

## Should the Senate Pass on the Social and Economic Views of Nominees to the Supreme Court of the United States?

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## SHOULD THE SENATE PASS ON THE SOCIAL AND ECONOMIC VIEWS OF NOMINEES TO THE SUPREME COURT OF THE UNITED STATES\*

THE rejection<sup>1</sup> by the United States Senate of the Presidential nomination of John Johnson Parker of North Carolina as an Associate Justice of the Supreme Court of the United States focused the attention of the American public on the question of the respective roles of the President and the Senate in the appointment of judges to our highest bench.

The particular charges against Mr. Parker were four in number: (1) that he lacked ability and training, (2) that as a judge of a lower federal court he had rendered a decision that was hostile to union labor, (3) that as a candidate for public office in North Carolina he had made a statement on the stump that the Negro in his present status was unfit for high political office, and (4) that the appointment was purely a political one—a “master political stroke” to keep alive the Republican organization in North Carolina. It shall not be our purpose to discuss the merits of these particular charges. Rather we shall address our remarks to the more fundamental question as to the policy of the United States Senate in rejecting Presidential nominations to the Supreme Court because of the social and economic views of the aspirants.

By way of introduction, we shall present first the historical explanation for the American system of federal judicial appointments. The Constitution of the United States provides<sup>2</sup> that “He (the President) shall nominate, and by and with the advice and consent of the Senate, shall appoint \* \* \* the Judges of the Supreme Court.” Three considerations are responsible for the above provision:<sup>3</sup> First, at the

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\* This is an address delivered at the annual meeting of the American Law Teachers Association at the Stevens Hotel, Chicago, Dec. 29, 1930.

<sup>1</sup> The Senate rejected Mr. Parker on May 7, 1930, after a debate of more than a week's duration. See 72 Cong. Rec. 6101. Also see Cong. Rec. for debates of Apr. 28, May 2, 5, 7, 1930.

<sup>2</sup> Art. II, Sec. 2, Clause 2.

<sup>3</sup> See Salmon, Lucy P. *The Appointing Power of the President*. 1 PAPERS OF THE AMERICAN HISTORICAL ASSOCIATION 5, p. 9 (N. Y. 1886).

time of the adoption of our Constitution, in England, the appointing power was in the executive. The framers of our Constitution, from experience, feared the Executive, and they were in no mood to encourage the growth of executive power; so they provided that the legislature should share in the appointing power. Secondly, under the Articles of Confederation the appointing power was in Congress. Experience had shown the "impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences."<sup>4</sup> So after the "critical period" sole legislative appointment was out of the question. Thirdly, the appointing systems in the states prior to the Constitution were not satisfactory. George Mason in the Constitutional Convention, inveighed against "the shameful partiality of the legislature of Virginia to its own members."<sup>5</sup> Alexander Hamilton, in discussing the weakness of the system in New York where the appointing power was vested in a governor and a Council of Appointment, declared that scandalous appointments to important offices had been made. "Some cases indeed have been so flagrant that ALL parties have agreed to the impropriety of the thing."<sup>6</sup>

Three general plans were presented to the Constitutional Convention. The Virginia Plan, presented by Edmund Randolph, contained no express provision relating to the appointing power, but it did empower the President "to enjoy the executive rights vested in Congress by the Articles of Confederation."<sup>7</sup> This would have given the President the appointing power, but since the executive was elected by Congress, the legislative body would have had considerable indirect control.

The New Jersey Plan,<sup>8</sup> presented by William Patterson, provided for a plural executive with appointing power, but the executive was to be elected by Congress, and here again the legislative body would have had indirect control.

<sup>4</sup> 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION, 119 (New Haven 1910).

<sup>5</sup> 5 ELLIOT'S DEBATES (Washington 1845) pp. 230-232.

<sup>6</sup> 2 FEDERALIST, 55 (Universal Classic Library Edition).

<sup>7</sup> 5 ELLIOT, *op. cit.* note 5, at 127-128.

<sup>8</sup> *Ibid.* at 191-192.

The Alexander Hamilton Plan<sup>9</sup> provided for a President with life tenure to be chosen by presidential electors. The President was to have the appointment of the heads of departments of finance, war and foreign affairs, and the nomination of all other officers subject to the approval or disapproval of the Senate. It will be noted that the Constitutional Convention in its attempt to avoid the weaknesses of earlier systems of appointment, leaned heavily on the Hamilton plan. So much for the historical background.

