

## THE SPECIAL COMPETENCE OF THE SUPREME COURT

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### I. NEWS FROM OLYMPUS

It is a fact of which the laity may take public notice that the United States Supreme Court has experienced a revolution.<sup>1</sup> Evidence of an unstable period abounds—forms loose their hold, jurists are released from conformity to rigid behavior patterns, a radical<sup>2</sup> probing goes through matters-taken-for-granted to the roots of things. The group who deplored the Old Court, dominated by the Four Horsemen<sup>3</sup> plus Hughes and/or Roberts, view the result with a satisfaction that calls for little support in analysis.<sup>4</sup> The group to whom once the Supreme Court could do no wrong, are shocked by a bench of new men betraying the vested interests which it is their very office to conserve.<sup>5</sup> In contemplation

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1. The literature on the revolution is legion. For a cross-section see Barnett, *Constitutional Interpretation and Judicial Self-Restraint* (1940) 39 MICH. L. REV. 213; Davis, *Revolution in the Supreme Court* (1940) 166 ATL. MONTHLY 85; Hankin, *Recent Trends in the Decisions of the Supreme Court of the United States* (1940) 8 GEO. WASH. L. REV. 1001; Powell, *Changing Constitutional Phases* (1939) 19 B. U. L. REV. 509; Jackson, *Back to the Constitution* (1939) 25 A. B. A. J. 745 (all favorable); Ballantine, *Business Without Precedents* (1940) 166 ATL. MONTHLY 235; Hogan, *Important Shifts in Constitutional Doctrines* (1939) 25 A. B. A. J. 629; Johnston, *Results of the Supreme Court's Reversal of Constitutional Theory* (1939) 51 VA. B. A. REP. 266 (all critical). For a complete survey of the recent work of the Court see Moore and Adelson, *The Supreme Court: 1938 Term* (1939-40) 26 VA. L. REV. 1, 697, 887; Moore and Saks, *The Supreme Court: 1939 Term—I. Public Law* (1941) 27 VA. L. REV. 253.

2. Radical, a good old word of the most respectable lineage, means one who persists in getting to the root of the matter. Jeremy Bentham called himself a radical; John Stuart Mill would not have taken offense at the term; in England the word today still carries more than a vestige of its old meaning. It is an engaging gloss on the trend of American thought that so necessary a word has gone so far astray.

3. Van Devanter, McReynolds, Sutherland, Butler, JJ., of course.

4. See Barnet, Davis, Hankin, Powell, and Jackson, *supra* note 1.

5. See Hogan and Johnston, *supra* note 1.

of gross result, the nature of the institution, the technology by which it carries on, and its changing discretion in the pattern of public control are likely to be overlooked.

If the work of less than four "October terms" amounted to writing a "yes" for a "no" in an application of established formulas of Constitutional law, the subject would invite no more than a catalogue of holdings. But change — with its long arm, its disturbing touch, its decree of events not yet manifest — has come to all the folkways of appellate process. Legal issues have been stated in novel ways; concepts dominant have exchanged places with concepts recessive; a new relationship has been given to the question of substance and the legal mould in which it is cast. Hardly an aspect of the Court's work has been untouched; and since its own suits do symbolic duty for a multitude of their kind, the revolution has extended to the whole institution of federal litigation and to all the affairs — personal, corporate, public — which it embraces within its sweep.

It is only rarely that the Court is permitted to write so significant a chapter in social history. On two previous occasions a shift of base, almost as sudden and brimful of consequences, has occurred. In the fourth decade of the last century, against the inherited theme of Marshall's nationalism, the Court wrote as accompaniment the popular sovereignty of Jackson and Van Buren.<sup>6</sup> A quarter of a century later, the Court was revitalized with another infusion of a national, Lincoln, republicanism.<sup>7</sup> A third revolution, startling in its results but emerging so gradually as to conceal its violence, attended the emergence of the national economy. Its rumblings began in the seventies;<sup>8</sup> the doors of the Court were blazed open for appropriate actions in the eighties;<sup>9</sup> and from the nineties to the twenties of our own century, the immunity of business enterprise to legislative control<sup>10</sup> was renewed and broadened.<sup>11</sup>

6. See generally CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* (1936) 124 ff.; cf. FRANKFURTER, *THE COMMERCE CLAUSE* (1937) 47-73.

7. See generally FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* (1939); SWISHER, *STEPHEN J. FIELD: CRAFTSMAN OF THE LAW* (1930).

8. See the dissents in the Slaughter House Cases, 16 Wall. 36, 83 (U. S. 1873); *Munn v. Illinois*, 94 U. S. 113, 140-45 (1877).

9. See among other cases *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U. S. 418 (1890); *Allgeyer v. Louisiana*, 165 U. S. 578 (1897). See generally Haines, *Judicial Review of Legislation in the United States* (1924) 3 TEX. L. REV. 1.

10. In the Constitution "the due process" was only the most prominent among the clauses which bowed before the surging winds of opinion. Commerce among the several states and the power to tax came to be regularly employed; the law of patents came to reflect impinging doctrine; and even the spending power did not completely escape invasion.

11. In law the dominant doctrine was liberty of contract; in economics it was known as free enterprise; in political science, as laissez-faire; in philosophy, as individualism.

But that there have been others does not make the recent upheaval less of a revolution for us. They now belong to the past, and such vitality as they once possessed lies now in that shadow land called history. In respect to upheavals which are gone, the returns are all in; in the instant case, the forces of change have not yet come to rest and we can sense only dimly its incidence upon a turbulent and emergent commonwealth. Here, as never before, there was fanfare off stage and a peal of lusty trumpets as prologue to the usual drama. The state of the nation made some sort of Court Unpacking plan inevitable. The national economy, despite little crochet patches of reform, had come turbulently into being under private—that is largely corporate—auspices. It had, following the Great War, gone through a period of feverish activity which collapsed into the Great Depression. An attempt to get the industrial machine going by pouring in money at the top had led the Hoover administration to defeat attended by the collapse of the banking structure. As the Roosevelt regime took over, the need was for a drastic program of action. It may well be that it lacked the knowledge and understanding demanded by a national crisis. Certainly learning was too much in bondage to the system which had broken down to point a clear path, and public policy had to feel its way with measures which could be little more than experiments. But, as the New Deal was challenged in a series of cases, the Court was in no position to set even amateurs right. The legalisms which its majority brought to judgment were more irrelevant to the problems which had to be met than the Acts of Congress which they struck down. Their arguments-at-law were impressed with economic norms and political theories already outworn; and the realities whence emerges the general welfare lay far beyond the remote orbits in which their minds revolved.

Thus men of good will, with archaic doctrine, accentuated the crisis of the commonwealth. A head-strong group, firm in its own dogmatism, forced its mandates upon the more sensitive members of its own group, upon realistic judges who sit upon lower federal benches, upon the administrative and legislative arms of the government. Its stress was laid upon the independence of the judiciary, and its arbitrary will was clothed in the rhetoric of a mere mechanical—and wholly discretionless—application of the law to cases or controversies as they came along. The Court's philosophy, as fixed by a slightly shifting majority, had little place for giving conscious direction to an economy which, like it or not, was on the move. It indulged freedom to the things to come only if their shape accorded with moulds already decreed by the Court. The affairs of mankind might go astray; the Court possessed the absolute to which they were bound to return.

Few there were who defended the wisdom of the Court's decisions; but many proclaimed the sacredness of its right to do the unsound thing.

To them the way out of the dilemma was to let nature take its course; in the fullness of time the lines of the great charter would be straightened out by the demise of judges. The bolder of the group, however, would prod nature along; it would separate official tenure from physical life; and, since justices are to hold their offices during "good behavior," it would with undiminished compensation induce their retirement. Another group, conscious that exit could not be unduly hastened, set about finding a stimulus to entrance, and elaborated the President's Court Plan. It set forth a way of gaining new blood, even if old blood refused to go on its way.<sup>12</sup>

The fortunes of the bill are well known; that abortive chapter in legislative history does not have to be retold here.<sup>13</sup> But the attending circumstance needs to be recalled; for out of it emerged a general climate of opinion receptive to a new personnel reforming the honored bench to which they ascended. If the Senate failed to coerce, it made it abundantly clear what it did not like; and, if there was no statute to restrain, proprieties were proclaimed which set limits of tolerance to judicial discretion. Reformation was expected from the Court itself and it was well advised to do through a self-denying ordinance what an Act of Congress did not command. An institution had been saved, but the escape was by a narrow margin; an ominous go-and-sin-no-more was the price of salvation.

In the atmosphere of this challenge the new appointees ascended the high bench. Qualified as severally they were for the duties ahead, each came to his office as a layman. Each had occupied some vantage post from which the easy or grudging response of high legal process to the strains of a developing culture were to be observed. Each, through concrete experience, could testify to the mischief which had been done by an attempt of the Court to impose its rigid dogma upon the seething activities of society. Black, as Senator and Chairman of the Committee on Labor, had witnessed the rise of the working man as an interest in the commonwealth. He had seen an inchoate mass of men become articulate, discover that they counted, assert their rights in the face of an unsympathetic judiciary. Reed, as Solicitor General, had taken Acts of Congress as stumbling answers to insistent necessities, reduced legislative remedies to causes at law, and had seen the Court employ a hocus-pocus guided by personal preference to block the path of social experimentation. Frankfurter had for thirty years made the Supreme Court his critical study; and, in passing its work in critical review, had evolved his own norms for its process and performance. Douglas, after a far from academic concern with business units, bankruptcy, protection of

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12. For the many proposals see *Hearings before the Committee of the Judiciary on S. 1392, 75th Cong., 1st Sess. (1937)*; SEN. REP. No. 711, 75th Cong., 1st Sess. (1937).

13. The story is told in ALSOP AND CATLEDGE, *THE 168 DAYS* (1938).

the investor, had taken a dominant part in getting an agency of financial control under way and in developing techniques of administration. Murphy, as an executive, had been called upon to meet crises, and under dramatic circumstances had experienced the need for insistent action uncomplicated by the paralyzing resort to litigation. Alike the new appointees came from a world of affairs; alike they saw the judiciary as one among many agencies of public control; alike they had become sensitive to the confusion which came about when judges overstepped their competence and the Court ventured outside its proper domain.<sup>14</sup>

Thus promptings from within reinforced urges from without to demand re-examination by the Court of its office and the manner of its performance. But fruits of that re-examination could not stand forth at once. A craft fixes its way of work, and the Court has its traditions to which all men trained in the law, however radical or conservative, will accord respect. Articles of faith are not recited; reference to them is piecemeal as the argument of the instant case demands. In granting or denying certiorari, in attention to items of appeal and error, in breadth or narrowness of the statement of facts, in selecting from inquisitorial candidates the question at issue, in the strategic use of precedents, in decreeing the next steps in the development of a doctrine, in the verbal choices which define holdings, in the subtlety of overtone which adds to or subtracts from the formal utterance, the Court decrees its own power, speeds or stays process, gives contours to the law. From these meager details the larger picture must be constructed.

The best evidence of a change in attitude is that the Court has receded from the front pages. It no longer claims the spotlight by decisive judicial battles, the event of each of which is to veto some commitment in national policy. It no longer assumes an oracular monopoly of the Constitution; the United States Reports are duller reading than once they were. Further testimony to a revolution is presented by current reactions to the work of the Court. The shift of office and direction of doctrine were plainly visible to a President of the American Bar Association when he declared that, because of the Court's oblivion to the American tradition, "legislative independence and legislative wisdom are America's almost sole reliance for the continuation of that security of the blessings of liberty for which the Constitution was framed."<sup>15</sup> Others decry the overthrow of the past.<sup>16</sup> But these novel departures are not refusals to

14. The ground-work laid by the famous dissenting judges—Holmes, Brandeis, Stone, Cardozo, and occasionally Hughes—must not be forgotten.

15. See Hogan, *supra* note 1, at 638.

16. See Ballantine, *supra* note 1. Note also Johnston, *supra* note 1, at 292: "The American constitutional system is taking water under no inherent weakness of its structure. . . . It is bogging down as a result of whimsies, debts, bureaus and functions let in through bilge cocks opened by a majority of the Justices sitting upon a reconstructed court contrary to the mandate during six generations of more than a hundred [*sic*] of their predecessors."

follow precedents. They lie upon quite another plane from that upon which stare decisis operates; for they represent an application of the current bench's theory of the Court's orbit to cases as they come along, and agreement or disagreement with past performance is a secondary phenomenon.

If the Court has accepted a new philosophy, the reverberations may be deafening. The prevailing outlook of the bench, in respect to the economy and the commonwealth, speaks through the intricate technology by which the Court's business is done. A shift in attitude here decrees a myriad dominant and echoing responses in the detail of decision. Let the bench commit itself to laissez-faire: the statute is confronted by a challenge; the administrative ruling is in jeopardy; the party who objects is allowed to cry out before he is hurt; the lower courts hamstring the operations of government with vetoes and immunities.<sup>17</sup> Let it put on another philosophy — or affect so far as it is able that "the Constitution of the United States" does not embody a political economic theory — and the whole pattern of political discretion makes its response.

But the new philosophy is not found by analysis of the detail of judgment after judgment; perspective lies not in categories of doctrines. The search is for the model of winepress which produces new wine to be poured into old bottles. The story lies in the Court's redefinition of its own function and a re-drawing of the lines which mark out its self-appointed jurisdiction. Nor need the story stop there. If now is the time for re-examination of function, bold steps may be taken. Though the Court tread cautiously, the observer may strike forth to explore the entire area.

## II. OFFICE OF THE COURT

The current bench has become acutely sensitive to the question of office and limits of competence. Any definition of domain and boundaries must emerge from the nature of the issues which may be brought before the Court. It is at once a judicial and a political body. It is judicial in that its usages are of a court of law. It considers cases between adverse parties; follows the etiquette of legal process; affirms, revises, annuls judgments addressed to particular persons. It is political in that its orders extend far beyond the individuals immediately involved; it fixes conditions and sets bounds about the resort to law; it revises the pattern of the separation of powers among agencies of government; it endows with intent, discovers latent meaning and resolves conflicts between legislative acts; it invokes Constitution, statute, its own decisions to hold Congress, department, administrative body in its place. Even when it

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17. See especially JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) 115-23.

imposes self-denial upon itself, politically it extends the frontiers of some other agency of control.

Judgments along these lines are political, not legal, decisions. Issues of due process, equal protection, privileges and immunities, are questions of the limits of the province of government. Issues of federal supremacy, commerce among the several states, immunity for government instrumentality are questions of the balance of powers within the federal system. Issues of separation and delegation of power are questions of the distribution of the tasks of Government among the agencies through which it operates. And beneath the formal terms in which all such questions are put, lie conflicts which involve the status and prospects of groups within the economy. A business unit pleads national supremacy as an escape from local taxes; an industry in the cause of its own balance-sheet becomes solicitous of states' rights.<sup>18</sup> Vested interest collides with vested interest within the solemnities of due process of law; the spirit of acquisition seeks to convert the inalienable rights of man into an immunity for corporate personality. On one level issues concern legal equities; upon a second, the division of political power; upon a third, the clash between the interests which make up the commonwealth.

However justices may put the questions, they cannot frame their judgments so that incidence lies upon the single level of legal equities. Questions of law present symbols through which political issues are resolved; and the political terms do vicarious duty for economic interests. Jurists are quite aware of the realities which appear before them disguised as legal disputants; and few of their number are content to compel the-difference-which-it-makes to wait upon the sidelines until the verbal ordeal has reached its result. It is only the simple soul oblivious to his judicial office who measures a human act by the plain words of a statute, appraises a course of conduct by the abstract dicta of former decisions, or lays the article of the Constitution beside the statute to see if they square. Whatever lip service is accorded the abacadabra, the judge strives for an appreciation of all that is involved, takes a surreptitious look at the political forces, or uses personal values as an animating spark. The wiser jurists are well aware of the polydimensional universe in which they work; the ones who profess devotion to a juristic process untainted by alien considerations are usually unaware of the sources of their own preferences. However its opinions are dressed for appearance in public, the Court either decides with an eye to consequences or chooses between doctrines proffered by rival attorneys, whose briefs exhibit a pragmatic architecture, and whose use of doctrine is dictated by non-legal interests.

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18. "When men begin to talk about the danger of infringing the rights of self-government, they usually mean that they fear for the special interests of the sections they represent. They seldom go forth to do political battle for the sake of abstract political theories." MACDONALD, *FEDERAL AID* (1928) 239.

Questions of constitutional law, statutory meaning, the reach of an administrative order present differences in scale; but, in their several degrees, they invite the same movement of mind on many planes to a single conclusion. A federal imposition of a price-structure for bituminous coal turns upon English usage in respect to "commerce" in the late eighteenth century;<sup>19</sup> the chancellor's injunction against interference with a yellow-dog contract rests upon a notion that union officials are uninterested parties, whose legal status as "strangers" may be traced back to the year books.<sup>20</sup> The control which the patentee may impose upon the retail prices of his licensee's goods is deduced from a liberty of contract which sprang into legal being in a domain remote from trade practice.<sup>21</sup> Yet the one presents the issue of an orderly or a chaotic industry; the second, of the validity of collective bargaining as an instrument of trade unionism; the third, of a sanction of the Government as a defense against the competition demanded by the law of the land. In such matters as these the judge can find a traditional doctrine relevant only by closing his eyes to all that is going on about him.

