar Benthamism in the current atomistic view the judge is made a lightning calculator not of competing intellectual methods but of his own desires and devices. Both views are helpful through their insistence that whatever influences the judicial decision must pass through the mind of the judge. But they do not take sufficient account of the fact that his mind is itself largely a social product, and that he is a judge within an economic system and an ideological milieu. Their influence is operative even

when he is not applying the "method of sociology," or using law consciously as an instrument for social ends.

For the problem of the relation of capitalism to the Supreme Court the construction of a theory of judicial decision is of crucial importance. If the historical analysis presented in the last two sections is valid, much in the development of American constitutional law is explainable in terms of a developing capitalism. Such an influence, to be effective, would have had to be operative homehow on the minds of the judges, through whom alone constitutional law grows. But how? In what form and through what agencies have the effects of economic development been transmitted to the minds of the judges? The easiest answer of course would lie in a theory of pressures. But while this might be valid for some of the lower reaches of the American judiciary, it has no meaning at all for these men, who are placed by their exalted and permanent positions beyond the reach of corruption, as they are placed also beyond that of democratic control. A theory of interests is likely to be more valid. The judge is a member of an economic class, of a social grouping, of a geographical section. He shares their interests and will, even if unconsciously, direct his policy-forming function to their advantage. But unless this theory is broadened to include general ideological influences as well as direct interests, it will suffer from the oversimplified and mechanical interpretation that has been applied to the framing of the Constitution.

An adequate theory of the judicial process in the Supreme Court would have to take account of a number of factors. (1) The Court works first of all with a set of traditional and technical legal elements. It must stay within the framework of a Constitution, confine itself to the facts and issues of actual cases brought before it, observe and create for itself a body of procedure. It must maintain so much continuity with its own past decisions as to achieve the necessary minimum of legal certainty, and so much consistency with its own past reasoning as to make the body of constitutional law a somewhat orderly intellectual system. In the process it creates concepts and develops doctrines, such as due process, liberty of contract and police power, giving them thereby a directive force over its future decisions. There has been a tendency in recent thought to treat all these legal factors in the judicial process less as rules than as techniques—fairly flexible and accordingly subservient to the more deeply rooted purposes of the judges. (2) The Court works within a cultural and institutional framework which the justices share with their fellow citizens. They live in and are sworn to preserve a society which is the end-product of a historical growth but is also changing under their very fingers. This society is dominated by

its capitalist system of economic organization and is therefore best viewed as a capitalist society. Its institutions and modes of thought are partly incorporated in the Constitution, partly in the body of constitutional law, but are mainly resident in the life of the society itself. (3) The Court works in a world of ideas which the justices share with their fellow-men. These ideological elements—conceptions of human nature, human motive, social possibility and ethical values—may be "preconceptions" and therefore submerged in consciousness, or they may be avowedly held and deliberately applied. Many of them, such as the competitive ideal and the right of property, proceed from the economic world, those that do not, such as human nature, individualism and natural law, have nevertheless a definite bearing on economic problems; all of them are social products and are affected by changes in the social and economic structure. (4) There are personal and intellectual differences between the judges—differences of background, philosophy, social convictions and sympathies.

Of these factors the second and third groups—the world of social fact and the world of social idea—include and are conditioned by the nature of our economic life. The selection that any particular judge makes of them will constitute what Thomas Reed Powell has called the "logic" of his decision; the selection that he makes of the first group of factors—the legal tradition and technology—will constitute the "rhetoric" by which he supports and rationalizes his decision.[102] For an explanation of the main trend of constitutional decision we may therefore look to the institutional and ideological elements [103] that exercise their compulsive force on the minds of the judges,[104] and to the changes wrought in these elements principally

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102. See T. R. Powell, *The Logic and Rhetoric of Constitutional Law* (1918) 15 JOURNAL OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD 645. This essay was one of the most important in shifting American juristic thought. The accepted theory of the judicial process had been that the judge was like the oracle of Jupiter at Dodona who, upon being presented with the problem that called for decision, stupefied himself with vapors and listened to the dim voices that came to him: or, in other words, that the judge brought to bear ancient lights to illumine modern instances. Professor Powell's emphasis was that the judge brought to bear his current outlook to manipulate the ancient rules.

103. In constructing an explanation of how those ideological influences operate on the minds of the judges, we shall have to remember that the judges are in this respect no different from ordinary men. The formation of opinion through the operation of "stereotypes," elaborated by Graham Wallas, and also by WALTER LIPPMAN, PUBLIC OPINION (1930) would apply here also.

104. Perhaps nowhere has this truth been more forcefully stated than in Justice Peckham's remarks about Lord Hale, in connection with Hale's statement of the "public interest" doctrine. . . "his views as to the policy and propriety of laws involving an interference with the private concerns of the sub-

by economic development. For an explanation of the groupings within the Court, we may look to the variations in outlook and belief as between the individual members.

This raises a question about the Court which is as important for social action as for juristic theory. What technique can be employed for shifting and controlling the trend of the Court's decisions? What are the chances, for example, that the Court will reverse the secular trend of its decisions during the past half century and adopt an attitude toward private property that will tolerate experiments in the direction of a controlled and articulated economy? The contemporary emphasis on the judge's capacity to make his rhetoric march to the tune of his social beliefs has as corollary the view that the crucial concern, whether of liberals or conservatives, should be the selection of the right judges—a sort of eugenics program for the judicial process. It seems clear, however, that such a view is over optimistic. It stops at the judge and does not push its analysis to what it is that determines his view of life. The judge's convictions and social preferences run in terms of the current ideologies of his day; through those ideologies the operative economic forces and master trends of the period find their way into the Court's decisions. In such a sense it has been said that a period deserves whatever Supreme Court it gets—because it has created the judges in its own ideological image. A period in which capitalist enterprise is on the aggressive and the individualistic ideal sweeps everything before it is not likely to read anything but an individualistic philosophy into its constitutional law. A period like the present in which the individualistic ideal has been undermined by worldwide economic collapse is likely to be increasingly tolerant of departures from an absolute conception of liberty or property.[105]

This does not involve, however, a rigorous determinism, either economic or ideological. The judicial process is not, as a too mechanical view might hold, powerless in the clutch of capitalist circumstance. The current institutions and ways of thought of a

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ject were, of course, colored by the general ideas as to the proper function of government then existing. This great magistrate, it will be remembered, was a firm believer in the existence of witchcraft, and presided at the trials of old women accused of such crime, and condemned them to death on conviction thereof. I do not mention this as any evidence against the ability, integrity or learning of this upright man and able lawyer; but it is entirely conclusive of the truth of the statement that all men, however great and however honest, are almost necessarily affected by the general belief of their times, and that Lord Hale was not one of the few exceptions to this rule." People v. Budd, 117 N. Y. 1, 46 *et seq.*, 22 N. E. 670, 682 (1889).

105. This is how I understand also E. S. Corwin's delightful Presidential address before the American Political Science Association, *op. cit. supra* note 45.

period determine only the larger outlines which the constitutional law of the period is likely to take. Within that framework there is room for a fairly wide selection and variation of emphasis. The Supreme Court effects a nexus between our fundamental law and our fundamental economic institutions. But by its very position as an agency of control it is powerful to change the contours of those institutions. The same constitutional fabric that contains the absolute individualism of Justice Sutherland gives scope also to the humanistic individualism of Justice Holmes, and the social constructivism of Justice Brandeis. The judicial process in the Supreme Court is no exception to the order of things everywhere. Within the limits set by its nature and function it can be carried on with creativeness and purpose or it can become merely a form of submission to the current drift.