The next point by way of introduction is to determine the extent to which the Senate has utilized directly its power of "advice and consent" in rejecting presidential nominations to the Supreme Court of the United States. It is impossible to determine to what extent Senators have influenced the nomination of candidates by the President. During our history, although the Supreme Court has varied in size, the total number of appointments to date is seventy-eight. The senate has rejected eight nominees.<sup>10</sup> They are John Rutledge, Dec. 15, 1795; Alexander Wolcott, Feb. 13, 1811; John C. Spencer, Jan. 13, 1844; George W. Woodward, Jan. 22, 1846; Ebeneazer R. Hoar, Feb. 3, 1870; William H. Hornblower, Feb. 16, 1894; Wheeler H. Peckham, Feb. 16, 1894, and John Johnson Parker, May 7, 1930. It should be noted that the first rejection is the only one relating to the Chief Justiceship,<sup>11</sup> and that the party involved, John Rutledge, had formerly held an Associate Justiceship.

The fight in the Senate over the Parker nomination was not limited to the narrow question of the intellectual ability and moral qualifications of the nominee. The clash between Senators Fess and Borah raised a much more fundamental problem, to which we shall direct our discussion. Senator

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<sup>9</sup> *Ibid.* p. 206.

<sup>10</sup> It is believed that this list is complete. The information has been taken from the official Executive Journals of the Senate until 1901 and after 1901 from the Congressional Record. The early indices were inadequate. See 2 WARREN, *THE SUPREME COURT IN THE UNITED STATES HISTORY*, Appendix pp. 757, 763. Also a Partial List of Executive Nominations rejected by the Senate, Library of Congress, Legislative Reference Service Pamphlet JK 583.

<sup>11</sup> 26 votes were recorded against the appointment of Charles Evans Hughes as Chief Justice. Such leaders as Webster, Clay and Calhoun were opposed to Taney's appointment as Chief Justice.

Fess,<sup>12</sup> the chief defender of Parker, intimated that "Parker is an incident. The Supreme Court is the issue." He declared that "an effort was being made to break down the independence of the Supreme Court by attacking nominees who do not fit in with the particular views of those who criticise." Senator Borah,<sup>13</sup> on the other hand, frankly admitted that "The Supreme Court judges pass upon what we do. Therefore it is exceedingly important that we pass upon them. \* \* \* We declare a national policy, they reject it. I feel that I am well justified in inquiring of men on their way to the Supreme Court something of their views on those questions."

The Senatorial debate thus raised the problem of the role of the Supreme Court in our constitutional system. Is the Supreme Court often a third legislative department? Does Senatorial investigation of every possible qualification of a nominee undermine the independence of the judiciary? Is it sound public policy for the Senate to pass upon the social and economic views of the nominee?

In order to discuss intelligently the problem raised by the Parker case, two preliminary considerations should be disposed of. Firstly, we should not be misled by the professions of the court that "It is not their function to hold Congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound."<sup>14</sup> That sentiment has been expressed innumerable times by our highest court since John Marshall inaugurated the "awful" power of judicial review. The crux of the problem is what the court does, not what it says it does. Secondly, let it be understood that there is no question as to any lack of constitutional POWER in the Senate to examine the nominee from every possible point of view. As far as the particular nominee is concerned, the Senatorial power of "consent" is as broad as the Presidential power of nomination. The only question is one of POLICY.

<sup>12</sup> Cong. Rec. Apr. 29, 1930.

<sup>13</sup> Cong. Rec. Apr. 29, 1930, p. 8220; also May 6, 1930, p. 8722.

<sup>14</sup> Taft, *C. J.* dissenting in *Adkins v. Children's Hospital*, 261 U. S. 525, 562; 43 Sup. Ct. 30 (1922). See majority decision in *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436 (1903). See 1 WILLOUGHBY, CONSTITUTIONAL LAW 32.

We cannot go far in the field of American constitutional law without encountering two widely divergent schools of thought. At the one extreme, we find a *doctrinaire conceptualism* that visualizes the fundamental law as a body of definite, eternal and immutable principles, that worships it as "a Temple of Liberty and Justice" and that attributes to the founding fathers the supreme achievement of crystalizing in the "Ark of the Covenant" the political wisdom of the ages. This position assumes that the authors of the Constitution were omniscient and that they anticipated each and every situation that might possibly arise. Obsessed by the dogma of the "separation of powers," the adherents of this view over-simplify the problem of government, and make of the court a sort of judicial slot machine. To the members of this school legislation is for the legislature, for is not the Constitution clear and complete, and is not the court's only function to determine the law as it IS, not as it OUGHT to be? To them, the Supreme Court is the holy of holies, an independent tribunal, functioning in a vacuum above and beyond the contemporary turmoils of party politics and the passing vagaries of temporary majorities.