But, however obvious may be the issues of political power and economic interest, the question is put to the Court in legal terms. Its process of decision is likewise circumscribed; and its answer is no more than the resolution of an issue between parties to the suit. Its heritage makes the judicial process in many respects an antithesis to that of the legislature. In form its issue is justice between contending persons; the business of the legislature is with rules under which all who are concerned may carry on. The court refers to legal norms, a course of conduct set forth in a record; the legislature predicates judgment upon all that can be gathered about the matter at issue. Judicial tradition suggests narrow bounds of art—no move without a genuine case or controversy, fact as served through strict rules of evidence, judicial notice only of that not to be disputed, taboo upon intangible and atmosphere, irrelevance of all that goes beyond the immediate issue. The legislature, entertaining an issue of policy, plays down the personal and roams at its will for all that will impart meaning. Against the wide sweep of the legislative process, in which all parties in interest may be heard, and even hopes and hazards of the future may be given place, the Court's task is performed within the strictures of due process. A case is docketed, the Court agrees to listen to an appeal, the parties are represented by attorneys, counsel have at each other with oral argument and printed brief; the bench takes the suit under advisement and renders a judgment in favor of one side. The reach of the order, the inter-

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19. *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936). See HAMILTON AND ADAIR, *THE POWER TO GOVERN* (1937).

20. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229 (1917).

21. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175 (1938).



pretation of the statute, the command of the Constitution, the fixing of the line between authorities, the recognition or denial of an economic interest emerge only within the interstices of the opinion or as propositions essential to the announced result. In disposing of the case the Court does not have to make explicit the rule of law which is compelling. Though the real interest of the public is in the criteria of conduct, declaration of the law is a by-product of the affirmance or reversal of judgments from below. Thus broad political process goes forward under forms evolved for the disposition of a narrow cause of action.

As creatures of the social order, judges cannot become oblivious to the political questions they are called upon to answer. Yet, as members of a craft, they are conscious of legal issues, operate in a legal atmosphere, respond to legal compulsions. The result is a hybrid process of mind in which far more goes on than can be contained in the form of opinion. Fact, value, background, projection into the future come into play, although their presence cannot be admitted. The scope of inquiry is broader than is affected, yet narrower than a direct attack upon the real issue would command. The judge must prod deeper and range further afield than he can usually admit; yet he is denied the facilities and enjoined from the act of inquiring into all that needs to be known to resolve the larger question. Rarely can the Court meet the real issue directly; it can always becloud the argument which marches to judgment so that only the initiate can read the implications. It can, while professing concern, avoid action; it can, while assuming to avoid it, assert political power. Where its larger commands are written in the detail of holdings, its results may escape public scrutiny. Its work, thus belonging to two worlds, does not easily invite appraisal and provides no obvious check upon irresponsibility.

In private law, the Court's work is in no vital way affected with a public interest. There its concern is with traditional subjects; it handles only a trickle of a mighty stream which pours through the lower courts;<sup>22</sup> its chance intrusion does little more than give prestige to one among competing rules or note a trend in public to which private law might well conform.<sup>23</sup> Where its oversight has manifest importance, the matter in spite of form really belongs to public law. In patents, for example, the suit is a private battle between individuals, yet the Court's real concern is with the limits of a private claim within the public domain of the useful arts.<sup>24</sup> Aside from these rare cases which impinge on a

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22. See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927) 307-18.

23. And since *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938), there has been little occasion to do more than warn lower courts to bow to the commands of state judges.

24. See HAMILTON, *PATENTS AND FREE ENTERPRISE* (TNEC Monograph No. 31, 1941) pp. 129-34.

public policy of importance to other agencies of government, the Court stands supreme in supervising private litigation and its power is unquestioned.

But the bulk of the Court's work is concerned with matters which lie within the expanding zone in which government meets the person, natural or corporate. Its task is to resolve all disputes which grow out of the accommodation of the activities of a people to the norms of public policy. It passes in review cases concerned with obedience or disobedience to the orders of the President and the Executive departments, the Acts of Congress, the commands of the various agencies to which the oversight of the economy has been delegated. In such matters its decisions recognize or deny legal standing to officials, enlarge or narrow their authorities, specify the sanctions upon which they may rely. In like manner it decrees the domains within, and the devices by, which the several states may impose their lesser policies. Thus the Court is forever engaged in a process of fixing the lines by which the activities of persons are kept in accord with the general welfare. In the running sum of its choices a pattern of benefit and deprivation is written; and wherever its incidence falls, there in effect it has taken sides. It must, with acumen and wariness, steer its constant course through matters that are controversial; yet it must avoid all appearance of being itself engaged in controversy. Its prestige depends upon recourse to ultimates which lie far above the petty interests which clash in court.

From the first the Court has found it expedient to veil its exercise of power.<sup>25</sup> It is far easier to plead that there has been no discretion than to justify its act of choice. It-is-not-we-who-speak, once established, comes to be taken for granted and makes secure the institution. An overt exercise of power, however wise, has always to be defended in the instant and leaves the Court constantly exposed. Given its task, its concern with political problems in legal form, its need to mask an inescapable discretion, some controlling authority was inevitable. It had to be a something than which there was nothing more ultimate; yet a something whose sanctions were so abstract and whose language was so general as not to rob the bench of its power of choice. The written Constitution, whether or not designed for dialectical use by the judiciary, was at the least a handy instrument for the purpose. Even if its primary intent was to establish a structure of government and a great mass of the writing was meant for a more immediate political use, there was language in it which the Court could use as a reference. Although the available lines were few, exposition could easily compensate for any lack in quantity. In their absence, the Court eventually might have had recourse to an order of nature, the inalienable rights of man, an economy

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25. See Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 180 (U. S. 1803) ("a law repugnant to the constitution is void; . . . courts . . . are bound by that instrument.").

too obvious to be disputed.<sup>26</sup> As it was, the Constitution merely provided the frame within which the higher commonsense was set and from time to time renewed. As with the higher, so too with the lesser law in its several degrees. Statute, ordinance, administrative ruling presented narrower ambits; but each, in its own degree, demanded sanction and invoked decision; each presented a kindred demand for a choiceless discretion.

Thus the Court had to deny, even as it was compelled to make, policy. Its avowed theory served not only to throw a screen about its own work but also to salve the collective conscience of the bench. In support of this it contrived various techniques out of the most reputable staff at hand. It was, under the rule of separation, at the head of one of three coordinate departments of government. It could not substitute its own for an Act of Congress; nor could it obtrude its will into any instrument through which the delegate of Executive or Legislature acted. It was, accordingly, driven to a mechanistic view of its own judgment. "The judicial branch of the government has only one duty — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."<sup>27</sup> The Court's only power "is the power of judgment"<sup>28</sup> exercised in a manner "uninfluenced by predilection for or against the policy disclosed in the legislation."<sup>29</sup> The Court "neither approves nor condemns any legislative policy."<sup>30</sup> If the Constitution "stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms."<sup>31</sup> A fundamental law, made "with the enlarged vision of those who are building for a future unknown or dimly discerned" might, through failure in foresight or in adequate endowment, betray it in a crisis or because of the "infinite variety of the changing conditions of our National life."<sup>32</sup> The Great Charter might become the Great Scapegoat.

Such a theory could not forever conceal the antithesis between appearance and reality. As critical winds blew from without,<sup>33</sup> doubts in the

26. Compare the words of Mr. Justice Cardozo in *Jones v. S. E. C.*, 298 U. S. 1, 32 (1936): "Appeal is vaguely made to some constitutional immunity, whether express or implied is not stated with distinctness." An interesting treasure hunt can also be built around a search for the constitutional provision standing behind the decision in *Crandall v. Nevada*, 6 Wall. 35 (U. S. 1868).

27. *United States v. Butler*, 297 U. S. 1, 62 (1936).

28. *Id.* at p. 63.

29. *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330, 346 (1935).

30. *United States v. Butler*, 297 U. S. 1, 63 (1936).

31. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 404 (1937) (dissent).

32. Mr. Justice Moody dissenting in the *Employers' Liability Cases*, 207 U. S. 463, 520-22 (1908).

33. See particularly the pioneer statement by Powell, *The Logic and Rhetoric of Constitutional Law* (1918) 15 J. OF PHIL. PSYCH. & SCI. METH. 645.

faith appeared from within. Only the most unsophisticated jurists were at home with it; and it rode highest when feelings ran deepest and jurists dared not doubt that their own positions were closely adjacent to the eternal verities. But justices who suspected that even the highest of benches was not insulated against prevalent belief, were reluctant to parade the make-believe. Mr. Justice Holmes frequently attacked the theory as faulty constitutional law. "As the decisions now stand, I can hardly see any limit but the sky to the invalidating of [the rights of the states] if they happen to strike a majority of this Court as for any reason undesirable."<sup>34</sup> Again, "I cannot believe that the [Fourteenth] Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibition."<sup>35</sup> And Mr. Justice Stone allowed many strands of disbelief to converge into the classic lines of his dissent in the *Triple-A* case. In speaking of the parade of horrors by the majority he observed, "Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern."<sup>36</sup>

Such views, long recessive, have now become dominant.<sup>37</sup> As they emerge they restate, rather than eliminate, the problem which provoked them into being. In a sense the change marks a long stride forward. It strikes at a dualism between word and deed, by which the Court could act yet deny the consequences of its own decision. It makes it impossible any longer for the majority of the bench to pretend not to do that in which they are busily engaged. And it means that the Court is inclined to accord full faith and credit to other agencies of government. Viewed in its most commendable light it amounts to a judicial attitude of respect for the ability of others to employ the words "good" and "right," "prefer" and "legal." But, as it passes from the idiom of protest to that of decision, a certain inchoate character stands forth. If it lives up to its declaration, the Court must scrupulously avoid all exercise of political powers; yet, under an intricate control where choices must be made between things in conflict which both profess to be legal, that is impossible. The intricacies of the federal system, of the national economy, of the emerging commonwealth utterly forbid it. Nor can the Court overtly assert the discretion which it actually exercises; for that would be to deny the absence of the taking of sides upon which the very judicial process itself rests. Viewed in its most unfavorable light, it represents a Machiavellian philosophy of going only so far as the Court can and still avoid the charge of "judicial usurpation"

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34. *Baldwin v. Missouri*, 281 U. S. 586, 595 (1930) (dissenting).

35. *Ibid.*

36. *United States v. Butler*, 297 U. S. 1, 87 (1936).

37. See notes 82, 98, 112 *infra*.

hurled at the late unregenerated bench. The ultimate length to which such a profession can go is the sackcloth and ashes of self-restraint; at best it represents an unsatisfactory attempt to enunciate a doctrine of balance between the judicial and the avowedly policy-making agencies of state. Unsatisfactory, because it sets down no clear line of demarcation of functions. An admonition to tread lightly, addressed to its own members, makes an ultimate out of a subjective quality in judgment. So long as men, even in their judicial office, are unlike, it will induce a widely variable response. At one end of the spectrum of decision stands a passing of the buck, at the other a can-I-get-away-with-it?

But more important is the aloofness of self-denial. It stands as a profession of faith, abstract, general, vague; it lacks the clear-cut contour,<sup>38</sup> the precision of statement, the detail of techniques by which it can be applied to the kind of docket which the Court cannot escape. It was formulated in the days when statutes were subjected to the ordeal of the higher law and as often as not failed to meet the test. Its origin, as it passes from dissent to dominance, makes it a doctrine of constitutional interpretation. In a large part of this domain, a laissez-faire attitude is quite feasible. Acts of Congress and of the legislatures of the several states are almost never to be called null and void.<sup>39</sup> But "the great tradition" has not allowed even the present bench to deny a domain of freedom reserved to the individual into which even government itself must not intrude; and when state clashes with federal authority, the Court cannot completely escape marking out boundaries. More important, the host of cases in which a constitutional issue does not appear — or can be avoided — is left to the bench. The Court may admit that Congress had full power to decree all that was claimed for the Act, yet insist that "the plain words" of its statute fall short or deny that its intent was to go so far.<sup>40</sup> It may, in a hundred ways, gross or subtle, set down an ultra vires between official act and legislative sanction. Such questions must be decided; they make up the great bulk of the docket; and to their resolution a rationale must be brought. The withdrawal from the constitutional field seems to be a change not in character but in magnitude. A formal concern with political power no longer appears on a cosmic scale; its trends are to be spelled out from the minutiae which make up many lines of day to day decision. The very detail may make results less abiding; the lower plane on which work is done may give greater play to legalisms. The threat of a some-

38. As recently as April 28, 1941, Mr. Justice Douglas recited the faith: "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation." *Olsen v. Nebraska*, 61 Sup. Ct. 862, 865 (U. S. 1941). Does this serve as a clear-cut rule of permissible action?

39. See notes 93, 98 *infra* for examples of hedging by the Court.

40. See pp. 1357-67 *infra*.

what greater confusion may hang over the pattern in the making. Yet inevitable power politics and the control of the economy are still present.

The Court cannot be unaware that a change in scale is not an escape from a definition of office. The Reports give ample evidence of a striving, by individuals and as a collect, for a philosophy of discretion to replace that which is gone.<sup>41</sup> Although its statement is over-general, and as yet its validity has not been attested by the variety of situation it is called upon to resolve, its outline has already emerged. Its attempt is to work out an accord between the traditional function of the Court and the necessities of a modern, industrial state. For its roots the doctrine goes back to the separation of powers; for its relevancy, it accords recognition to the hierarchy of authorities through which individuals in society supervise activities of mutual concern. Its key-word is "competence." Each agency of state—executive, legislature, commission, board, lower court—is to be accorded authority within the demesne of its own competence. And, as one among agencies by which the will of the people is impressed upon its multifarious business, the Supreme Court itself must stay within the frontiers which mark out its special competence.

In more specific terms, this Court—and all others—will act only when it is competent; and, when resort is properly had to it, will act only in the manner in which it is competent. A thread of doctrine from long ago becomes a dominant strand. From the days of *Luther v. Borden*,<sup>42</sup> the Court has possessed a ready way of escape; it has had only to cry "political question" to allow the issue to go to some other body. In more recent times, certain fields in which the entry of the judiciary might disturb yet could hardly clear up, have been recognized as beyond its province. The treaty-making power was some time ago admitted to be almost, if not quite, out of its reach;<sup>43</sup> and recently it has been loath to interfere in the maintenance of labor standards on Government contracts.<sup>44</sup> The doctrine derives, too, from the long list

41. See pp. 1344-49; 1370-72 *infra*.

42. 7 How. 1 (U. S. 1849).

43. See *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936); *Z. & F. Assets Realization Corp. v. Hull*, 311 U. S. 470, 490 (1941) (concurring opinion by Black and Douglas, JJ.).

44. *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940). The technical legal argument of Mr. Justice Black was that the plaintiff had no standing to sue because it had suffered no legal injury. This represents, of course, legal reasoning at its worst because the criterion of legal injury is whether a court will redress the injury—*i.e.*, whether there is standing to sue. The Justice retrieved himself, however, by setting out the real reason for the decision. "The case before us makes it fitting to remember that 'The interference of the Courts with the performance of the ordinary duties of the Government, would be productive of nothing but mischief; . . .'" *Id.* at 131, quoting from *Decatur v. Paulding*, 14 Pet. 497, 516 (U. S. 1840). *Cf.* *United States v. Bush*, 310 U. S. 371 (1940).

of dissents which plead for judicial restraint. The Court must not set aside the legislative act;<sup>45</sup> it was not formally charged to do something;<sup>46</sup> it lacked the facilities, the knowledge, the understanding;<sup>47</sup> it was not competent to prescribe, or even to declare that the remedy chosen was not a reasonable one.<sup>48</sup> The great impulse towards such a doctrine, however, has come from the rapid growth of administrative control. "On the basis of intrinsic skills and equipment . . . the federal courts [are not] qualified to set their independent judgment on such matters against that of the chosen state authorities. Presumably that body [a state commission] . . . possesses an insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals."<sup>49</sup> Such an attitude is especially apparent where the legislature in specific terms has stated where competence lies. "Congress entrusted the Board, not the courts, with the power to draw inferences from the facts." "The Board, like other expert agencies dealing with specialized fields . . . has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony."<sup>50</sup> The language varies, but the trend is clear. The Court does not intend to substitute its judgment for that of the agency whose work it passes in review. An ultimate authority is not to replace the appropriate competence.

Items such as these are only glimmerings of a philosophy of competence. Here an injunction against the judiciary usurping an administrative office;<sup>51</sup> there a warning against a remote control of a local matter.<sup>52</sup> Here an insistence that the judicial process must not be pushed

45. See the quotations, p. 1330 *supra*.

46. Compare Mr. Justice Brandeis dissenting in *Railroad Comm. of Calif. v. Los Angeles Ry.*, 280 U. S. 145, 164-66 (1929); *Beal v. Missouri P. R. R.*, 312 U. S. 45 (1941); cases cited *infra* note 52.

47. See Mr. Justice Brandeis concurring in *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, 86-93 (1936); *cf.* his dissent in *Burns Baking Co. v. Bryan*, 264 U. S. 504, 517 (1924).

48. See, for example, the dissents in *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 403 (1928); *Ribnik v. McBride*, 277 U. S. 350, 359 (1928); *Tyson & Bro. v. Banton*, 273 U. S. 418, 445, 447 (1927).

49. *Railroad Comm. of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570, 575 (1941).

50. *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 597 (1941).

51. See *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (1941); *N. L. R. B. v. Bradford Dyeing Ass'n*, 310 U. S. 318 (1940); *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206 (1940); *N. L. R. B. v. Falk Corp.*, 308 U. S. 453 (1940); *N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241 (1939); *cf.* *F. C. C. v. Pottsville Broadcasting Co.*, 309 U. S. 134 (1940).

52. See *Railroad Comm. of Texas v. Pullman Co.*, 61 Sup. Ct. 643 (U. S. 1941); *Palmer v. Massachusetts*, 308 U. S. 79 (1939); *cf.* *Nashville, C. & St. L. Ry. v. Brown- ing*, 310 U. S. 362 (1940).

beyond its proper domain,<sup>53</sup> there a protest at judges having a fling with crafts which are not their own.<sup>54</sup> No full-blown theory of competence is presented; if it has been formulated, it can hardly be expressed within the traditional limits of judicial opinion. Even more, there is question whether the current bench is ready to accept the necessary consequences of its adoption of novel norms. Older members of the Court have already voiced a dissenting fear that the old days of policy-making are returning.<sup>55</sup> In any event, if competence comes to be the rule, the rule is the Court's rule; and the Court, by proclaiming or denying competence, divides authority among the various agencies of government. A rejection of power is a change in the manner of its assertion.

### III. THE CRITERIA OF COMPETENCE

It is not easy to discover the criteria of competence. No absolute is to be invoked; for domains do not stand out sharply, and the techniques of control merge into each other. It is idle to insist that jurisdiction runs with crafts, when crafts bear confused marks of identity. It is experience with a subject rather than skills brought into play which causes one board to differ from another. A commission, however concerned with the facts, cannot ignore the law; a court, however intent upon the rule, cannot ignore the situation before it. Competence is an affair of elements and of degree; the factors which make it up may be variously compounded; the variation from proficiency to proficiency is a matter of more or less. There are many things which a court can do well, yet not so well as some other body. There are many things, which at the current state of public policy, no agency can handle quite adequately; yet one agency promises a little better result than another. In one realm a court may boldly enter, where in another it must go warily. As a relative term competence raises a series of specific questions.

Who, then, is to decide competence and appoint bounds? In the first instance power lies with the legislature. The jurisdiction of the Supreme Court lies with Congress;<sup>56</sup> the pattern for "the inferior courts" is of Congressional making. From time to time, in various provinces, Congress has enlarged or narrowed the Court's domain and has changed the manner in which its authority is exercised.<sup>57</sup> As aspects of a rising national

53. See Mr. Justice Black dissenting in *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 423 (1938); Mr. Justice Frankfurter's opinion in *Newark Fire Ins. Co. v. State Bd. of Tax Appeals*, 307 U. S. 313 (1939).

54. See *Railroad Comm. of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570 (1941); *Railroad Comm. of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940).

55. See the quotations of Mr. Justice Stone, p. 1367 *infra*, and Mr. Justice Roberts, note 194 *infra*.

56. Except in so far as Article III of the Constitution confers jurisdiction without Congressional action. Cf. *Crowell v. Benson*, 285 U. S. 22 (1932).

57. See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927), especially c. 7.



economy demanded oversight, the legislature, national and state, created agencies of administrative control. It has moved because the volume of traffic had become greater than the judiciary could handle; but its form of answer had been impelled by an attempt to discover a more appropriate procedure than resort to litigation.<sup>58</sup> The going at times has been difficult and courts have been jealous of other bodies which have encroached upon their preserves.<sup>59</sup>

A dilemma results; the lines of authority move in opposite directions. The legislature marks out the province within which the Court is competent; the Court decrees the legislative intent and tells the law-making body what it means by its own statute.<sup>60</sup> In the administrative body Congress acts by deputy; the lines which block off administrative competence are fixed by the Court.<sup>61</sup> If the legislature asserts that it has the final say, the judicial branch acts under its overlord and loses its independence. If the last word remains with the Court, the judiciary elevates itself into ascendancy over the legislature. As is usual with an institution not cut to blue-print, neither is supreme and fortunes vacillate.<sup>62</sup> The words "judicial" and "political" roughly mark out spheres of influence; and even if their contours respond to attitudes, their compulsions are never completely spent. It seems clear that the legislature should settle—or should decree a way of settlement for—disputes political in character. It might go so far as to deny any judicial review of orders of the Interstate Commerce Commission, the Wages and Hours Division, or the National Labor Relations Board; for there appears no persuasive reason to deny Congress the power to say that a particular matter is ineptly handled by legal, or could be better handled by administrative, process.<sup>63</sup> The primary allocation of work according to type seems clearly to belong to the law-making arm. But a narrowing of the Court's province is not to dispute its finality; a legislative policing

58. See Feller, *Administrative Law Investigation Comes of Age* (1941) 41 COL. L. REV. 589, 599 ("... the creation of the more controversial of these agencies was brought about by an explicit fear of the bias of the judiciary.").

59. See *F. T. C. v. Gratz*, 253 U. S. 421 (1920); McFARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION* (1933).

60. A case in point is REV. STAT. § 3224. See note 166 *infra*.

61. If any judicial review is afforded, it will encompass the question of acting within the scope of the statute. And even if review is denied, courts might still intervene by extraordinary writ. See pp. 1372-73 *infra*.

62. See generally JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941).

63. This is not to say that even the present Court, or Congress for that matter, is prepared to go so far. The judicial tradition is still powerful in its weight. And even if judicial review were denied directly, the extraordinary writs to protect the individual against star chamber proceedings would remain. See pp. 1372-73 *infra*. The main point is that government is frequently partisan, and if it deliberately wishes to enforce its partisanship to the hilt, the judiciary hardly bespeaks realism if it insists that partisanship has no place in American life. See McGOWEN, *The Battle of the Processes* (1940) 28 CALIF. L. REV. 277.

of its dicta — though now and then proposed by some adventurous soul — is in no immediate prospect.<sup>64</sup> The two departments remain coordinate, even though each retains only a qualified independence. In the question-begging statement of old “each is sovereign in *suo regno*.”

Beyond the general lines marked out by Congress, the Court is umpire between competences in conflict. If only the matter appears before it in proper habiliments, it can mark lines about its own discretion.<sup>65</sup> The checks are only such stops in tradition, process, and political theory as it may set up for its guidance. To this end it can put to fresh employment the ancient requirements of “standing to sue,” “case or controversy,” and “justiciable issue.” Such terms are inert things, responsive to the flexible will of jurists. They may be employed to protect the court against the trivial and the frivolous, or to avoid meeting issues which may prove embarrassing. But, as the criteria of jurisdiction, such tests can be made to serve admirably as standards of competence.

An established check on the Court's jurisdiction is “the political question.” Among the oldest of judicial folk-ways, it has no specific warrant in the Constitution. It derives by implication from the separation of powers and connotes an issue in and of itself not justiciable, a something left after the legal aspects of a cause in action have been cleared up. The matter is as completely within the discretion of another agency as to present a no-trespass sign to the courts. A political question has no certain norm and is not easily to be isolated from the controversy in which it is set. A bench which finds all sorts of commitments to policy in the Constitution will find little scope — save as a necessary escape — in such a sanction; a bench which believes that the general welfare has been entrusted to legislature and the governmental establishment will find much. A solicitude towards an unhampered operation of agencies of government within the appointed provinces could find no more fitting instrument, and in recent months an area recognized as political has been enlarged by the Court.<sup>66</sup> A residuum of non-judicial

64. Aside from the suggestions made at the time of the Court Unpacking Bill, note 12 *supra*, Theodore Roosevelt and Robert LaFollette were almost the only ones to suggest drastic reform.

65. It is important to note that the Court in decreeing its own competence is, except in cases coming from state courts, also setting limits to the competence of the federal judiciary. But even within its own special realm it may protect its own competence—competence to handle the work given to it. Long ago, it sought to reduce the quantity of its work. See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927) c. 7. A wide tolerance lies between the handful of appeals it must accept and the host of cases it may at its pleasure review. It may accordingly choose to limit its docket to the issues it can best handle. But it must, at the same time, not shut off cases incompetently handled by lower federal courts. To do this would be ostrich-like.

66. See cases cited in notes 43, 44 *supra*. Here “political” refers to justiciability. The “political” nature of issues which must be passed on is something else again. It goes without saying that this has been enlarged. See note 82 *infra*.

power over policy—large or small as the bench makes it—is to be unquestioned in any manner.

A kindred—at times overlapping—device is “the genuine case or controversy.” Often the legal controversy is only the rhetorical shell of a policy question. A suit has been trumped up in order that the Court may pronounce valid or null-and-void some legislative act.<sup>67</sup> If the matter must be resolved by combat at law, the less encumbered the issue, the better. But, if the Court regards a choice between alternative ways of serving the common good as no concern of its own, it may strip away the trappings as sheer disguise, discover the real issue to lie beyond its competence as a court, and refuse to entertain the suit. On a number of recent occasions the Court has split upon whether it would entertain a plea it was bound to reject or bluntly refuse to listen.<sup>68</sup> Justice Frankfurter protested vigorously that the Court should lend no encouragement to an attempt to set aside a state law when the attempt was predoomed to failure; and to the argument that, because the record had been incorrectly built, it would have to remand he replied that the Court could invoke the ancient powers of the Chancellor “as though the suit were before him *de novo*.”<sup>69</sup> In another case, Justice Black insisted that the power of a state to prohibit a monopoly is unquestioned, and would indulge it no right of access to the courts for purpose of challenge.<sup>70</sup> Although neither spoke for the majority, their dissents show clearly the direction of the judicial winds. As a question comes consistently to be answered in the negative, it is only a question of time before the Court refuses to allow it to be raised. Even where there is a question of substance which it must eventually entertain, the device can be employed to delay action until it emerges in a genuine law-suit.<sup>71</sup> A premature consideration means an issue-in-the-abstract; a deferment means that the policy in question has time to prove its worth in practice before having to undergo judicial scrutiny. Thus the “case or controversy” may be used to evade, to limit jurisdiction, to defer judgment, to mark out lines of competence.

The technical requirement of standing to sue is a variant of the same symbol. Like the case or controversy requirement it is a convenient

67. See JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) c. IX.

68. See *Beal v. Missouri P. R. R.*, 312 U. S. 45 (1941); *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940); *Gibbs v. Buck*, 307 U. S. 66 (1939); *Polk v. Glover*, 305 U. S. 5 (1938); *cf. Driscoll v. Edison Light & Power Co.*, 307 U. S. 104 (1939).

69. *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 322 (1940).

70. *Gibbs v. Buck*, 307 U. S. 66, 77 *et seq.* (1939).

71. “Passing upon the possible significance of the manifold provisions of a broad statute is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.” *Watson v. Buck*, 9 U. S. L. WEEK 4339, 4341 (U. S. 1941).

device to shield the executive and legislative action against judicial attack. Yet here again, it may be only another technical way of saying that the business in question is not the concern of the Court. As an open formula it does on occasion serve as a test of the Court's competence. For, where the issue concerns the internal operations of government, it is clearly inadvisable for the judiciary to interfere, while the imposition of conflicting commands by separate agencies makes its intervention necessary.<sup>72</sup> That, in the one instance, the aggrieved party lacks and in the other possesses standing to sue is commonsense. The criterion is whether the litigant has any business inquiring into the matter. But, such instances aside, the doctrine is little more than a convenient judicial tool which is employed rather to inhibit action when the Court regards itself as incompetent than as a measure of its distinctive competence.<sup>73</sup>

But criteria do not lie upon a single level; other values may be invoked to assume or to reject cases. Tempo may be endowed with consequence. The process of justice is avowedly, necessarily, empirically "decorous." Its office is to provide a forum for a judicious survey of a course of action, to assess departures from norms of equity, to decree whatever punitive, remedial and preventive measures the situation commands. It has, so far as it can make use of improvised tools, attempted to cover the period *pendente lite* with a hasty answer.<sup>74</sup> It has, with much stress and strain, failed to accommodate its procedures to the stream of activities which attest a going business in an intricate industrial society. Here a continuous supervision, a constant adjustment, a detail of decisions — of little consequence in the instance, yet amounting to a policy in the aggregate — present a demand which cannot be met from the bench. If private equities must be scrupulously respected and still a public overseer is essential, the answer is the administrative tribunal. Yet this hybrid invention has not been watched over with an eye single to its function. Instead its performance has been seriously compromised by trespass upon its process and territory. The judiciary, suspicious of an upstart, has attempted to impose a procedure which grew up under other conditions. And business enterprise, anxious to escape agencies which

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72. Compare *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940), discussed in note 44 *supra*, with *United States v. American Trucking Ass'ns*, 310 U. S. 534 (1940). The latter case is not, strictly speaking, one involving conflicting commands because both agencies urged identical interpretations of the statute. But the type of issue is one requiring judicial resolution.

73. See *Tennessee Electric Power Co. v. T. V. A.*, 306 U. S. 118 (1939); *Duke Power Co. v. Greenwood*, 302 U. S. 485 (1938); *Alabama Power Co., v. Ickes*, 302 U. S. 464 (1938). See Moore and Adelson, *The Supreme Court: 1938 Term* (1939) 26 VA. L. REV. 1, 67. Cf. Shulman, Book Review (1937) 15 No. CAR. L. REV. 309, 311, n. 5.

74. Interlocutory orders, particularly temporary injunctions, are judges' answers to the cry of tardiness.

it could not control, has sought to dissipate command into an interminable ceremonial. Thus the ancient law court, which it was the very purpose of the new tribunals to escape, would be on its way to a return. If judicial review is added to administrative process, year follows year while a single question in a course of hurried events awaits decision. The resulting delay, devastating in its incidence, has been remarked in militant terms by members of the present bench.<sup>75</sup> The demand for speed is an important term in the equation of competence. As judicial etiquette now goes, it cannot be accorded formal recognition, but it has of late made a lusty appearance upon the plane which underlies "the opinion of the Court."<sup>76</sup> Other vehicles are at hand for carrying its value; the finding of the administrative body has a weight; the chancellor has his zone of discretion in respect to stay or injunction.

A close ally to speed is expertness. The decision should come from an authority whose answer can be relied upon. The delegation of power, the specialization of office, the establishment of separate controls, has been intended to refer decisions of various sorts to agencies most competent to make them. The trend has been to recognize an intermediate term between "the law" and "the facts." A knowledge of the subject, an understanding of the process in which it is set, a feel for the intangibles which comes out of experience are factors in the judgment.<sup>77</sup> They never become quite articulate; they are indigenous to the administrative process and not easily transplanted to another forum. As the case goes up, such considerations tend to fade from the record; the Court handles a matter which lacks a dimension present at the more secular hearing below.<sup>78</sup> An oblivion to the unlikeness between the administrative and the judicial process comes easily to lawyers who think of Court review only as a further series of steps in a single process. And this failure to distinguish in kind — studied or obtuse — is accompanied by demands for a wide-open door to judicial appeal. As the work of the agency increases in magnitude and complexity, the qualitative difference between

75. See Mr. Justice Black dissenting in *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 423-27 (1938). Cf. Mr. Justice Frankfurter in *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U. S. 4, 5 (1940) ("The case concerns a rate controversy which has been winding its slow way through state and federal courts for thirteen years."). See also Mr. Justice Brandeis in *St. Joseph Stockyards v. United States*, 298 U. S. 38, 88-93 (1936).

76. See *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U. S. 4 (1940); see cases cited in notes 223, 225 *infra*; cf. cases cited in notes 50, 51 *supra*.

77. ". . . all are part of the imponderables which the Board was entitled to appraise." *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 599 (1941). See also the quotation in note 225 *infra*.

78. Compare the approach to the problem in *Railroad Comm. of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570 (1941) with that in *Morgan v. United States*, 304 U. S. 1 (1938). And see note 225 *infra*.

the two processes becomes more obvious; and of this difference in kind the Court is in time bound to take effective notice.<sup>79</sup> It was bound to discover that trial at law fails to serve the administrative process in the search for the substantive result, and remains valuable only as a guarantee of orderly process. There is nothing to stop the Court — whatever form of words it employs — from refusing to exercise its authority when it distrusts its own judgment. The Congress, to whom the power properly belongs, may reapportion labors and impose upon the Court a task it is reluctant to assume. But its authority is buttressed by intricate technology and favorable presumption, and its ingenuity can always rise to a refusal to march where it fears to tread.

The criterion of judgment by the expert is not limited to administration. The will of the people, in spite of its omniscient quality, is supposed to be informed; the laws of the land are presumed to emerge from a process which turns knowledge to full account. The direct responsibility for a statute belongs to the legislature; the social need has come to it; its concern is with an over-all view of the situation, the factors in conflict, the alternative proposals. It has the facilities for gathering facts, diagnosing maladies, prescribing remedies. The Court is limited to such values, materials, considerations as can be crowded into the narrow confines of a suit at law. In respect to interstate trade barriers three members of the Court noted that Congress alone can “not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union.”<sup>80</sup> Such a limitation upon judicial vision has traditionally been set down in shorthand as “the presumption of constitutionality”; but the indulgence of such a presumption has usually stopped short of its implications. Mr. Justice Black thrust at its vested logic when he questioned the Court’s action in requiring a hearing on the validity of a state statute, passed unanimously in one house, with a single vote contra in the other, and approved by the governor. After noting the competence of the legislature to appraise facts and resolve conflicts of interest, and commenting upon “the careful and cautious consideration given to the matter,” he accused the Court of using judicial review to weigh again the pros and cons of the measure.<sup>81</sup> Again and

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79. “It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.” *United States v. Morgan*, 9 U. S. L. WEEK 4336, 4338 (U. S. 1941). See also *United States v. Morgan*, 307 U. S. 183, 191 (1939).

80. *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 189 (1940).