At the other extreme are those that deny that it is possible to provide for any future contingency because each and every situation contains an element of novelty and calls for an unique treatment. The members of this school are so completely under the spell of the idea that we are living in a dynamic world that they deny the possibility of formulating any principles whatsoever, for words uttered yesterday could not have the same meaning today. To them a written Constitution containing "parchment barriers" is a futile thing. The evolving sense of right of the community is the only source and sanction of law. All is flux and "with every breath of the American people, there is born a new Constitution." To them there is no distinction between interpretation and legislation. They have seized upon the idea that the Supreme Court is legislating generally, and in criticizing that tribunal they are attempting to judge it by standards that are applicable only to a popular, representative, legislative body. This latter position should be viewed as a protest against the canonization of the Constitution

which has so long dominated our legal and political thought. The protagonists of the dynamic approach, however, in their eagerness to demolish the static conception, have overstated their case. Perhaps somewhere between these two extremes will be found a realistic way of viewing the role of the Supreme Court as the ultimate umpire in our constitutional system.

The writer, although not an adherent of the extreme dynamic school, believes that it is sound policy for the Senate to pass on the social and economic views of nominees to the Supreme Court. As we see it, there is a fundamental difference in the very nature of the action of a court (1) in interpreting a statutory or constitutional provision which is vague and ambiguous from that of (2) attempting to repeal or modify a concise and definite statutory or constitutional provision. The unwary who are unable to grasp the distinction will characterize the court in both cases as "legislating" or in both cases as "interpreting" as it suits their interests. Actually, the court in the first case, is performing one of the primary and legitimate functions of the judicial department; that of interpreting the law. In the second case, the court is usurping power and is assuming the role either of a legislative or a constitutive body.

As an illustration of the distinction, consider the Supreme Court's attitude toward two great anti-trust statutes, the Clayton Act and the Sherman Act. In deciding in the former<sup>15</sup> case that the Clayton Act did not exempt labor unions from the operation of the Sherman Act, the Supreme Court interpreted the Clayton Act in the only legitimate way that it could interpret it.<sup>16</sup> In the second case<sup>17</sup> the court, by adopting the so-called "Rule of Reason," read into the Sherman Act the word "unreasonable" and the Big Business interests thus gained a victory, which through their powerful Congressional lobby, they had been unable to secure for a period of twenty-one years by means of an amendment

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<sup>15</sup> Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1920).

<sup>16</sup> See article by author in WASHINGTON UNIVERSITY STUDIES (1924), "How Far is the Theory of Trust Regulation Applicable to Labor Unions?"

<sup>17</sup> Standard Oil of New Jersey v. United States, 221 U. S. 1, 31 Sup. Ct. 502 (1910).

to the Sherman Anti-Trust law. The labor sympathizers, failing to realize the distinction between interpretation and legislation, vehemently criticised both decisions. As a matter of fact, the criticism of the latter was deserving, but that of the former was wholly unwarranted. In the former case, Congress, the only culprit, escaped the wrath of the labor forces.

Three great jurists have commented on the general nature of the judicial function in so far as it relates to judicial law making. Mr. Justice Holmes has said, "I recognize that judges do and must legislate. But they can do so only interstitially; they are confined from molar to molecular actions."<sup>18</sup> Judge Cardozo expresses the same view. The courts "have the right to legislate within gaps, but often there are no gaps. In countless litigations, the law is so clear that the judges have no discretion."<sup>19</sup> Of course that does not prevent the court from changing the law and thus exercising its discretion legislatively, where the law is clear. This the Supreme Court did in *Farmers Loan and Trust Co. v. Minnesota*,<sup>19a</sup> when it flatly reversed *Blackstone v. Miller*.<sup>19b</sup> Dean Pound, referring to the extremists who believe that the courts are legislating generally, says that "they overlook as a rule the important difference between the process of legislative law making and the process of incidental selection of legal materials and giving them shape as legal precepts, which is involved in not a little of judicial decision. The latter may be called judicial law-making without any reflection upon the courts."<sup>20</sup> In another place he says, "In Jhering's apt phrase, the process is one of juristic chemistry—but the chemist does not make the chemicals which go into his test tube."<sup>21</sup>

However, when the Supreme Court is considering the constitutionality of a statute under the "due process clause" or under other vague and amorphous provisions of the Constitution, we are inclined to believe that all of the statements

<sup>18</sup> *Southern Pacific v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 523 (1916).