81. *Polk v. Glover*, 305 U. S. 5, 16 (1938).

again, for the majority as well as in dissent, justices have disclaimed the competence of the Court in this field.<sup>82</sup>

In the shift to a new base, the solicitude for a full record plays a part. If the issue is to be entertained, it must be the real issue, not a mere legalistic question. To that end the bench must be as fully informed as the body whose judgment it reviews; a complete picture demands an adequate recitation of fact and a realistic brief.<sup>83</sup> But all that is requisite to decision cannot be crowded into a legal document; the judicial process does not lend itself easily to policy making; the Court, without authority to create where it strikes down, is not at its best in a legislative role.<sup>84</sup> The Brandeis brief—as argument or dissenting opinion—was invented as a defense against reading the preferences of justices into the Constitution. Its vogue was greatest when statutes had to run the gauntlet of null-and-void. As the minority has become the Court, it passes along with other assets of the dissent. It still serves a function in preserving to the cause at law the realities with which it is concerned.<sup>85</sup> But affirmative use reveals clearly the half-way thing the device is. The demand for all that lies back of a legislative act is a demand for evidence that reasonable men might have passed it. That is to accord to the law-makers a wide zone of discretion; and that in turn is to say that in respect to the substantive question the legislature is more competent than the judiciary. Mr. Justice Black, for example, finds distasteful the affirmative use of so compromising a device. He would go all the way, dismiss for want of jurisdiction, and deny to the Court the right to substitute its “right” and “wrong” for that of the

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82. See *Olsen v. Nebraska*, 61 Sup. Ct. 862, 865 (U. S. 1941), quoted *supra* note 38; *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 445 (1940) (“Nothing can be less helpful than for courts to go beyond the extremely limited restrictions [of] the Constitution . . .”); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 394 (1940) (“Those matters . . . relate to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen—matters which are not for our concern.”); *Osborn v. Ozlin*, 310 U. S. 53, 66 (1940) (“All these are questions of policy not for us to judge.”); *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 320 (1940) (“The wisdom of such a policy—its efficacy to achieve the desired ends—is of course not our concern.”); *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 189 (1940), quoted p. 1340 *supra*; *Polk v. Glover*, 305 U. S. 5, 16 (1938); *Indiana v. Brand*, 303 U. S. 95, 117 (1938).

83. “Unless we know the facts on which the legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious. Knowledge is essential to understanding; and understanding should precede judging.” Mr. Justice Brandeis dissenting in *Burns Baking Co. v. Bryan*, 264 U. S. 504, 520 (1924).

84. Compare the statement of Black, Frankfurter, and Douglas, JJ., p. 1340 *supra*.

85. See *United States v. Carolene Products Co.*, 304 U. S. 144, 152-55 (1938).

responsible authority. His argument takes "the democratic process" more seriously than the doctrine of judicial review would allow.<sup>86</sup>

In fact, the theory of competence opposes the drive towards judicial review. Due process, equal protection, privileges and immunities are verbal counters; they are animated by the feeling that some authority ought to arrest legislation which has gone astray. In the good books, statutes emerge from an informed process of deliberation; in actual life they frequently are responses of the legislature to the pressure of interested groups. It has been argued by one, as distinguished in political science as he is in law, that "legislation is more and more the product of stark pressure with little or no reason admixed"; and that judicial review returns the process "to the test of deliberation, reason, principle and fact in an atmosphere of comparative detachment."<sup>87</sup> The assumption of pure reason guiding deliberation may be outmoded; the Congress may be a forum in which interests, in accordance with their strength, register their various wills. Yet, the implications of such an argument have been only cautiously indulged by its proponents. If the Court is to strike down where the legislature inconsiderately acted, why should it not act where the legislature inconsiderately struck down? Even if the Court goes only half-way, it usurps a political office and becomes an additional custodian of the general welfare. It assumes the wisdom of legislation to be a thing apart from the process which engenders it. It is a denial of the validity of the democratic process. The logic of the contention carries its advocates farther than they want to go.

In last analysis the aim of government is the satisfaction of the needs of the groups which make up the commonwealth. If a wise, disinterested and beneficent authority is at hand, the matter can be left to a third party. But when divine right—whether for King, God's vicar, Star Chamber or dictator—is at a discount, persons in interest must rely upon such processes as human frailties can devise. Individuals with like desires group themselves and articulate their demands. If a group finds itself opposed to another group, the number of possible modes of resolving the dispute is limited. Each can exact its own justice; a knock-down and drag-out fight ensues; but this occurs only if government is impotent. A forum may be provided for a consideration of opposing views, and a decision reached. Or resort may be had to an arbiter. Such peaceful mediation is the essence of the judicial process. In individual matters, and with norms acceptable to the community, it works well enough. But when bigger things are in order, the vehicle of adjudication becomes overloaded or refuses to accept the traffic. The issue may be novel and criteria of judgment uncertain; a submerged group,

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86. See the quotation *infra* note 122. Note that in the *Carolene Products* case Mr. Justice Black dissented from the part cited *supra* note 85.

87. Dickinson, *Due Process of Law* (1939) No. CAR. B. A. REP. 133, 147.



becoming articulate, demands rights; the difference-it-makes reaches far and wide and out into the future. Here is too much of clash, the subjective, the unknown to be entrusted to arbitration. The demand is not for an answer, but for standards and values by which answers are to be secured. In matters of individual satisfaction and group assertion no third party can decide. Instead, a forum for discussion and mutual consideration, can at least provide a mechanism for a resolution of conflicting demands. A democratic system converging into a legislative process, with the traditional complement of civil liberties, provides such an institution. It cannot respond to the aggregate will of a countless number of atomic individuals; a considerable amount of organization into pressure groups is the price of its operation. Its pressures count for more than numbers; the fault lies, not with the democratic process, but with the privileged structure of society which it reflects. And if voices are more confused than needs, the organization of opinion, rather than the process of law-making, is to blame. The state is a body of many members; and each of these must become articulate if the legislature is to consider its necessities.

The judicial system is uniquely ill-adapted to handle pressure groups. After the last procedure has been invoked and the last substantive issue has been referred to the appropriate norm, the question of novelty has only emerged. A reference, rather than a result, is needed; and since abstract justice cannot supply it, it must emerge from a balance between pressures. The judicial process is based upon strength of argument; the presiding judge makes his decision upon his feeling as to how the matter ought to be. He is pent in by atmospheric influences emanating from the dominant group; he is impelled to stay within the zone of tolerance marked out by public opinion. If, within these limits, he is free from partisan pressure, he is subject to the pressures of the past frozen into the legal code. The political process, by contrast, moves avowedly towards the recognition of new interests, the creation of new rights, the redefinition of the norms of justice. In its very nature there are no fixed standards by which its results can be measured. In an endless process, in which groups rise and fall, and interests refuse to become a stereotyped commonwealth, it must forever make articulate that which is inchoate. Even "the immutable principles of the Constitution" cannot arrest the corrosion and renewal of social structure. The Court is now fumbling towards a recognition of the logic of its own position. If, when, as it comes, it will recognize that its competence comes up sharp at the boundaries of the substantive process of legislation.

In sum these various elements are falling into a pattern of competence. In character they are not all of a kind; and the types of dispute which come into Court differ in quality as well as in degree. There is

accordingly variety in norm as well as variation in subject matter. Hence no logical scheme of categories can be imposed upon the scattered results. Again and again it will be set down that policy is for some other body and "not for this Court." But a major premise of competence and incompetence cannot of itself decree results. Instead of easy generalization, inquiry can garner no more than the sorts of things the Court finds within its own, and the sorts of things it sets down within the competence of others.

#### IV. RETREAT FROM THE CONSTITUTION

At its hands "the law of the Constitution," as a body of substantive rules, is on the wane. Another bench, with a different conception of its own office, might impress a trim structure upon the whole domain of public policy. The current bench, through its self-denying ordinance, has mitigated the former pervasiveness of oversight. The lines once maintained in sharp relief are now exposed to legislative change; and if many remain where once they were, their firm foundation in the supreme law of the land has been replaced by the precarious will of the legislature. The current position, however, bears the marks of being transitional. The Court has not formally surrendered its power; it does not in general refuse to accept a case which raises a constitutional issue. But the older presumption of constitutionality has been elaborated into a technology by which review becomes little more than the fulfillment of traditional proprieties. For example, in the good old days the Court attempted to impose upon the several states the outline of a fiscal policy which in the name of justice outlawed "double taxation."<sup>88</sup> Its iron will was no match for the perplexing intricacies of a continental industry. The Court's intermittent stabs at an assortment of situations led to a hodge-podge of "rigid and artificial legal concepts"<sup>89</sup> which created as much confusion as it eliminated. Recently the Court has first in instances fallen back and next beaten a fast retreat from a battle-ground in which the terrain would not sustain its tread.<sup>90</sup> There may be confusion, overlapping, injustice; but a situation out of hand cannot be corrected by the hit-or-miss of the instant case. Form, equity, precision can come only through such a complete overhauling as Congress alone can decree.<sup>91</sup>

In respect to state burdens on interstate commerce, the Court is exercising a similar, somewhat slower, and more orderly retreat. It will no

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88. See Collier, *Shall the Courts or the State Legislatures Umpire Tax Jurisdiction Disputes?* (1940) 8 GEO. WASH. L. REV. 1179.

89. *Newark Fire Ins. Co. v. State Board of Tax Appeals*, 307 U. S. 313, 323 (1939).

90. See *Withdrawal of Due Process Limitations on State Tax Jurisdiction* (1941) 50 YALE L. J. 900; Collier, *supra* note 88.

91. See Rodell, *A Primer on Interstate Taxation* (1935) 44 YALE L. J. 1166, 1181-85.

longer invoke the commerce clause to protect corporations whose habitats are far from local from sharing in the assessments imposed by the state.<sup>92</sup> As yet diverse threads have not been woven into a strand that bears the authority of the Court. They concur that a state statute which on its face discriminates against a commerce which refuses to respect political boundaries is void.<sup>93</sup> But beyond the vague contours of this general utterance, the brethren are not in accord. Black, Frankfurter, Douglas, JJ., apparently feel that as soon as a controversy arises as to whether a statute, innocent on its face of such an intent, actually discriminates in practice, the limit of the Court's competence has been passed.<sup>94</sup> Although he would not go so far, Mr. Justice Stone does insist upon a strong presumption in favor of the reasonableness of any state statute which impinges upon interstate trade.<sup>95</sup> The other justices, in varying degrees, are more tolerant of judicial review; they feel a duty to keep commerce among the several states free of barriers.<sup>96</sup> If an approach already manifest becomes dominant, the oversight of the federal system will be largely left to Congress.<sup>97</sup> It seems the more competent to give full consideration to the many factors involved in national policy.

In regard to the state's control of "its own economy," the Court has stayed its hands. The symbols of "due process" and "equal protection" once powerful to strike down, nowadays seem to exhaust their power in bringing issues under review.<sup>98</sup> A Court which is willing to admit that the wisdom of legislative acts is debatable, can claim for itself no

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92. The development is outlined in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 46 (1940) ("But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, . . .").

93. *Best & Co. v. Maxwell*, 311 U. S. 454 (1940); *Hale v. Bimco Trading Co.*, 305 U. S. 375 (1939).

94. Dissenting in *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 183 (1940).

95. See his opinions in *South Carolina State H'w'y Dep't v. Barnwell Bros.*, 303 U. S. 177, 190-91 (1938); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 46ff. (1940); cf. his concurring opinion in *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 180 (1940).

96. See the Chief Justice's dissent in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 59 (1940); Mr. Justice Reed dissenting in *West India Oil Co. v. Domenech*, 311 U. S. 20, 29 (1940). Neither of these two concurred in the other's dissent in the above two cases. Mr. Justice Roberts, however, concurred in both dissents. Mr. Justice Murphy has not yet indicated his full-blown philosophy on trade barriers.

97. For critical views see Dowling, *Interstate Commerce and State Power* (1940) 27 VA. L. REV. 1; McAllister, *Court, Congress and Trade Barriers* (1941) 16 IND. L. J. 144; Dickinson, *The Functions of Congress and the Courts in Umpiring the Federal System* (1940) 8 GEO. WASH. L. REV. 1165.

98. The cases upholding recent economic legislation under the Fourteenth Amendment are too numerous to mention. The only Act to fail in the past two terms was by a divided Court, Black, Douglas, and Murphy dissenting. *Wood v. Lovett*, 9 U. S. L. WEEK 4346 (U. S. 1941). And even here it was the "obligation of contracts" clause which stood in the way, not the Fourteenth Amendment.

exclusive competence to decide. It may admit that the local needs of a single state do not stand out in sharpest relief from Olympian heights.<sup>99</sup> And if remedies can not operate in the abstract, it may concede that the-man-on-the-spot is best able to judge impinging conditions.<sup>100</sup> All along the front of state control the Court is falling back. A number of justices have apparently come to doubt the fear expressed by Mr. Justice Holmes when he said, "I do think the Union would be imperiled if we could not make that declaration [of unconstitutionality] as to the laws of the several States."<sup>101</sup> If it be once admitted that the Congress is competent to preserve the Union,<sup>102</sup> a self-assumed load of heavy responsibility is at once lifted from the shoulders of the Court. In result the judicial arm ceases to be an impediment over which experimental legislation may tumble.<sup>103</sup> Yet, in spite of self-surrender, the Court reserves and exercises the power to strike down local economic legislation obviously aimed at discriminating against the outlander.<sup>104</sup>

In its converse terms of guarding the states from destruction this reservation of power to preserve the Union is less insistent. As long ago as the days of John Marshall, the Court insisted that the supremacy of the national government was not to be lightly set aside in the name

99. Compare "Reading the Texas Statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment. . . ." *Railroad Comm. v. Pullman Co.*, 61 Sup. Ct. 643, 644 (U. S. 1941).

100. Compare "Deeply imbedded traditional ways of carrying out state policy, . . . are often tougher and truer law than the dead words of the written text." *Nashville C. & St. L. Ry. v. Browning*, 310 U. S. 362, 369 (1940).

101. COLLECTED LEGAL PAPERS (1920) 296. This is apart from the problem of conflict between state and federal laws. See pp. 1367-69 *infra*.

102. Compare Chief Justice Marshall's distinction between federal taxation of state instrumentalities and state taxation of federal instrumentalities. *McCulloch v. Maryland*, 4 Wheat. 316, 435-36 (U. S. 1819).

The recent cases on tax immunity present, incidentally, a brilliant example of the technique of judicial retreat from the constitutional policy-making field. Marshall declared, perhaps as a dictum, that "the power to tax involves the power to destroy." [*Id.* at 431]. It came later to be argued that neither state nor nation could tax "the instrumentality" of the other. As instrumentality radiated by a kind of contagious magic, an artificial and unrealistic structure of immunities was created. [See Powell, *An Imaginary Judicial Opinion* (1931) 44 HARV. L. REV. 889]. By a simple approach, going back to Marshall, the Court has cut this intricate structure away. A person may receive his income from an instrument of government, but he pays his tax as an ordinary citizen. Congress may forbid or allow state taxation of its instrumentalities; states can do little to stop federal taxation of its instrumentalities. *Graves v. O'Keefe*, 306 U. S. 466 (1939); *Helvering v. Gerhardt*, 304 U. S. 405 (1938). Although not stated in terms of competence, the emerging rule clearly limits the discretion of the Court. It decrees an elementary pattern, and regards departures as matters of policy to be decreed by the legislature.

103. See the quotation in note 121 *infra*.

104. See *Best & Co. v. Maxwell*, 311 U. S. 454 (1940); *Hale v. Bimco Trading Co.*, 306 U. S. 375 (1939). See also note 115 *infra*.

of state's rights.<sup>105</sup> As times have changed and issues have shifted, the terms of the formula for the division of power have undergone mutations of meaning, and Marshall's federal supremacy has sometimes been in eclipse.<sup>106</sup> Yet, except for the lapse during early New Deal days, the policy sponsored by Mr. Chief Justice Taft of giving great weight to a Congressional declaration of need for national action has been in the ascendancy.<sup>107</sup> The current bench relies perhaps more heavily than ever before upon such declaration,<sup>108</sup> and yet is loath to take the last step and admit that a Congressional determination is final. It admits the competence of the legislative branch, but attaches a string which keeps the last word within its own reach. If a state statute collides with an Act of Congress, and interpretation cannot trim the two to fit, the federal power has precedence.<sup>109</sup> But the federal system is deeply grooved, and there doubtless remains a residual territory which the Court will preserve to the states. The *Schechter* case<sup>110</sup> must be read today with the gloss of a hundred opinions; but it probably still carries the meaning that to make Congress sovereign to the whole economy would doubtless compromise the Union.<sup>111</sup> In fact, however, the present bench admits the power of Congress to mark out the field of its own competence.<sup>112</sup>

Yet, if the Court rarely gives it exercise, it has not abdicated its veto power. This fact warrants the observation of the Attorney General that the victory of the President over the Court is "temporary."<sup>113</sup> It is not current usage, but authority in reserve which is important; and, since the ways of the Court respond to a changing personnel, habits put off can easily be put on. The use of its power to strike down statutes which seek to preserve trade to citizens of the state against outsiders presents

105. See *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824); *Brown v. Maryland*, 12 Wheat. 419 (U. S. 1827); *Willson v. The Black-Bird Creek Marsh Co.*, 2 Pet. 245 (U. S. 1829).

106. See *City of New York v. Miln*, 11 Pet. 102, 130 (U. S. 1837); *The License Cases*, 5 How. 504 (U. S. 1847); Corwin, *loc. cit. supra* note 6.

107. See *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 40 (1923); Corwin, *The Schechter Case—Landmark, or What?* (1936) 13 N. Y. U. L. Q. REV. 151, 167-69.

108. See Mr. Justice Douglas' discussion in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 394-96 (1940).

109. *Hines v. Davidowitz*, 312 U. S. 52 (1941). This assumes, of course, that the federal power is "granted" or "implied."

110. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

111. See Powell, *Commerce, Pensions and Codes II* (1935) 49 HARV. L. REV. 193, 205-13.

112. One has only to glance at the cases since 1937 upholding Congressional power. See, for example, *Phillips v. Guy F. Atkinson*, 9 U. S. L. WEEK 4366 (U. S. 1941); *United States v. F. W. Darby Lumber Co.*, 312 U. S. 100 (1941); *United States v. Appalachian Power Co.*, 311 U. S. 377 (1940); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940); *United States v. Lowden*, 308 U. S. 225 (1939); *United States v. Rock Royal Co-operative*, 307 U. S. 533 (1939). See Mr. Justice McReynolds dissenting in *N. L. R. B. v. Fainblatt*, 306 U. S. 601, 614 (1939).

113. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) vi.

an easy temptation. Such a veto has a great tradition behind it; the cordon of state barriers at political boundaries was a dominant factor which provoked the Constitution into being.<sup>114</sup> And even though in this field Congress might be left to do the kind of job the Fathers performed in Philadelphia, the supreme law of the land already gives the warrant, and the Court does not step outside its office to stay a short-sighted and pressure-ridden state legislature.<sup>115</sup> But statutes are rarely so sharply drawn as to serve a single objective; disputes can arise as to legislative intent and it can be argued that the outlander is only a burnt offering on the altar of some legitimate cause.<sup>116</sup> The graduation is easy; through such an inviting breach the Court may go far in the assertion of its power. If again it sallies militantly forth, it can easily pass beyond the limits of its competence; and through due process, the commerce clause, the reserved rights of the states—brightly furbished up for a new crusade—exalt sterilizing legalisms as the law.

Apart from such an overlapping area, the criteria of competence should hold the Court well aloof from general legislation. A growing recognition of stresses and strains in the national economy enlarges the orbit of federal power;<sup>117</sup> and more and more the states are called upon to fill in the detail of policies emanating from Washington.<sup>118</sup> It is essential that the two controls be exercised with as much consistency and as little friction as may be. But such adaptation was well along before the Court noticed it;<sup>119</sup> it is singularly barren of justiciable issues; its

114. See *Baldwin v. Seelig*, 294 U. S. 511, 523 (1935) ("The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union not division.").

115. "State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, . . . have been thought to impinge upon the constitutional prohibition even though Congress has not acted." *South Carolina State H'wy Dep't v. Barnwell Bros.*, 303 U. S. 177, 184 n. (1938). The Court went on to give the reason for this. "Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *Ibid.* Cf. *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 189 (1940), quoted p. 1340 *supra*.

116. Consider the dispute over the question of discriminatory taxation in *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176 (1940).

117. "The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. . . . Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the Nation." *Helvering v. Davis*, 301 U. S. 619, 641 (1937). Cf. *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495 (1937).

118. See MACDONALD, *FEDERAL AID* (1928) pp. 2-4, 13, 271; KEY, *THE ADMINISTRATION OF FEDERAL GRANTS TO STATES* (1937) cc. I, XII.

119. See Mr. Justice Stone in *United States v. Butler*, 297 U. S. 1, 85-86 (1936).

problems have been called "political questions."<sup>120</sup> Within its shrinking domain, the state should be master of its own public policy. With the art of control backward, there must be experiment;<sup>121</sup> and the political process, far more than the judicial, leaves the way open for retreat and a fresh start. An occasional veto from Washington merely obtrudes a disturbing element into a course of events the Court is powerless to direct; in its corrective touch it is a denial of the whole democratic system of legislation by popular pressures. In a changing culture "our traditional mode of life" is not the most meaningful of terms; but if, in nation and state, the economy is to be kept flexible enough to preserve personal opportunity, the dominant reliance must be upon the legislature.<sup>122</sup> For the Court to attempt to hold the pattern of national life true to the American ideal would be to adventure far beyond the frontiers of judicial competence.

#### V. CITADEL OF THE ANCIENT LIBERTIES

Although in fact the Court makes the legislature supreme in matters of policy, it has been unwilling to make definitive its presumption that a statute is constitutional. Its position may be due to a desire to keep its rule of review uniform and its reluctance to abandon its veto in issues of civil rights. A few years ago a bench headed by the present Chief Justice read "liberty of contract" out of the due process clause and promptly read freedom of speech into its place.<sup>123</sup> The current bench, accentuating a trend which for a decade has been in the making, has in effect set up a presumption of unconstitutionality against all legislation which on its face strikes at freedom of speech, press, assembly, or religion.<sup>124</sup> At the same time, while degrading substantive, it has exalted procedural due process — at least in instances where a natural person

120. See *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 189 (1940). Cf. *Massachusetts v. Mellon*, 262 U. S. 447, 483 (1923). For dissenting views see *McAllister and Dickinson*, *supra* note 97.

121. "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs." Mr. Justice Brandeis dissenting in *New State Ice Co. v. Liebman*, 285 U. S. 262, 311 (1932).

122. "On remand of petitioners' bill which fails to show that the Florida law is invalid, may the Court, on evidence outside this bill, hold that the law violates due process because the court is convinced that the legislature might have chosen a wiser, less expensive and less burdensome regulation? If a Court in this case and under this bill has this power, this final determination of the wisdom and choice of legislative policy has passed from legislatures—elected by and responsible to the people—to the Courts." Mr. Justice Black dissenting in *Polk v. Glover*, 305 U. S. 5, 18 (1938).

123. Compare *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251 (1931) with *Near v. Minnesota*, 283 U. S. 697 (1931). See *Shulman*, *infra* note 131.

124. See (1940) 40 *Col. L. Rev.* 531.

had been denied counsel,<sup>125</sup> a jury of his peers,<sup>126</sup> an atmosphere of decorum or some other requisite of a fair trial.<sup>127</sup> Not infrequently the Court has been faced with statutes which in letter made all equal before the law, yet in actual operation became instruments of discrimination.<sup>128</sup> In one realm it must look into the detail of trials for crime,<sup>129</sup> in another into the detail of the administration of a law.<sup>130</sup> For the consideration of such minutiae, its door must be capable of being flung wide open. A rule of jurisdiction in terms of types of causes invites disturbing questions; a general invitation, and discretion as to what presumptions will be indulged serves the same result.

Yet holdings rebut appearance; few of the justices would now assert that the Court extends equal courtesy to the person natural and the person corporate or that civil rights obtain access no more easily than liberties of property. The distinction has evoked—and provoked—numerous attempts at rationalization.<sup>131</sup> Some have been content to say no more than that the ancient liberties of the folk are “more fundamental” than those which relate to business and hence must be more zealously guarded by the courts.<sup>132</sup> A supporting buttress is that the

125. *Powell v. Alabama*, 287 U. S. 45 (1932).

126. *Smith v. Texas*, 311 U. S. 128 (1940); *Pierre v. Louisiana*, 306 U. S. 354 (1939); *Norris v. Alabama*, 294 U. S. 587 (1935).

127. *Moore v. Dempsey*, 261 U. S. 86 (1923).

128. See, e.g., the cases cited *supra* note 126.

129. See *White v. Texas*, 310 U. S. 530 (1940); *Chambers v. Florida*, 309 U. S. 227 (1940); and cases cited *supra* note 126.

130. “Though the law itself be fair on its face . . . , yet, if it is applied and administered by public authority with an evil eye and an unequal hand, . . . , the denial of equal justice is still within the prohibition of the Constitution.” *Yick Wo v. Hopkins*, 118 U. S. 356, 373 (1886).

131. Apart from judicial utterance, see Shulman, *The Supreme Court's Attitude toward Liberty of Contract and Freedom of Speech* (1931) 41 *YALE L. J.* 262; LEVY, *OUR CONSTITUTION: TOOL OR TESTAMOUNT* (1941) 256-64; JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) 284-85; cf. Powell, *Changing Constitutional Phases* (1939) 19 *B. U. L. REV.* 509, 531 (“yet on both sides the paradox is more apparent than real.”). For criticism of attempted rationalizations see Commager, *Book Review*, *N. Y. TIMES*, March 30, 1941, § 6, p. 16; LERNER, *IDEAS ARE WEAPONS* (1939) 66-68.

132. “Freedom of speech and freedom of the press cannot be too often invoked as *basic* to our scheme of society.” Mr. Justice Frankfurter in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 299 (1941). “This nation *relies* upon public discussion as one of the *indispensable* means to attain correct solutions of problems of social welfare. . . . Our whole history teaches that adjustment of social relations through reason is possible while free speech is maintained.” Mr. Justice Reed dissenting in the same case at 567. The First Amendment is “the *foundation* upon which our governmental structure rests and without which it could not continue to endure as conceived and planned.” Mr. Justice Black also dissenting at 559. “The maintenance of the opportunity for free political discussion . . . , is a *fundamental* principle of our constitutional system.” The Chief Justice in *Stromberg v. California*, 283 U. S. 359, 369 (1931). (*Italics* added in all quotations).



Constitution in specific terms outlaws abridgment of civil rights while whatever protection it decrees for property is set down in terms vague enough to invite a wide discretion.<sup>133</sup> The argument is not proof against possible attack. As history it is open to qualification; the verbal lineage of the due process clause runs back to the Bill and the Petition of Rights; and the men who presented those documents to "tyrannical" kings were as much concerned with "liberties" in respect to their "estates" as in respect to their religion. It has also its exegetical difficulties; one wonders how rights so fundamental managed to find their habitation within the same vague terms of "due process" now set down as a part of the Fourteenth Amendment. Although there is nothing explicit there, and a prohibition on federal now emerges as a limitation upon state action, we are told that the matter is too well-settled for discussion.<sup>134</sup> Yet, in a series of steps, the process of transference can be traced;<sup>135</sup> as an example of borrowing and adaptation of doctrine, it is of a kind with reading laissez-faire into the supreme law of the land. In the one case there is nothing more obvious, natural, or inevitable than in the other.

It has the character, too, of inviting an overt exercise of judgment. The several ancient liberties were never absolute; and, as caught up in the generic term liberty, they do not completely escape the finite. The Court has never said, the current bench is unlikely to say, that executive and legislature may never interfere with a person's freedom.<sup>136</sup> In this light, although instances may range as widely as the colors in a spectrum, the action of the state must be measured against the invasion of private right, and the issue becomes a matter of more or less. Yet it is this very process of weight and balance which the Court seeks to avoid in ordinary legislation.<sup>137</sup> The legislature which abridges freedom of speech is convinced that its action is necessary in the given instance. When the Court enters a denial, it sets its judgment against that of a coordinate

133. "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, . . ." Mr. Justice Stone in *United States v. Carolene Prod. Co.*, 304 U. S. 144, 152n (1938), citing two opinions of Chief Justice Hughes, *Stromberg v. California*, 283 U. S. 359, 369-70 (1931); *Lovell v. Griffin*, 303 U. S. 444, 452 (1938).

134. "It is now too well settled to require citation that by the Fourteenth Amendment the guaranties of the First Amendment are protected against abridgment by the states." *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 301, n. 3 (1941).

135. See Warren, *The New "Liberty" Under the Fourteenth Amendment* (1926) 39 HARV. L. REV. 431.

136. "The right [of free speech] is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom." *Stromberg v. California*, 283 U. S. 359, 368 (1931). See also Mr. Justice Frankfurter in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 299 (1941), and in *Minersville School Dist. v. Gobitis*, 310 U. S. 586, 596, 600 (1940).

137. See cases cited in note 82 *supra*.

arm of government. To defend its action by invoking the word "fundamental" is only to state its result.

The Court must also exercise independent judgment in deciding whether an issue is one of civil rights.<sup>138</sup> A couple of generations ago, in an America which was on the make, personal freedom was esteemed as opportunity in a land of promise. To the mind of Mr. Justice Field, liberty-and-property was a single word and he did not hesitate to read the right to get ahead into the Fourteenth Amendment.<sup>139</sup> But the idiom of ultimates changes and common-sense goes along. A peaceful picketing, for which fifty years ago the law would have been hard put to find a place, is today an attribute of freedom of speech.<sup>140</sup> But peace has no fixed truce with the picket line, and, as little by little violence obtrudes, all the activity it touches is put beyond the law.<sup>141</sup> The Court, by its own decrees, must separate into antithetical categories when there are no certain criteria of distinction.<sup>142</sup> Today there are persons, whom the members of the Court would not consider unreasonable men, who regard the matter as an aspect of a clash between economic groups which the state should regulate.<sup>143</sup> And men not devoid of reason argue that when the National Labor Relations Board forbids an employer to send anti-union pamphlets to his own employees, there is no denial of the traditional freedom of the individual.<sup>144</sup> To accept the thesis that such questions fall within the discretion of the Court, is to accord deference to an ultimate.

Members of the Court have been bothered by their own dichotomy. Mr. Justice Stone has preferred reasons for subjecting "to more exacting judicial scrutiny" statutes which affect civil liberties.<sup>145</sup> Some of these

138. Compare Comment, *The Compulsory Flag Salute in the Supreme Court* (1940) 9 I. J. A. BULL. 1, 12 ("the Court did not follow the lead of some state tribunals which, in questioning the *validity* of the religious scruple against saluting, have opened the way to facile rejection of religious claims through simple denial that any religious scruple is 'in reality' involved").

139. See his dissenting opinions in the Slaughter House cases, 16 Wall. 36, 83 (U. S. 1873); *Munn v. Illinois*, 94 U. S. 113, 140, 142 (1877); *cf.* his opinion for the Court in *Barbier v. Connolly*, 113 U. S. 27, 31-32 (1885).

140. *Thornhill v. Alabama*, 310 U. S. 88 (1940).

141. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287 (1941).

142. "Such an adjustment requires austere judgment, . . ." *Id.* at 556. "But I am not satisfied with the entire austerity theory. For anyone to transcend his own convictions in the way Holmes is reported to have done would be more than human—and Holmes was always human." LERNER, *IDEAS ARE WEAPONS* (1939) 66. For a recent defense of the "austerity theory" see Shulman, Book Review (1941) 50 YALE L. J. 1307, 1310.

143. See Gregory, *Peaceful Picketing and Freedom of Speech* (1940) 26 A. B. A. J. 709.

144. See Greene, *Civil Liberties and the N. L. R. B.* (1940) 8 I. J. A. BULL. 89, 99-100.

145. *United States v. Carolene Prod. Co.*, 304 U. S. 144, 152n. (1938).

rights, he ventures, have unique importance because their denial tends to restrict "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."<sup>146</sup> In effect such a statement commutes the due process of the common law into an over-all safeguard for a democratic form of government. It has often been pointed out by those learned in the annals that in its origin due process meant no more than that actions of the government must be according to rule;<sup>147</sup> that, whether life or property was erroneously taken was of no consequence, if only the legal ceremonial were properly fulfilled. When the Court voids a conviction obtained by duress, sets aside a verdict because negroes were excluded from the jury, or decrees a new trial after the accused has had time to prepare his case, it invokes the established sanction.<sup>148</sup> Mr. Justice Stone brings the germ to maturity in a due process for democracy in action. He would keep open the right of intellectual search and maintain a free forum for the interchange of ideas and the resulting action. That done, it is not of judicial concern that mistakes are made, provided the rules of the game are followed. A people through repeated trial and corrected error must work out its own salvation.

Such a rationale has relatively easy going so long as it is limited to the democratic process. It encounters obstacles as soon as it leaves its procedural orbit. A "prejudice against discreet and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>149</sup> A group, for instance, may be within the nation, not of it. It may refuse, or be unable, to entertain commerce in "reason" with the mass of persons whose will guides the state. It may even be intent upon ignoring the ballot-box in a determination to achieve its own reforms. Such a group is always under suspicion; it is asking quite a bit of the majority to make a place in the democratic system for those who will have nothing to do with the democratic process.<sup>150</sup> In an extreme case freedom of speech for the militant fraction might even

146. *Ibid.* "It is an unreal and illogical distinction. It is unreal because it implies that economic progress has been retarded by the damming up of political channels; the reverse is more nearly true. It is illogical because it proclaims faith in democratic processes for some purposes but distrust of them for others." Commager, *supra* note 131.

147. See Corwin, *The Doctrine of Due Process of Law before the Civil War* (1911) 24 HARV. L. REV. 366; Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 18 How. 272 (U. S. 1856).

148. See cases cited in notes 125, 126, 129 *supra*.

149. *United States v. Carolene Prod. Co.*, 304 U. S. 144, 153n. (1938).

150. For an argument that freedom of speech should be denied to those who preach denial of freedom of speech, see Ascoli, *Freedom of Speech* (1940) 9 AM. SCHOLAR 97; cf. NIEBUHR, *CHRISTIANITY AND POWER POLITICS* (1940) 83-93. For a refutation of this view see MacLeish, *Freedom to End Freedom* (1939) 28 SURVEY GRAPHIC 117.

imperil democracy itself. If, as Mr. Justice Stone insists, civil rights are an instrument of the popular commonwealth, they can hardly be tolerated as threats to its operation. If then the line is crossed, the legislature can act for the protection of the state.<sup>151</sup> But the line is vague; nerves or propaganda may lead to statutes when there is no real hazard; a moment of hysteria may touch off a grand witch hunt. The door is open to judicial scrutiny, by such norms as are at hand, in an atmosphere immune as may be to the panic without. There will be border-line cases; the Court must say "good" or "bad"; the judgment of "reasonable" or "unreasonable" must be pronounced upon acts of the legislature. Statutes must be assessed in terms of the emotional urge they house. In the end, the theory of Mr. Justice Stone, which attempts to insulate a procedure, endows the Court with judgment upon the wisdom of legislation.

Stone's is only the most articulate among current theories. Their number is legion; and, whether "fundamental," "specific," or resting upon a value so ultimate as to defy expression, they are variants of a single theme—that there are attributes of human activity which ought to be put beyond the reach of the majority and the will of the law-making body. But the passive demand for restraint does not generate an active agent for its exercise. It offers no convincing argument that the protection of civil liberties lies within the distinctive jurisdiction of the Court. It does not prove that the matters at issue lie within the distinctive competence of a bench habituated to the law. In the instant a decision to uphold or to outlaw requires a weighing of the social need in an exercise of police power against the harmful abridgment of personal liberty.<sup>152</sup> Nothing in the endowment, training, experience of judges suggests their superiority to the personnel of other agencies of control. The sole argument is their aloofness; they are not responsible to a people who, on occasion, may become a great beast; their tenure is not dependent on their decisions. But such a reason is subject to discount where judges hold for a span less than life; it disappears altogether where their terms are short and they must be returned to their offices at the polls. Its vitality is at its crest in respect to members of the Supreme Court.