<sup>19</sup> CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1927) pp. 123-129.

<sup>19a</sup> 280 U. S. 204, 50 Sup. Ct. 98 (1930).

<sup>19b</sup> 188 U. S. 189, 23 Sup. Ct. 277 (1902).

<sup>20</sup> *LAW AND MORALS*, 1924, p. 54.

<sup>21</sup> Pound, *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 641, at 643.

quoted above are too conservative as they relate to the possibility of judicial law making. We would then agree with Professor Frankfurter when he says, "With the great men of the Supreme Court constitutional adjudication has always been 'statecraft.' The great judges are those to whom the Constitution is not primarily a test for interpretation but the means of ordering the lives of a progressive people."<sup>22</sup>

There are certain governmental powers that are so broad and elastic as to defy and baffle any attempt at precise definition or rigid classification. This is partially due to the nature of the powers and partially to the poverty of our language. It would be futile to attempt to define "due process of law" or the "police power." The method by which our courts determine by a process of mutual inclusion and exclusion whether a certain case falls within or without the class may be governed partly by precedent and partly by what has been termed "constitutional conscience" or "hunch."<sup>23</sup> Obviously in this particular field, constitutional law is bound to be a more or less uncertain and amorphous thing. Here is a field where "the decision will depend on a judgment or intuition more subtle than any articulate major premise."<sup>24</sup> The great desideratum of the court in these cases will be whether the goal of its decision is an economically or socially valuable thing.<sup>25</sup>

Professor Cushman,<sup>26</sup> in an admirable article, has traced the various attitudes of the Supreme Court of the United States in construing the due process clause of the Fourteenth Amendment. Here in truth, is an illustration of the Chief Justice Hughes' dictum<sup>27</sup> that "The Constitution is what the judges say it is." The early view was one of judicial non-interference. In the case of *Munn v. Illinois*<sup>28</sup> the court declared that the due process clause afforded no pro-

<sup>22</sup> THE PUBLIC AND ITS GOVERNMENT, Yale Press (1930) pp. 75, 76.

<sup>23</sup> Joseph C. Hutcheson, *The Judgment Intuitive; the Function of "the Hunch" in Judicial Decision* (1929) 14 CORN. L. Q. 274-280.

<sup>24</sup> Holmes, J., dissent in *Southern Pacific v. Jensen*, *supra* note 18.

<sup>25</sup> Max Radin, *The Theory of Judicial Decision; Or How Judges Think*, 357 (1925).

<sup>26</sup> (1922) 20 Mich. L. Rev. 737. See also Frankfurter, "Hours of Labor and Realism in Constitutional Law"; (1916) 29 HARV. L. REV. 353.

<sup>27</sup> HUGHES, ADDRESSES (1908) p. 139.

<sup>28</sup> *Munn v. Illinois*, 94 U. S. 113 (1876).

tection against unreasonable rate regulation by the legislature but that the remedy (if any) was at the polls. Later the court went to the other extreme and entered the so-called period of "judicial ruthlessness"<sup>29</sup> applying a mechanical and legalistic interpretation of the Fourteenth Amendment. More recently the courts have become social and economic experts aided and encouraged by the Brandeis type of brief.<sup>30</sup> There is also a tendency at the present time toward the Holmes doctrine of judicial self-denial wherein the social and economic questions are left to the legislature.<sup>31</sup> On the other hand, there is also a tendency on the part of the court to extend its authority not only into the realm of social and economic questions but also into the questions of physics and metaphysics.<sup>31a</sup>

As Dean Pound has pointed out, the evolution of the common law was from that of "strict law"—a law of definite rules—to one of standards, of which the standard of behavior judicially attributed to the "reasonable man" is the principal one. The modern interpretation of "due process of law" as reasonable legislation—that is to say, what the court judges to be reasonable—puts our constitutional law on an analogous footing.<sup>32</sup> Because of rapidly changing economic and social conditions, the police power of the states is expanding at the expense of the due process conception. This inevitable growth is "the life of the law."<sup>33</sup> Why should we not face the situation realistically and concede that the Senate should have the right and the duty to pass on the social and economic views of nominees to the Supreme bench.