It has greatest weight, where provinces are distinct—as when the Supreme Court sits in judgment of the acts of the several states. In its current statement the Fourteenth Amendment is a national imposition of the minimum requisites of the democratic process upon the political sub-divisions of the Union. So long as the nation demands the preserva-

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151. See note 136 *supra*.

152. "To maintain the balance of our federal system, in so far as it is committed to our care, demands at once zealous regard for the guarantees of the Bill of Rights and due recognition of the powers belonging to the states." *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 297 (1941).

tion of traditional liberties within its parts, the Court must face a barrage of intricate problems. The cases which come along demand speed; there is always danger that the mischief is done before the invalid act is erased. They require the expert; a legal command is not to be taken at face value, the question is what it means in the situation. A formal question of freedom of the press may become so interwoven in an economic conflict as to lose its identity. Not the reference of instance to norm, but the resolution of a conflict of values set in a cultural matrix is involved. In most instances a recitation of fact would reveal the denial of a right, but the real question is the validity of such a denial. Here nothing less than an economic and social panorama would suffice to indicate the presence or absence of a "clear and imminent danger."<sup>153</sup> But the very habituation of judges to the precisions of legal process is a hazard to their recreation of the whole picture. And if the cloistered judge is able to etch in the background with all its tangibles and intangibles, the situation is likely to be of public knowledge. It is not keener vision or larger knowledge which sustains the Court's exercise of power; it is rather, that as the structure of government now goes, there is no other agency to which the task can be entrusted. Here competence is a mere derivation of the Court's power to say the last word.<sup>154</sup>

As respects acts of Congress the Court's position is somewhat different. The statutes in question are not expressions of local sentiment; they emanate from the will of a nation. If they are expressions of prejudice and passion, or if they sanctify a crusade against any race or sect, their generating winds of opinion are country-wide. That the Court, which professes to guard against such dangers, is itself susceptible to such a contagion, the pages of the United States Reports adequately attest.<sup>155</sup> Nor is it obvious that in this larger domain, the

153. The phrase is from Mr. Justice Holmes' dissent in *Abrams v. United States*, 250 U. S. 616, 627 (1919).

154. Note the footnote at the very end of Mr. Justice Frankfurter's opinion in the *Flag Salute* case. "It is to be noted that the Congress has not entered the field of legislation here under consideration." *Minersville School Dist. v. Gobitis*, 310 U. S. 586, 600 (1940). Does this imply that the Court acts, not because it is peculiarly competent, but because others have not taken over the task?

155. See, e.g., *Ex parte McCordle*, 7 Wall. 506 (U. S. 1869); *Georgia v. Stanton*, 6 Wall. 50 (U. S. 1867); *Wilson v. New*, 243 U. S. 332 (1917); ADAMS, *THE THEORY OF SOCIAL REVOLUTIONS* (1913) 97. Compare the problem facing the Court in *Caminetti v. United States*, 242 U. S. 470 (1917), involving the Mann Act. Congress had indicated clearly that the Act was aimed only at commercial prostitution. The Court rejected this and held it applicable to a couple voluntarily crossing a state border. ". . . it can hardly be doubted that . . . [the Court] was influenced by the disinclination to seem to condone a moral dereliction. . . . The Court desired to support religion in every way. It did not desire to connive at sexual immorality in any way." Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863, 883n.

Court rather than Congress holds by prescriptive right the office of protector of ancient liberties. If they are fundamental in, or instrumental to, the operation of the commonwealth, that belief is as prevalent among legislators as among judges.<sup>156</sup> To insist that five of a bench of nine be empowered to set aside the command of the two houses, approved by the President, is to set down a serious qualification upon the democratic process. The arguments for judicial control are that the matter calls for calm, unhurried thinking; that it substitutes the reference of a situation to established norms for a political resolution of competing pressures; and that judicial review gives a second chance to strike at attempts to curb personal liberties. But calm, unhurried thinking is not a necessary attribute of the judicial forum;<sup>157</sup> the reference of the situation to norms reveals the same conflict of values; and review involves the substitution of a judicial for a political determination. The task is, in an emergency, to alter the rules of democratic procedure, and that bears the ear-marks of a political question—a political question unique only in its importance. If, in last analysis, the reasonable man of the law is to decide, the Congress is as close to the will of the country as the majority of the Court. The “procedural freedom” which Mr. Justice Stone demands can be guaranteed by the legislature as well as by the judiciary; he asks only for a “more exacting scrutiny.”<sup>158</sup>

Such contentions as these, it will be insisted, deny “the supremacy” of the Constitution. To this the proper retort is that there is no such question. As a written document the Constitution is a collection of sanctions. As an instrument of government it is an aggregate of usages, blessed by these sanctions, and shaped to the necessities of a developing nation. As circumstance passes, usages come, are developed, and fade. The power of the Court in respect to civil liberties is in a sense usurped; neither those who framed the First, nor those who copied from the Fifth into the Fourteenth Amendment, could have anticipated the unique province which the Court rules today. But that is not to call its authority illegitimate. In a going society all institutions which endure put off old duties and put on new ones.<sup>159</sup> Such adaptation is inseparable from life.

156. “. . . it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.” Mr. Justice Holmes in *Missouri, K. & T. Ry. v. May*, 194 U. S. 267, 270 (1904).

157. The impeachment of Justice Chase for his charge to a jury in 1803 is a case in point. See 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1928) 276-92. Cf. Mr. Justice Cardozo’s characterization of the Court’s opinion in *Jones v. SEC*, 298 U. S. 1 (1936). “A commission . . . is likened with *denunciatory fervor* to the Star Chamber of the Stuarts.” *Id.* at 33. (Italics added).

158. See the quotation on p. 1352 *supra*. It is true that the justice wants “judicial” scrutiny. But the point is that he distinguishes between the issues in a way that other agencies could also distinguish.

159. Compare Llewellyn, *The Constitution as an Institution* (1934) 34 *Col. L. Rev.* 1.

And judicial supremacy, which has been achieved in a series of judgments, can in this realm be as logically derived from clauses on parchment as in any other. Its constitutional reference has been attained in the same way in which "the commerce clause" was accorded an expanding domain, "liberty of contract" was read into "due process" and read out again, and the Tenth Amendment was stripped of a veto power put there by its interpreters.<sup>160</sup> And if the Court should abandon to Congress the province of civil rights, the shift of power would presently come into accord with the usages of the Constitution. The Court would merely have changed its opinion as to its proper province; it would have appointed fresh limits to its own competence.

A paean of praise has recently been accorded the Court for its stalwart defense of personal liberties. But the province of civil rights has no natural frontiers; the power asserted here may easily be driven into domains now recognized as political.<sup>161</sup> If currently questions of policy do not lie within its distinctive competence, it is because its own will has made it so. The body which can pass can also repeal a self-denying ordinance. The technique of "passing upon cases as they arise" provides a perfect cover through which an about-face can be executed without notice or hearing. A year ago a salute to the flag under duress indicated that even the current bench was willing to abate religious freedom when the salvation of our form of government was at stake.<sup>162</sup> For the protection of the rights of men the people of the United States must look to the people of the United States.<sup>163</sup>

## VI. FROM NULL-AND-VOID TO ULTRA VIRES

In spite of its professions, the Court has not ceased to be an agency of policy. If it has disclaimed the right to pronounce legislative acts null and void, it has retained the power to declare what they mean. As it has retreated from the constitutional, it has dug in along the statutory front. There, with techniques accommodated to more minute workmanship, it has resumed its work as overlord to commonwealth and the economy. In part at least, it cannot escape its current duties. As the

160. See Feller, *The Tenth Amendment Retires* (1941) 27 A. B. A. J. 223.

161. To the argument that the legislature is irresponsible can be countered the query: Were the legislature to have the final word, would it not assume greater responsibility? Cf. Mr. Justice Brandeis in *St. Joseph Stockyards v. United States*, 298 U. S. 38, 92 (1936) ("Responsibility is the great developer of men.")

162. *Minersville School Dist. v. Gobitis*, 310 U. S. 586 (1940).

163. "If we are really so vicious that we can be saved only by nine or by five men in silk gowns in the District of Columbia, I fear that we are likely to continue in a bad way whatever the five or nine may do. Zeal for civil liberty must be more widespread to be satisfactorily effective." Powell, *A Constitution for an Indefinite and Expanding Future* (1939) 14 WASH. L. REV. 99, 108.

general provisions of the law are applied to situations which come into court, there must be an interpreter. That is not the task for the legislature; besides, the enacting body has usually been dispersed and no longer may bear witness to its intent real or manifest. As to their own statutes, the highest courts of the several states are most competent; and so long as litigation is before local tribunals, they have the last word.<sup>164</sup> Even where the diversity rule brings issues into federal courts, an attempt is made to keep discretion at home.<sup>165</sup> But, where acts of Congress must be construed, the Court cannot escape responsibility. In many of these instances, there is no way for the Court to avoid relying on its own conception of the proper policy for the Government to follow.<sup>166</sup>

The Court, as tradition demands, affects not to engage in such practices. ". . . It is not our function to engraft on a statute additions which we think the legislature logically might or should have made."<sup>167</sup> "Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress."<sup>168</sup> Yet few of the brethren can view interpretation as so primitive and discretionless an exercise of mind. To an argument that failure of the Government to act was an admission of its lack of statutory authority, Mr. Justice Black replied, "To assign reasons for such inaction is but to guess. And the guesses would doubtless vary almost in accordance with the preconceived notions of the guessers."<sup>169</sup> In whatever elementary terms the Court's task is put, the application of a Congressional command to a case or controversy employs an equation which contains many variables.

164. The interpretation of a state statute is conclusively determined by the state court. See *Watson v. Buck*, 9 U. S. L. WEEK 4339, 4341 (U. S. 1941); *Minnesota ex rel. Pearson v. Probate Court*, 309 U. S. 270, 273 (1940).

165. See *Watson v. Buck*, 9 U. S. L. WEEK 4339 (U. S. 1941); *Arkansas Corporation Comm. v. Thompson*, 61 Sup. Ct. 888 (U. S. 1941); *Railroad Comm. of Texas v. Pullman Co.*, 61 Sup. Ct. 643 (U. S. 1941); *Beal v. Missouri P. R. R.*, 312 U. S. 45 (1941); *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940).

166. It is possible for a statute to be so clear that reasonable men cannot quarrel over its meaning. In such a case, if some persistent soul insists on litigating the issue, the Court has no need for peering into its inner-consciousness. But even crystal clarity is no guarantee of judicial abstention from legislation. Consider REV. STAT. § 3224. "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." [26 U. S. C. § 1543 (1934)]. Meaning could hardly be more obvious. Yet Justices Stone, Brandeis, Reed, and Black have all had occasion recently to dissent because the Court found an "exception" to the application of this statute. See *Allen v. Regents*, 304 U. S. 439, 453, 455 (1938); *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, 511 (1932).

167. *United States v. Cooper Corp.*, 61 Sup. Ct. 742, 744 (U. S. 1941).

168. *Ibid.* "Primarily, our task is to read what Congress has written." *F. C. C. v. Columbia Broadcasting System*, 311 U. S. 132, 135 (1940).

169. *United States v. Cooper Corp.*, 61 Sup. Ct. 742, 750 (U. S. 1941).



As in other fields of law, the temptation to personal judgment has been noted;<sup>170</sup> and, through a series of rules, the Court has attempted to minimize it. A long time ago "the plain and unambiguous meaning of the words" was set up as a criterion.<sup>171</sup> But the voice of the legislature is addressed to all whom it may concern; a vague command is never "plain" and the contours of abstract terms are never obvious. A criterion for the criterion then became necessary, and "intent" came to the help of judges.<sup>172</sup> But in tort, contract, and crime intent has proved illusive and often a "constructive intent," inferred from the act itself, had to suffice. The intent of a group of men, emerging from the intricacies of a legislative process, was not less baffling. Besides, statutes which endure have to be applied to situations which could never have been in prospect. To meet such a contingency courts have employed the symbol "manifest intent."<sup>173</sup> It is, however, far from obvious what is manifest and what is obscure. At this point a criterion for the criterion is essential.

The need is for a quasi-ultimate in a spiraling process. The current bench has not been indifferent to the need of a guiding principle to make an evasive intent clear up the meaning of uncertain language. In a case in which a number of motor carriers attempted to escape the Fair Labor Standards Act by throwing themselves upon the mercy of the Interstate Commerce Commission, Mr. Justice Reed wrestled valiantly with the problem.<sup>174</sup> The interpretation of a statute is to find the intent of Congress. This "duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said."<sup>175</sup> For the "danger" that "the judges' own views" will obtrude, the best guard is a "lively appreciation." If the language itself will not do, the Court must "look beyond the words."<sup>176</sup> And Mr. Justice Murphy, speaking for a bench in which the five Roosevelt appointees made up a majority, refused to impose a set of blinders upon "the look

170. "Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views . . ." *United States v. American Trucking Ass'ns*, 310 U. S. 534, 544 (1940). See also the warning by Mr. Justice Stone, quoted p. 1367 *infra*.

171. See the cases cited by Mr. Justice Reed in *United States v. American Trucking Ass'ns*, 310 U. S. 534, 543, n. 18 (1940). See also Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863, 867.

172. See Jones, *Statutory Doubts and Legislative Intention* (1940) 40 COL. L. REV. 957, 965ff.

173. See Chafee, *The Disorderly Conduct of Words* (1941) 41 COL. L. REV. 331, 400. Sometimes, Mr. Justice Frankfurter says, "The Congressional will must be divined." *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, 389 (1939).

174. *United States v. American Trucking Ass'ns*, 310 U. S. 534 (1940). The Chief Justice and Justices McReynolds, Stone, and Roberts dissented.

175. *Id.* at 544.

176. *Id.* at 543. See note 190 *infra*.

beyond."<sup>177</sup> It would, where the meaning of authoritative words is at large, "be anomalous for us to close our minds" to anything which helps to make clear that which upon its face is ambiguous. It may be that "legislative materials" are "without probative value" or even "contradictory." But "they can scarcely be deemed to be incompetent or irrelevant."<sup>178</sup> Such an attitude multiplies "the number of aids"; it makes canonical so large a body of material that any conscientious and reasonable interpretation, "in accordance with preconceived notions," can be rested upon accepted rules of construction.

A single case reveals the clash of canons which runs through so much of the Court's recent work. The issue was whether the United States, as a victim of collusive bidding in the purchase of automobile tires, was entitled to sue for triple damages under the Sherman Act. Such a situation was not before the Fifty-first Congress when the Sherman Act was passed; there is no evidence that it was in "the contemplation" of the members at that time. Mr. Justice Roberts, for the majority, paraded seven verbal reasons — in instance not in accord with historical doctrine and in the aggregate not wholly persuasive — for denying to the Government the only possible relief.<sup>179</sup> Speaking for Reed and Douglas, JJ., as well as for himself, Mr. Justice Black pointed out quite simply that the purpose of the law was "to give purchasers of goods an opportunity to buy them at prices fixed by competitive trade."<sup>180</sup> He commented that it would be "strange indeed" if the Sherman Act "should now be found to afford a greater protection against collusive price-fixing to every other buyer in the United States than is afforded to the United States itself."<sup>181</sup> For him and his colleagues this obvious and common-sense attitude towards the policy the statute embodies was sufficient without the parade of esoteric techniques for ascertaining "the intent of Congress"; for he added, "so much for what seems to me to be the logical approach to the problem, and the one that should cause us to say that the government can sue for damages."<sup>182</sup> Then, according to legalistic law its rhetorical due, he stated, "If, however, we apply familiar canons of construction, I think we are led to the same result."<sup>183</sup>

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177. *United States v. Dickerson*, 310 U. S. 554 (1940).

178. *Id.* at 562.

179. *United States v. Cooper Corp.*, 61 Sup. Ct. 742, 744-48 (U. S. 1941).

180. *Id.* at 748.

181. *Id.* at 749.

182. *Ibid.*

183. *Ibid.* If, let's say, a James M. Beck prize should be offered for the worst decision of the term, the authors would like confidently to place in nomination the *Cooper* case. The runner-up would doubtless be *Gray v. Powell*, 61 Sup. Ct. 824 (U. S. 1941), which permitted a concern to escape the Bituminous Coal Act by leasing mines and engaging "independent contractors" to mine the coal. In the latter instance, however, there is a technical flaw. By an even division, the Court affirmed the judgment below;

As the Court becomes sparing in its use of constitutional sanctions, its interpretation of legislation grows in public interest. As once it fell into groups of "liberal" and "conservative" in respect to the supreme law of the land, so now lines may be forming over the pattern its interpretation of statutes is to take. All the justices would doubtless concur with Mr. Justice Frankfurter that "one certainly begins" with the words of the statute.<sup>184</sup> But that is no more than to raise the question, for the legal issue is the meaning of the statute in reference to the matter at hand. Nor does it help to say that if words are "plain and unambiguous," the Court will "look no farther"; for if they were, the Court would probably not have to look at all.<sup>185</sup> As the issue is driven beyond words—as, because of their "trickiness," inevitably it must be—all will concur that the focus of deliberation is legislative intent. But intent lies, not in the verbal symbols, but in the purpose which animates them. The intent of 435 Representatives plus 96 Senators becomes a matter of imputation; and, as a number of statutes play upon a single suit, intents may be in conflict. An appeal to the dictionaries is met by a demand for a "meaning" derived from "a considered weighing of every relevant aid to construction."<sup>186</sup> But intent, a term of art from private law, is too narrow a focus for all that is made to converge upon it. For the search is for the things that can be made to signify; and intent, useful enough in assessing the conduct of an individual, is hardly at home as a measure of a legislative act. Off its native heath, it is not held in restraint, and can easily serve sponsors whose views march towards opposite goals. One judge may regard a statute as a legislative command, to be strictly construed and severely applied. Another, equally conscientious, may regard it as an instrument giving effect to a public policy. Neither, however self-effusive, can give effect to a legislative purpose untainted by his own will.

If to the judge, the letter of the law alone counts, the whole of the letter can be had only through inference. It is easy enough to draft a legal opinion which does not offend one's sense aesthetic. It is possible to draft several and allow the symmetry of logic to make the choice. A strong feeling for the separation of powers may cause the jurist to

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and, conveniently enough, it did not recite its reasons. Whether this case remains as runner-up will depend on the action of the new Court. Rehearing has been granted. 61 Sup. Ct. 938 (U. S. 1941).

184. "While one may not end with the words of a disputed statute, one certainly begins there." *F. T. C. v. Bunte Bros.*, 312 U. S. 349, 350 (1941).

185. But even here, there may be an exception. In *United States v. Dickerson*, 310 U. S. 554 (1940), there was no question of the "plain and unambiguous" meaning. Congress completely forgot to say what it meant. Only by showing that the legislature "thought" it had said what it wanted to say could the Court avoid the words of the statute.

186. *United States v. Dickerson*, 310 U. S. 554, 562 (1940).

refuse to add any contribution of his own even if he is persuaded that the interpretation furthers the purpose the legislature had in mind. If the Constitution insists that wisdom is for the legislature, the Court should in judgment give effect to no more than the legislature did. But such a profession disregards the fact that the Court deals in frozen words; and that courts must bring commands to life in the complex social situations brought before them.<sup>187</sup> The lapse in language, the hidden inconsistency, the change in conditions, the unforeseen development, the unexpected harshness, the cleverly contrived loophole — all of these are inevitable contingencies to be met. The judge who refuses to meet them neglects to keep the active statute in readiness for present service. Instead of keeping off the legislative beat, he helps to batter a static statute into uselessness.

Unless the judge keeps dominant the purpose of the statute, the function of the legislature could be easily usurped. There was a time when Congress, in long and intricate be-it-enacted's, sought to anticipate every contingency which lay ahead. Now the trend is towards skeleton statutes flexible enough to meet any situation which lies ahead. Although in orbit they are large or small, in character Constitution and statute are much alike. Today Marshall's famous statement might be paraphrased, "We must never forget it is a statute we are construing."<sup>188</sup> The temptation to a "preconceived notion" is often insistent and never entirely absent; many legislative acts before the Court involve policies of state, in accord or out of harmony with, the jurist's own social views. A tradition of interpretation, as reputable as its antithesis, is that provisions are to be construed to give effect to the purpose of the legislature.<sup>189</sup> A corollary is that, when words have been inaptly chosen, it is the duty of the Court to endow them with appropriate meaning.<sup>190</sup> As the phrases of command are applied to the facts, they must derive their meaning from a conception of the statute's office. It is the spirit thereof which gives life — through the minds of the justices.

Statutory interpretation is old; but only with the retreat from the higher law, has it become the arena for conflict in policy. As yet the justices are not quite at home with its novel place in public law. In its usual utterance, it accords respect to the legislature, disclaims a will

187. Compare Mr. Justice Holmes in *Towne v. Eisner*, 245 U. S. 418, 425 (1918); and Judge Learned Hand in *Commissioner v. City Bank Farmers' Trust Co.*, 74 F. (2d) 242, 247 (C. C. A. 2d, 1934).

188. See *McCulloch v. Maryland*, 4 Wheat. 316, 407 (U. S. 1819).

189. "It must be insisted that the legislative purposes and aims are the important guideposts for statutory interpretation, not the desiderata of the judge." Landis, *A Note on "Statutory Interpretation"* (1930) 43 HARV. L. REV. 886, 892.

190. "When that [plain] meaning has led to absurd or futile results, . . . this Court has looked beyond the words to the purpose of the act." *United States v. American Trucking Ass'ns*, 310 U. S. 534, 543 (1940).

of its own, and professes to do no more than discover what another body has said. Mr. Justice Frankfurter demands "the un glossed text"; he insists, "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle"; he will have no commerce with "elusive and subtle casuistries."<sup>191</sup> He is wary when "meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendos of disjointed bits of a statute."<sup>192</sup> He can insist that "translation of an implication drawn from the specific aspects of one statute to a totally different statute is treacherous business."<sup>193</sup> Yet the same justice can discover the true intent of Congress; write a marginal note into the Norris-LaGuardia Act; use this to resolve the ambiguities of the Clayton Act; and eventually bring the moving gloss to rest within the Sherman Act itself.<sup>194</sup> For him there must be no invisible "radiation" from a judicial opinion into a legislative command;<sup>195</sup> yet, when occasion beckons, he resorts to interpretation by attenuation. It is unfair to say that Mr. Justice Frankfurter alone knows the location of the switch by which the radiation is turned off and on; for he does no more than expose to public notice the personal values which direct his exegetical exploits. Others are less conspicuous, not because their ways are of a different kind, but because they hide the sources of preference under a more mature and artful rhetoric.<sup>196</sup> Men differ in vision, self-effacement, awareness; but,

191. *Helvering v. Hallock*, 309 U. S. 106, 118, 121 (1940).

192. *Palmer v. Massachusetts*, 308 U. S. 79, 83 (1939).

193. *F. T. C. v. Bunte Bros.*, 312 U. S. 349, 353 (1941).

194. *United States v. Hutcheson*, 312 U. S. 219 (1941).

Mr. Justice Roberts, dissenting, said that the Court's interpretation seemed to him "a usurpation by the courts of the function of the Congress not only novel but fraught, as well, with the most serious dangers to our constitutional system of division of powers." *Id.* at 472. See also Gregory, *The New Sherman-Clayton-Norris-LaGuardia Act* (1941) 8 U. OF CHI. L. REV. 503 ("The majority opinion displays a boldness of judicial technique seldom to be observed."); Landis, *The Apex Case* (1941) 26 CORN. L. Q. 191, 212D ("The technique of the majority opinion is thus difficult to defend . . ."). And see especially Steffen, *Labor Activities in Restraint of Trade: The Hutcheson Case* (1941) 36 ILL. L. REV. 1.

195. See *F. T. C. v. Bunte Bros.*, 312 U. S. 349, 351 (1941).

196. For examples of consummate technique in concealing policies beneath artful rhetoric, see Mr. Justice Stone's opinion in *S. E. C. v. United States Realty & Improvement Co.*, 310 U. S. 434 (1940); the Chief Justice's opinion in *Bacardi Corp. of America v. Domenech*, 311 U. S. 150 (1940); Mr. Justice Douglas' opinion in *Nye v. United States*, 61 Sup. Ct. 810 (U. S. 1941).

Mr. Justice Black sometimes takes less pains to conceal his policy. See his opinions in *Hines v. Davidowitz*, 312 U. S. 52 (1941); *Superior Bath House Co. v. McCarroll*, 312 U. S. 176 (1941). But the Justice admits his disdain of the value of legal abacadabra. See the quotation p. 1358 *supra*.

For examples of divergent views, each persuasive in its arguments for the correct statutory construction of the Elkins Act, see the majority and minority opinions in *Union P. R. R. v. United States*, 9 U. S. L. WEEK 4371 (U. S. 1941).

in so intricate a matter as giving effect to the will of the legislature, the jurist without a philosophy of law — and of life — is lost.

Implicit in all such utterance is the concept of competence. It may well be, when the Court has become habituated to the statutory front as its main line of operation, that it will chisel out an orderly pattern of competence. Here, as in constitutional matters, reliance must be placed upon the Court's own approach. Its task is easiest when an administrative agency mediates between verbal command and its application. Then a presumption is set down in favor of the meaning imposed upon the disputed words by the body charged with direct responsibility.<sup>197</sup> A long-standing administrative ruling is entitled to great weight;<sup>198</sup> re-enactment in the face of outstanding interpretation is indicative of Congressional acquiescence.<sup>199</sup> An extension of such rules is implicit in recent utterance and seems inevitable.<sup>200</sup> An agency of government is an institution; the statute which called it into being is an enabling act; its policy is not a legislative manifest, but an aggregate of usages sprung from the law-in-action. The claims for the expert, the intangibles of the situation, the effective performance of its function are as pertinent as with constitutional issues. It may be that clashing policies need to be brought into accord; but, within their respective domains, the Court may well recognize an authority more competent than itself.

In bald terms, such a respect for "the executive" would once have been called improper delegation of judicial power. It amounts rather to a broad qualification set against the doctrine of separation. It can be as glibly argued as ever it was that an agency cannot enlarge its own authority by a "strained" interpretation; that appeal to Congress for amendment is the only lawful means of correction. But this theoretical distinction overlooks the very character of the current process of regulation. In the conduct of affairs a stream of questions emerges; the answer to each must be inserted in its place as events move hurriedly on. The judgment must be made at once, by the agency which promises to make it best, out of the fullest factual and the best legal materials which are at hand. Legislative and executive are only aspects of the same process, differing somewhat in scope and character, but not to be

197. See *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549 (1940); *Norwegian Nitrogen Prod. Co. v. United States*, 288 U. S. 294, 315 (1933).

198. See Paul, *Use and Abuse of Tax Regulations in Statutory Construction* (1940) 49 YALE L. J. 660, 662, nn. 12, 13; Griswold, *A Summary of the Regulations Problem* (1941) 54 HARV. L. REV. 398, 408ff.

199. See Paul, *supra* note 198, at 663ff; Griswold, *supra* note 198, at 399ff.

200. The indicated extension is not on a conceptual level alone. Indications are that the Court may very well use the rules only when their incidence is a realistic aid to support of executive action. See *Helvering v. Reynolds*, 9 U. S. L. WEEK 4332, 4333 (U. S. 1941); *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 100ff. (1939).

severely distinguished. An executive formulating controls for legislative action does not stand over the frontier from the executive formulating policies of enforcement under the statute.<sup>201</sup> A Court, mindful of its own place within modern government, will be slow to question the interpretation of agencies to which such matters come in regular course. The logic, which accords "independence" to the legislature, seems to support a kindred "administrative finality."

It will be objected that such a surrender by the Court invites "government by bureaucracy." The fault with such an argument is that it shifts its issue in its course. It assumes that the executive is prone to, and the judiciary immune from, a reading of its own preferences into the administration of the law. It assumes a liberty in one group of human beings which it replaces with a restraint in the other. Even more, it endows with irresponsibility the more responsible body, and confers a divine aloofness upon the one held to no accounting. A more practical objection is that an overweening executive could make the scope of his authority limitless;<sup>202</sup> but this applies, with even greater force, to the Court. The objection overlooks, in the one case as in the other, the traditions of a going institution which play upon a personnel which comes and goes. In respect to the administering agency, it disregards the confinements of language. Legislation is to be looked at, not as a code of rules for unchanging conduct, but as a grant of power to public officials, within a certain domain and subject to specified limitations, to direct private activities toward the public utility. Just as the will of the Court is restrained by the necessity of producing a satisfying reason, so the executive is held in check by the demand to justify the exercise of power.<sup>203</sup> If the executive act escapes the sanctions upon which it usually rests for support, the Court can be asked for an *ultra vires*. Nor is the judiciary the sole reliance against an agency off its beat; a "hands-off" by the Court would throw to the legislature the main burden of limiting executive action. In verbal terms legislation may be confining or expansive; and its permissive range can, in their several degrees, be expanded or contracted by the legislature, by the agency, by the court. The real question is who is to decide where discretion is to be lodged. In the long-run the active down-to-earth administrator will be

201. Compare "Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provision's enactment to Congress." *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549 (1940).

202. Compare the case of the Webb-Kenyon Act, vetoed by President Taft principally on grounds of its unconstitutionality, passed over his veto, and then upheld by the Court in *Clark Distilling Co. v. Western M. Ry.*, 242 U. S. 311 (1917). See Bicklé, *The Silence of Congress* (1927) 41 *HARV. L. REV.* 200, 210-11.

203. It might be argued, of course, that almost anything can be justified, given a sufficiently nimble wit; the objection applies with like force to the Court.

better able to shape a statute into a going control than will a court operating in its rarified climate.<sup>204</sup>

It goes without saying that the Court cannot formally accept the usage of executive interpretation. As with the constitutional issue, its self-denial will find dominant expression in the language of presumption. But, the individual votes of the justices may underline the current trend and make it increasingly evident that such a motivating factor operates silently.<sup>205</sup> In fact, as an inarticulate major premise, such an indulgence to the executive may have more validity as a device of prediction than criteria to which verbal homage is constantly paid. If the accommodation of legislative policy to statute-in-action is shifted from Court to executive, the bounds of the citizen's permissible activity will be found, not in the occasional grand pronouncements from the heights, but in the every-day close-to-facts rulings of administrators. The United States Reports will then, even less than before, contain "the law"; the less pretentious but more realistic records of active agencies of control will state the substance.

Here, then, in the struggle for judicial supremacy is the new battlefield. Neither executive nor legislature can adequately discharge its office without a sympathetic judiciary. The current bench does not question the power to govern; it is just now inventing and perfecting techniques for use in statutory interpretation. Its commitments in specific cases and with particular doctrines bear the experimental quality of a formative period. For that reason, even where utterances ring out with dogma, they are to be accepted as somewhat less than authoritative. As experience accumulates, a technology in the making will develop, and pieces—many of them to be newly cut—will come into place. In the transition, the molar gives way to the molecular, and the change of scale makes it possible to revise without beating a retreat. The more minute workmanship creates less exposure to attack. But, if it further withdraws the judicial process from public scrutiny, it also robs the process of a kind of other-world finality. A statute sacrificed to the

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204. In this connection it is important to observe that the administrator can always shape policy by refusing to act. This may be as far-reaching in its impact as vigorous enforcement would be. Judicial restriction is on action alone; as a safeguard against executive action, it may cause more injustice through interfering only half-way than would be caused by an unhampered administrator working out a consistent over-all program. See generally Arnold, *Law Enforcement—An Attempt at Social Dissection* (1932) 42 YALE L. J. 1.

205. Reading Mr. Justice Reed's opinion in the *American Trucking* case [note 174 *supra*] and compiling his votes in the *Bunte*, *Cooper*, *Union Pacific*, and *Classic* cases [notes 184, 179, 196 *supra* and 239 *infra*], one might assume that his experience as a Solicitor General has led him to formulate some such philosophy of acknowledging executive interpretation. Except for their dissents in the *Union Pacific* and *Classic* cases, the same might be said of Justices Black and Douglas.



supreme law of the land was null and void; an ultra vires set against statute may be erased by the legislature. The move has been into a universe of relative values—and away from the absolute.

## VII. UMPIRE TO THE FEDERAL SYSTEM

Another novel battleground in the struggle for judicial supremacy accompanies the retreat from the Constitution. If the bench displays a tolerance of the laws of the states, it has not closed its door to cases concerned with them. Its acceptance of federal supremacy is unqualified,<sup>206</sup> and, if it allows statutes to stand, it is because they carry no hazard to the operation of the national Government. It will, in the modesty of its office, attempt to construe in such a way as to bring the national and the local measure into accord.<sup>207</sup> But, if the conflict cannot be avoided, the Act of Congress is the supreme law, and the command of the state must yield.<sup>208</sup> Only infrequently will a dormant federal power, such as the commerce clause, be employed to nullify legislation.<sup>209</sup> Hence, if a state act is struck down, it is usually because Congress has invaded the domain. If allowed to stand, it is not because the state act is in itself irrevocably valid, but because Congress has said nothing to the contrary. If, later, Congress should speak where now it is silent, the Court would enter the federal priority against the once-valid act. The criteria are for the Court itself to employ; and justices, persuaded that displays of local regulation are obnoxious, may easily assert that through its act the Congress has taken over the domain. A caveat has recently come from Mr. Justice Stone: "At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding" local authority against "vague inferences as to what Congress might have intended if it had considered the matter" or "by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted."<sup>210</sup> The power to annul is still there; the Court has not turned its back upon a federal supervision of the state legislature; it has merely substituted Congressional veto for constitutional prohibition.

206. Even cases denying exercise of Congressional power contain hints that the Court would not oppose the exercise, were Congress to amend its words. See *F. T. C. v. Bunte Bros.*, 312 U. S. 349, 355 (1941).

207. See *Maurer v. Hamilton*, 309 U. S. 598 (1940); *Board of County Comm'rs v. United States*, 308 U. S. 343 (1939).

208. *Hines v. Davidowitz*, 312 U. S. 52 (1941); *Bacardi Corp. of America v. Domenech*, 311 U. S. 150 (1940); *McGoldrick v. Gulf Oil Corp.*, 309 U. S. 414 (1940); cf. *California v. Thompson*, 61 Sup. Ct. 930 (U. S. 1941).

209. See note 93 *supra*.

210. *Hines v. Davidowitz*, 312 U. S. 52, 75 (1941).

As with endowing statutes with meaning, the real question is the nature and extent of the Court's intrusion into the field of policy. If it acts only where the state barges into a domain where federal control is established, there is nothing to note.<sup>211</sup> Nor will there be serious difficulty if the regulation by the state is of a kind with and less severe than that of the Federal Government.<sup>212</sup> The bother arises when states attempt to impose different and more stringent measures than has seemed to Congress wise.<sup>213</sup> The Court's sanction is that Congress has pre-empted the field; and that almost necessarily involves judgment by implication, for rarely will the national act specifically deny to the state all concurrent power. As between a proper exercise of police power and a direct thrust into an alien domain, only inference can separate "essence" from "incident." A Congressional Act, which literally comes into no collision, can be endowed with a purpose at odds with the state's objective. In a recent case, context and background of a federal statute were drawn upon to prove that Congress wished oil for ship's stores to be free from state, as well as national, taxation.<sup>214</sup> By its invocation of legislative history this technique is less subject to abuse than is a direct resort to inference. An inferred dichotomy between "practices in commerce" and "transactions affecting commerce"<sup>215</sup> — like all distinctions which lack a tangible reference — supplies the judge's pleasure with a comfortable sanction.