It may be said that the above conclusion is a theoretical justification of the Senate's right to pass on the social and economic views of nominees to the Supreme Court based on

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<sup>29</sup> *Ives v. Buffalo R. R. Company*, 201 N. Y. 271, 94 N. E. 431 (1911).

<sup>30</sup> *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324 (1907).

<sup>31</sup> *Green v. Frazier*, 253 U. S. 233, 40 Sup. Ct. 499 (1919); *Block v. Hirsch*, 254 U. S. 640, 41 Sup. Ct. 13 (1920).

<sup>31a</sup> *First National Bank of Boston v. Maine*, 284 U. S. 312, 52 Sup. Ct. 174 (1932).

<sup>32</sup> Edwin S. Corwin, *THE CONSTITUTION AND WHAT IT MEANS TODAY*, Preface v: 1 Princeton University Press (4th ed. 1930).

<sup>33</sup> Brandeis, *J.*, dissenting in *Washington v. Dawson*, 264 U. S. 219, 236, 44 Sup. Ct. 302 (1923).

the role that that court plays as a policy-determining body. We will consider only a few of the practical difficulties of this Senatorial function in operation.

Firstly, it has been said that the Senate of the United States is the worst "rotten borough" institution in the world.<sup>34</sup> New York, with a population of twelve millions, has the same representation as Nevada with less than eighty thousand. If the Senate were based on the proportional principle, New York would have three hundred Senators to Nevada's two. It is obvious that the "landed interests" are over-represented in the Senate. The backward states' doctrine of Mr. Grundy is not novel. Gouverneur Morris, in the Constitutional Convention, declared, "The busy haunts of men, not the remote wilderness, is the proper school for political talents. The 'back' members are always adverse to the best measures."<sup>35</sup> The system of representation encourages the formation of agricultural and other blocs which negative majority rule.<sup>36</sup> Professor Ford has pointed out that in the field of legislation, Senate majorities often represent population minorities on important measures such as the Missouri Compromise of 1820, the renewal of the Bank Charter in 1831, and the Tariff Act of 1842.<sup>37</sup> And yet with all of its weaknesses, it is the universal opinion of students of government that it is far superior to the House of Representatives. If there is to be legislative participation in the appointing power, the United States Senate is the preferable existing participant.

But the query might be raised as to whether the Senate being predominantly rural and Southern will not be a check on any attempt in the future to liberalize the Supreme Court. Has it been so in the past? It is very difficult to arrive at an answer concerning the past and even more perplexing to formulate a prophecy regarding the future. The following aspects of the problem deserve further study: (1) the amount of progressive legislation that has been vetoed by

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<sup>34</sup> Burgess, *The Election of United States Senators* (1902) 17 POL. SCI. Q. 650.

<sup>35</sup> 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION, 583.

<sup>36</sup> W. S. CARPENTER, DEMOCRACY AND REPRESENTATION, pp. 60-61, Princeton Univ. Press (1925).

<sup>37</sup> THE RISE AND GROWTH OF AMERICAN POLITICS, p. 275.

the President; (2) the number of progressive proposals in Presidential messages that have been disregarded by the Senate; (3) the liberal or conservative character of the eight nominees rejected by the Senate. But even if there are liberals among the eight, a further inquiry must be made as to whether they were rejected because of their liberalism or on some other ground. A study of the Senate debates over the Parker rejection wherein only a small percentage of the membership participated in the discussion would throw little light on this query.

Secondly, if the Senate is to pass on the social and economic views of the nominee, does it necessarily follow that this practice will encourage partisanship and will result in straight party voting alignments? Obviously, if this result is to follow, the American appointing system would break down because of deadlocks, unless the President should go outside his party for the nominee. During the last fifty-two years, the Republican party has held the Presidency for thirty-six and the Democratic party for sixteen years. For a confirmation of appointments requiring only a majority of the Senate, the President was of the same political party as the Senate for forty of the fifty-two years.<sup>38</sup> But we need not fear the possibility of a deadlock for the very good reason that our two great parties do not represent any fundamental difference in point of view. If this were as strict a party government as our political orators would have us believe, it would have been impossible during the last fifty-two years for any treaty to be made, for at no time during that period did the President have the necessary two-thirds of the Senate without securing votes of the other party in support of his measure.<sup>39</sup>

Finally it is submitted that if the Senate exercises its right in the future to pass upon the social and economic views of nominees to the Supreme bench, it will not mean that that august tribunal will be drawn inevitably into the maelstrom of party politics. Certain considerations will have a determining influence to prevent that dire calamity.