The language of statutes, legislative history, judicial tradition may draw their lines and impose their pressures; yet there remains an area in which notions of policy and even personal prejudice can have a role in the play. As with the meaning of statutes, the Court may discover a substitute whose proper duty it is to pass upon all questions of policy. A few years ago, a number of states, as *amici curiae*, refused to protest a federal control of the bituminous coal industry; they uniformly insisted that regulation, not only of prices, but of wages and hours as well, lay beyond the "competence" of the separate commonwealths;<sup>216</sup> the current bench would undoubtedly attach great weight to such testimony.

211. See *Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. R.*, 257 U. S. 563 (1922); *Nielsen v. Johnson*, 279 U. S. 47 (1929) (treaty); *Asakura v. Seattle*, 265 U. S. 332 (1924) (treaty).

212. See *Kelly v. Washington*, 302 U. S. 1, 10-14 (1937); *cf.* *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 222-24 (1938).

213. See *Erie R. R. v. New York*, 233 U. S. 671 (1914); *McDermott v. Wisconsin*, 228 U. S. 115 (1913).

214. *McGoldrick v. Gulf Oil Corp.*, 309 U. S. 414 (1940); *cf.* *West India Oil Co. v. Domenech*, 311 U. S. 20 (1940).

215. See *F. T. C. v. Bunte Bros.*, 312 U. S. 349 (1941). For a discussion of this dichotomy as related to expansion of federal power over a period of years see (1941) 50 *YALE L. J.* 1294.

216. *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

If the question is whether state legislation encroaches upon federal policy, no more persuasive argument could be presented, than a brief by the United States disclaiming such trespass. An insistence by the United States that such a conflict does exist should possess equal probative value.<sup>217</sup> Such a procedure amounts to receiving the observations of persons who occupy vantage posts; it is a preventive against the casual assertion of authority by the judiciary. Although such devices are still inchoate, there is no longer a disposition to exalt a theoretical federalism over a practical government.<sup>218</sup>

The paths of retreat from policy-making are not yet beaten. Nor do they all move in a single direction. Now and then a trail, by a circuitous route, leads back to the political front. It may prove to be the rule — as it is already evident in the instance — that the liberty accorded executive and legislature is postulated upon an expectation of good behavior. In England the courts assume that the Houses of Parliament “intend” to observe the proprieties which the courts believe are inseparable from good government.<sup>219</sup> In emulation, the Court may in effect be saying, “We grant you power, O Congress, but we will presume that you do not intend to overstep limits which to us seem fit and proper.” A literal “null and void” is bad; an “ultra vires” at just the right time may prove an effective warning. A strong government has come to be essential; it cannot retain its efficiency in the face of a reiterated series of vetoes. If the Court is to retain its oversight, its obtrusions must be less frequent and less obvious than in days of yore. Its subtle pressures must be attended by a great deference to the legislature in formulating policies and to the executive in their administration.

### VIII. THE FACTS OF THE CASE

A court of law has ways of impressing its will upon the course of events. It may invoke the Constitution, find a meaning within the lines of a statute, direct the moves which make up due process to a result of its own. In motion, party, jurisdiction, certiorari it has a vast area

217. See *Hale v. Bimco Trading Co.*, 306 U. S. 375, 379 (1939) where the Court took cognizance of the brief filed by the Government. The Government also opposed the state statute invalidated in *Hines v. Davidowitz*, 312 U. S. 52 (1941). Note the problem in *Mitchell v. United States*, 61 Sup. Ct. 873 (U. S. 1941), where the Solicitor General filed a brief in opposition to the position taken by the Interstate Commerce Commission. And see *Maurer v. Hamilton*, 309 U. S. 598 (1940), where the combined efforts of the Solicitor General and the Commission were unavailing.

218. There are apparent exceptions to this. See *F. T. C. v. Bunte Bros.*, 312 U. S. 349 (1941); (1941) 50 *YALE L. J.* 1294; *Union P. R. R. v. United States*, 9 U. S. L. WEEK 4371, 4379 (U. S. 1941) (dissent).

219. See Cole, “Government,” “Law,” and the Separation of Powers (1939) 33 *AM. POL. SCI. REV.* 424, 428-33.

in which to operate; here the individual ruling has little significance apart from the general pattern which all such holdings make. Typical of the lesser devices of judicial discretion is "the facts." As with Constitution or statute the Court chisels a major premise to its liking, so here it brings its craft to bear upon the minor premise. Here, in comparison with the lower courts, it has scant opportunity and must work within narrow quarters. Yet, by its own example as well as by words of admonition, its authority runs out through the whole judicial system.

In a sense the impact of fact-finding on public policy is indirect. A judge may be biased or judicial; he may be sensitive or insensitive, realistic or ritualistic, in his search for the total situation. The Court may insist upon a clean-cut separation between "the recitation of facts" and "the conclusions in law"; and Mr. Justice Douglas may, in an elaborate opinion, which is virtually a Papal Bull to the bishops of the judicial dioceses, give a superb demonstration of how it is done.<sup>220</sup> Yet men are well-set in habit before they come to the bench, and the most that can be done is to enhance critical awareness and to induce a high resolve towards better workmanship. Nor is litigation an ideal instrument for capturing a protracted course of corporate events or throwing into focus and relief the larger situation which is the reality of the instant case. It was in a concern with elementary problems of tort, crime, contract, that the technology of trial was developed, and it has never been adequately accommodated to a recognition of the values of public policy.

A long time ago the executive and the legislature recognized the need for the expert and a mitigation of the severities of process. The judiciary not only lagged far behind; but only a few years ago were condemning other agencies of government for attempting to streamline procedure. Departures from the great ceremonial were denounced as denials of the rudiments of fair play and proceedings akin to Star Chamber.<sup>221</sup> At least within the narrow orbit of review, this hostility has been abated by the Supreme Court.<sup>222</sup> As Mr. Justice Frankfurter remarked for the current bench, "Modern administrative tribunals are the outgrowth of conditions far different" from those which brought traditional procedure into being. They have, to a large degree, "been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process." He cautions that unless the "vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray

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220. *United States v. Socony-Vacuum Co.*, 310 U. S. 150 (1940).

Recognition should also be accorded Justices Brandeis and Stone for their crusades over the years in behalf of the minor premise. See notes 83, 85 *supra*.

221. *Jones v. S. E. C.*, 298 U. S. 1, 33 (1936), quoted in note 157 *supra*.

222. See note 51 *supra*.

outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."<sup>223</sup>

Such an approach frees the agency of administration from irrelevant tradition. Inability of the judicial system to accommodate itself to these demands might nullify a public policy. The inadequacy of trial-at-law as a method of capturing the pattern of trade practice to determine whether an industry has violated the anti-trust laws is notorious;<sup>224</sup> yet it is but a sterling example of the frustration with which in the courtroom the law confronts the affairs of big business. If techniques are evolved which enable regulation to keep in step with business, the best exhortation to the lower courts is not to interfere. Administration must contrive its own technology, and a distinctive accomplishment of the present bench is to impose a laissez-faire upon parties who would oppose.

It is, however, not enough to refuse to exalt the judicial process and to admit that there are other ways to so much of truth as is to be had. A court review of the facts would distort administration, by causing the focus to shift from the situation below to the supervision imposed from above. Any competence which persons skilled in the matters at hand possess goes for naught if courts reweigh evidence. Here the present justices recognize nearness, experience, intangibles, the feel for the situations, factors in the equation of decision which cannot be constricted into a formula of requisites.<sup>225</sup> They are keenly aware that the relevant facts transcend the written evidence and that, should they undertake to review, a host of pertinent considerations lie beyond their reach. At best they can justify a substitution of their own judgment only by "a lack of substantial evidence"; but so normless a criterion easily drifts into we-do-not-approve-of-the-result. Severity at the top if not sufficiently articulate may easily lead to laxity in its use further down;<sup>226</sup> and a number of recent lectures to lower courts indicates the omnipresence of temptation.<sup>227</sup> The uncompromising self-denial as now developing is essential to the integrity of fact-finding. But here, as with Constitution and statute, a disclaimer of discretion is not an abdication of power. In the midst of relatives, there can be no absolute for self-

223. *F. C. C. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 142, 144 (1940).

224. See HAMILTON AND TILL, *ANTITRUST IN ACTION* (TNEC Monograph No. 16, 1940) 45-75, 101-20.

225. "This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation." *United States v. Morgan*, 9 U. S. L. WEEK 4336, 4337 (U. S. 1941). See also the quotation in note 77 *supra*.

226. It may be that a feeling of uneasiness over how carefully lower courts would heed the explicit qualifications set forth by the Court to confine its ruling within narrow limits, led to the dissents in *N. L. R. B. v. Express Publishing Co.*, 61 Sup. Ct. 693 (U. S. 1941) and *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287 (1941).

227. See the Court's statement of reasons for granting certiorari in *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206, 208-09 (1940).

denial. The "rudimentary requirements of fair play" must still be insured;<sup>228</sup> there must always be more than "a mere scintilla" of evidence.<sup>229</sup> Here, as elsewhere, the only guarantee of the Court staying within the limits of its competence is the discipline which it imposes upon its own conduct.

In the area in which the finding of facts belongs to the courts, the question is different. So long as the resort is to the law, the Court is overseer to the system and no aspect of litigation lies without its competence. Its task is to use its power, without reserve, to make the process of judicial fact-finding as efficient as possible.<sup>230</sup> It must, for the same reason, employ its authority to preserve the procedures which safeguard the liberties of the individual. "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."<sup>231</sup> The Court may refuse to strike down legislation which seems to it inimical to the common good; it may indulge a statute far beyond the limits which seem to it wise. But it will make a sharp distinction between actions initiated in an administrative body and in a court; surrender facts to an agency more competent to find them; and demand that judges below be fully informed about the situations to which they apply the law. In its insistence upon the facts in the instant case the Court is well within its traditional duty; as respects another arm of the government, the "findings," as the facts of the action before it, should be fully set forth.<sup>232</sup> Whether the administrative or the judicial process shall be used is for the legislature; but, where the issue is left to justiciable settlement, the Court stands supreme within its bailiwick.

The ancient writ of habeas corpus may well usurp the final word. From a time when the purposive memory of man runneth not to the contrary, it has belonged to the courts; and surely competence dwells where authority is established. So long as it is not used as an entering

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228. *Morgan v. United States*, 304 U. S. 1, 14-15 (1938). The latest case in this eleven-year litigation, though finally upholding the Secretary of Agriculture, does not purport to overrule the quoted proposition. *United States v. Morgan*, 9 U. S. L. WEEK 4336 (U. S. 1941).

229. See *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229 (1939). But when the Court begins to admit "imponderables," it becomes difficult to be sure what is a "mere scintilla." See notes 77, 225 *supra*.

230. See Hughes, *Foreword* (1941) 50 YALE L. J. 737, 738.

231. *Chambers v. Florida*, 309 U. S. 227, 241 (1940).

232. See *United States v. Baltimore & O. R. R.*, 293 U. S. 454 (1935); *Panama Ref. Co. v. Ryan*, 293 U. S. 388 (1935); *cf. Pacific States Box & Basket Co. v. White*, 296 U. S. 176 (1935).

wedge for policy, it is an appropriate judicial tool.<sup>233</sup> Congress may decide that, under extraordinary circumstances, particular liberties may be abridged, and the Court may be loath to issue any order to the contrary. But it need not hesitate to inquire into whether the circumstances of the instance fall within the limits of the proscription. It is beyond question that in time of crisis, public officials are over-zealous, and the facts as found may depart from the truth. Or the courts themselves, under the spirit of a holy crusade, may allow fictions to corrode their minor premises. But, when feelings run high and reason has become captive to the emotions, any power is likely to be abused. The real question is the relevant competence of the courts to separate the seditious element from the lawful expression of personal freedom. Their record, as the last great war attests, is far from spotless.<sup>234</sup> But it is hard to think of an agency of control which would not have done far more. And where courts are competent—if only because of the meager hope of lodging authority elsewhere—it is well to leave them free to handle a difficult matter in their own way.<sup>235</sup>

#### IX. THE POWER OVER POWERS

It is hazardous to attempt to discover a pattern still in the making in the detail of separate judgment. Except for a general word here and there, the Court has not published the design which it is imposing upon the activities of government; and those who seek to make explicit where all is still implicit act at their peril. Yet a recitation of holdings reversed, of advanced points taken, of doctrines turned back upon themselves or given a new direction somehow falls short of what the Court has been doing. The manner of work, the range of jurisdiction, the things left undone, the changes effected beyond the orbit of litigation, the hundred intangibles which attend an agency of control all testify to a political revolution. Not only are the ways of the Court changed and the office of the judiciary redefined; but also lines between the great provinces of government are being redrawn and a revised *modus operandi* is being imposed upon each.

As yet the movement is too fast to allow an abiding perspective. In each of the last three "October terms" a different picture has been presented. In the first the coming of new men was most apparent and

233. For evidence of the seriousness which the Court attaches to the writ of habeas corpus, see *Holiday v. Johnston*, 9 U. S. L. WEEK 4343 (U. S. 1941); *Ex parte Hull*, 61 Sup. Ct. 640 (U. S. 1941); *Smith v. O'Grady*, 312 U. S. 329 (1941); *Walker v. Johnston*, 312 U. S. 275 (1941); *Johnson v. Zerbst*, 304 U. S. 458 (1938).

234. See CHAFEE, *FREEDOM OF SPEECH* (1920).

235. This discussion of the writ of habeas corpus applies with only somewhat less certainty to the other extraordinary writs utilized by courts.

views stood out with individual sharpness. In the second, there was a tendency for newcomers to get together and in the face of their older colleagues to declare the law. In the third, with the disappearance of "the last of the Romans," there has been drift towards a new alignment. Mr. Chief Justice Hughes, now as always, is far more concerned with the vitality of the institution over which he presides than with doctrinal integrity among its members.<sup>236</sup> Mr. Justice Stone, naturally enough, seems content enough with advance positions to which for years he never dreamed that he could bring his Court. Mr. Justice Roberts finds the majority of the bench far away from the center from which he used to shuttle to right or left. The disappearance of the Four Horsemen has made a far greater difference than the departure of Brandeis and Cardozo, JJ. For a bench of nine, confronted by the problems of a culture in crisis is bound to divide; and, since the stalwarts are no longer there to put their questions, the division will be along new lines. Already there is evidence of an authoritarian group,<sup>237</sup> to be led by Mr. Justice Frankfurter, and of a realistic group, with Mr. Justice Black and Mr. Justice Douglas in the van. But the area of difference will be more confined, and the lines of severance more loosely drawn than in the past.

But, as justices differ when novel questions come, an area once in dispute promises to become a domain of order. It will be taken for granted that "a court travels beyond its province" when it usurps the office of another body. A doctrine of competence will accord rightful domains to various agencies of government; and, within appropriate limits, each will have a liberty to shape its procedure to its task and a finality of discretion quite absent in the old days. A judicial retreat means an advance by the executive or the legislature; a surrender of authority by the Court means its assumption somewhere else. The current bench clings as closely as any bench of old to the separation of powers. In using competence to deny its own power, it employs its own authority to mark out zones of competence. The separation of powers is as the Court's own power makes it.

But a caveat is in order. Separation of powers, doctrines of competence, redefinitions of domains of authority — these are abstractions used to describe institutions which move forward only by man-power. And men have convictions — convictions of the "Good Society," of means

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236. Almost at press time news comes of the departure of the Chief Justice. The succession of Stone parades more than insures the continuity with the past. If the appointment of Byrnes obtrudes an unknown factor, that of Jackson should make of the new Court an even newer Court. His insistence that institutional, as well as personnel, change is essential, may be expected to give drive to trends already in evidence. See his *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) c. X.

237. A result of the "austerity" approach. See note 142 *supra*.



of achieving it, of each one's proper duty in aiding the achievement. Which of these convictions motivates a judge is never obvious. Sometimes his vote coincides with them all; sometimes there is conflict. Given conflict, one of them must overpower the others.<sup>238</sup> The infallible, the ideal judge is conceived in terms of proper duty in furthering the achievement of the Good Society. But man is fallible; he cannot always put aside his deeper conviction of the substance of the Good Society. Hence any delineation of power in the abstract must leave wide margins for the dereliction occasioned by that "higher" duty.

It is well, therefore, to be wary of the Court bearing gifts. An ancient line can be made to read, "the power to give involves the power to take back." The Court's surrender is not as plenary as it is represented. But as it retreats from the Constitution to statutes, it can do with an *ultra vires* almost all that a null-and-void can accomplish.<sup>239</sup> It meets conflicting meanings, where policy alone can make the choice, and policy is what the Court says it is. In the lesser orbit, where the matter is less exposed to public discussion, the exercise of discretion may be more smug and less forthright than in the exposition of the higher law. But, however tolerant it may be, the "independence" of other agencies is but another name for the Court's indulgence. The Court escaped reform from without by reforming itself from within. But the duration of that reform is at the Court's pleasure. Even in creating a government of laws, the Court cannot escape being a government of men. In last analysis, agencies of state are but instruments; it is the people who must preserve the ancient liberties.

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238. Assuming that these three categories exhaust the field. Such convictions as that one's friends should always win, or that justice should be dispensed by coin-flipping are too fantastic to consider. And even if accepted, they could be subsumed under one of the headings above.

239. It should be remembered that Congress may never get around to changing a statute once it has been construed. This is particularly true of a burning issue. The Louisiana primary case turned, so far as a split of the justices was concerned, on statutory interpretation. But the question might just as well have been a constitutional one, for it seems unlikely that Congress would have acted no matter which way the decision went. See *United States v. Classic*, 9 U. S. L. WEEK 4355 (U. S. 1941).