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<sup>38</sup> THE AMERICAN PARTY SYSTEM, MERRIAM AND GOSNELL (Revised Edition, 1930, Macmillan) pp. 81, 82.

<sup>39</sup> *Ibid.* p. 81.

First it should be noted that strictly party appointees seem often to lose their partisanship once they have been elevated to the Supreme bench.<sup>39a</sup> If there was ever a case of carefully scrutinized, hand-picked political nominees, it was in those appointments made by the Jeffersonian Republicans after the death of the Federalist party. The fundamental requisite of every nominee was that he be a strict constructionist and every appointee had that requisite. But Charles Warren<sup>40</sup> has shown that "in *Story's* case, as in so many other instances in the history of the court, there was demonstrated the utter futility of the expectations frequently entertained by politicians that the judicial decisions of a judge would accord with his politics at the time of appointment to the Supreme bench." Confirming this view, President Buchanan wrote on July 18, 1857,<sup>41</sup> "No Whig President has ever appointed a Democratic judge, nor has a Democratic President appointed a Whig; and yet the remark has been general that the Democrats appointed to this bench have always leaned to the side of power and to such a construction of the Constitution as would extend the powers of the Federal Government." To this statement there is one exception, Peter V. Daniel of the Old Dominion, appointed during the closing hours of the Van Buren administration. Daniel was the strict constructionist *par excellence* and for a period of nineteen years on the Supreme bench

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<sup>39a</sup> Frederic J. Stimson in his autobiography, "MY UNITED STATES," reveals an interesting sidelight concerning the appointment of Justice Holmes to the Supreme Court. Many of Roosevelt's admirers thought that Holmes was too theoretical but Roosevelt told Stimson that he was going to appoint Holmes because he was "right" on the Insular Cases. The country under McKinley had committed itself to an imperial policy in the Far East. Wisely or unwisely, we had taken the Philippines and rightly or wrongly, it would not do to let them have jury trial or the local freedom guaranteed by our national Bill of Rights. So Holmes was appointed and on that point Roosevelt was not disappointed. But Holmes disappointed Roosevelt soon thereafter in the Northern Securities case. Roosevelt had also appointed Moody to the highest bench and he (Moody) was "right" in his decision both in the Insular cases and in the Northern Securities case. At a banquet, Roosevelt declared, "When I appointed Moody to the bench I made a home run, but Holmes made a one-base hit and was out at second." This incident is an interesting commentary on the attempt of a President to pack the Supreme Court of the United States, p. 102.

<sup>40</sup> I WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 420.

<sup>41</sup> *Ibid.* footnote p. 420, v. 1.

he dissented consistently in every case involving the doctrine of implied powers.<sup>42</sup>

Men may differ as to the reasons for this desertion from the strict constructionist camp. Beveridge believes that they became turncoats because of the influence of the master mind and personality of John Marshall.<sup>43</sup> Perhaps the extremely strict constructionist view is by its very nature limited to the party in opposition. This explanation seems plausible in view of the embarrassment of Jefferson over the purchase of Louisiana. Perhaps the true explanation is that with the growth of the country and the development of means of transportation and communication, a sort of "manifest destiny" compelled the abandonment of the principle that was dear to Jefferson's heart.

But there are other influences that make for the futility of purely political appointments to our highest bench. The tenure for life and its attending independence and the importance and dignity of the office will tend to sublimate the factious and petty and partisan. Finally, the fact that the court by a self-imposed limitation refuses to give advisory opinions and refuses to appear in the role of an assailant of the law by limiting its jurisdiction to a *bona fide* case wherein the rights of an individual under the law are involved will further remove the court from partisan influences. De Tocqueville, commenting on this aspect, has said, "It will be readily understood that by connecting the censorship of the laws with the private interests of members of the community, and by ultimately uniting the prosecution of the law with the prosecution of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit."

However, the impression should not be gained from the above discussion that the Supreme Court ever has, or will be, entirely free from political influence. Brooks Adams has pointed out that "from the outset the American bench, because it deals with the most fiercely contested of political issues, has been an instrument necessary to political success.

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<sup>42</sup> *Ibid.* vol. 2, pp. 79-82.

<sup>43</sup> 4 BEVERIDGE, LIFE OF MARSHALL, 60.

Consequently, political parties have striven to control it." <sup>44</sup> It has been said, and I believe truly, that the trend of Marshall's and of Taney's views in cases involving political doctrines could not be changed by argument of counsel in special cases. They enunciated party tenets. And so in the rare case where Supreme Court judges were selected to serve on the Hayes-Tilden Electoral Commission, they voted as party men. This kind of partisanship can not be corrected by any change in the method of selection.

But the possibility of an alignment of party against party is not the only aspect of the politics involved in the approval or disapproval by the Senate of Presidential nominees. A more complicated feature is the probable effect of a Senator's vote, be he Democrat or Republican, upon his standing with his constituents and his own political future. In fact, the ramifications of politics are so intricate that it may be doubted whether the Senate, being a political body, can divorce political considerations from the question as to the social and economic outlook of the nominee.

In this connection we desire to refer to what seems to be the most unfortunate aspect of the Parker case. Frank R. Kent <sup>45</sup> writing in the *Baltimore Sun* before the rejection of Parker, said, "When the debate on the Parker appointment occurs this week, there will be much oratory about his alleged conservative or reactionary trend, about his unfairness to labor, about his political and judicial record and about Mr. Hoover, but there will be remarkably little about his attitude toward the Negro in politics, although that will be uppermost in the minds of every regular Republican on the floor. That is the tender spot. That is the thing they walk around as if it were a swamp. It is hypocrisy at its height." This acute observer of the American political scene was right. Such regular Republicans as Deneen of Illinois and Robinson of Indiana voted against the Parker nomination presumably because of their

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<sup>44</sup> THE THEORY OF SOCIAL REVOLUTIONS, pp. 47-48.

<sup>45</sup> BALTIMORE SUN for April 28, 1930.

fear of the Negro vote, and ten Southern Democrats <sup>46</sup> voted for Parker. Their position was a difficult one. If Parker was to be rejected because of his view on the Negro in politics, perhaps no outstanding Southern nominee of either party can be found in the future whose view will differ from that of Parker. Even if it were possible to find a capable nominee who had not expressed himself publicly on the matter, the Senate as a real advisory body would find a means of "smoking out" the nominee. The significance of this aspect of the case can only be realized when it is pointed out that Justice McReynolds is the only Southerner on the present bench and that he is entitled to, and it is rumored will, retire in 1932. There was a time <sup>47</sup> when the slave power dominated the Supreme Court of the United States. Has it come to pass that the New South will be unrepresented on the highest tribunal because of the political power of the emancipated Negro? <sup>48</sup>

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<sup>46</sup> Blease, Broussard, Glass, Harrison, Overman, Ransdell, Stephens, Swanson, Simmons, and Smith paired in favor.

<sup>47</sup> *Dred Scott v. Sanford*, 19 How. 393 (U. S. 1856).

<sup>48</sup> The vote on the Parker nomination was as follows: *Yeas*, 39. Allen, Baird, Bingham, Blease, Broussard, Dale, Fess, Gillett, Glass, Goldsborough, Gould, Greene, Hale, Harrison, Hastings, Hatfield, Hebert, Jones, Kean, Keyes, McCulloch, Metcalf, Oddie, Overman, Patterson, Ransdell, Reed, Shortridge, Simmons, Smoot, Steck, Stephens, Sullivan, Swanson, Thomas (Ida), Townsend, Walcott, Waterman, Watson.

*Nays*, 41. Ashurst, Barkley, Black, Blaine, Borah, Bratton, Brock, Capper, Caraway, Connally, Copeland, Couzens, Cutting, Deneen, Dill, Frazier, Harris, Hawes, Hayden, Howell, Johnson, Kendrick, La Follette, McKellar, Norris, Nye, Pine, Pittman, Robinson (Ark.), Robinson (Ind.), Schall, Sheppard, Shipstead, Steiwer, Trammell, Tydings, Vandenburg, Wagner, Walsh (Mass.), Walsh (Mont.), Wheeler.

*Not Voting*, 16. Brookhart, Fletcher, George, Glenn, Goff, Grundy, Heflin, King, McMaster, McNary, Moses, Norbeck, Phipps, Robison, Smith, Thomas (Okla.).