The Supreme Court: Some Interpretations of Congressional, Executive and State Power

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THE SUPREME COURT: SOME INTERPRETATIONS OF CONGRESSIONAL, EXECUTIVE AND STATE POWER

FRANCIS P. KELLY †

IT WAS February 5, 1937. Franklin D. Roosevelt, President of the United States, had, the preceding November, been overwhelmingly chosen by the people to serve an additional four years in office. Now he had embarked upon his second term. Confident of his power, he this day sent an historic message to the Congress. The message asked that for every judge of a court of the United States who had reached the age of seventy years, having held a commission as judge of any such court or courts at least ten years, continuously or otherwise, and who did not resign or retire within six months thereafter, the President, by and with the consent of the Senate, might appoint an additional judge. The number of judges of any court was to be permanently increased by the

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1 Governor Alfred M. Landon of Kansas, the Republican candidate for President in 1936, received 16,679,583 popular votes and eight electoral votes (from Maine and Vermont). President Roosevelt's popular total was 27,876,673. The President carried forty-six States of the Union, for the greatest electoral triumph in the history of the United States. STONE, THEY ALSO RAN 317 (1944). Book Seven, Ch. IV of this work contains a most interesting account of this campaign.

2 The Twentieth Amendment to the Constitution, adopted February 6, 1933, had changed the inaugural date for the President and Vice-President from March 4 to January 20.

3 Even the warmest admirers of the late President must concede that election to his second term did not blunt his drive for office. Compare the language of John L. Lewis on October 25, 1940, in denouncing a third term: "How startling, therefore, is the spectacle of a President who is disinclined to surrender . . . power, in keeping with the traditions of the republic. The suggestion of a third term under these conditions is less than wholesome or healthy. Personal craving for power, the overweening abnormal and selfish craving for increased power, is a thing to alarm and dismay. . . ." ALINSKY, JOHN L. LEWIS: AN UNAUTHORIZED BIOGRAPHY 188 (1949).


22
number appointed thereto under the section just summarized.\textsuperscript{5} The Supreme Court of the United States was not to be increased beyond fifteen members.\textsuperscript{6}

Though couched in general terms as applying to the federal judiciary as a whole, the President's proposal was immediately recognized\textsuperscript{7} as essentially an attack upon the Supreme Court; all else was incidental. Certainly, the Court had not been kind to the legislative program popularly known as the "New Deal." From late 1933 to the middle of 1936, no less than twelve acts of Congress had been held unconstitutional.\textsuperscript{8} To leading supporters of the President, this seemed like judicial nullification.\textsuperscript{9}

The President himself soon abandoned any pretense that his plan was designed to cure a disease endemic to the entire judicial system of the United States. In a radio address on March 9, 1937,\textsuperscript{10} he strongly castigated the role that the Supreme Court assumed. He accused the Court of not pulling in harness with the other two branches;\textsuperscript{11} of setting up a government not of laws but of men;\textsuperscript{12} of being out of touch with the times;\textsuperscript{13} of being composed of men selfishly dis-

\textsuperscript{5} Id. § 1(b).
\textsuperscript{6} Id. § 1(b) (1).
\textsuperscript{7} The radio statements of Congressman Treadway (R., Mass.) and Senator William H. King (D., Utah) on the very day of the delivery of the message offer abundant proof of this fact. Similarly, Congressman Noah M. Mason (R., Ill.) commented on February 11, 1937: "Mr. Speaker, from the letters coming to Members of Congress, and telegrams from all over this great land of ours today—north and south, east and west—I am convinced that from pulpit, from banquet halls, from legislative halls, from the streets, figuratively speaking, the patriots of this Nation of both parties are proposing and drinking to the great toast 'Our Federal Constitution; it must be preserved.' (Applause.) That is our task." 81 Cong. Rec. 1156 (1937).
\textsuperscript{8} SCHWARTZ, THE SUPREME COURT 10 (1957).
\textsuperscript{9} JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 86 (1941).
\textsuperscript{10} Radio address by President Franklin D. Roosevelt, March 9, 1937, in 2 COMMAGER, DOCUMENTS OF AMERICAN HISTORY 563 (5th ed. 1949).
\textsuperscript{11} "The three horses are, of course, the three branches of government—the Congress, the executive, and the courts. Two of the horses are pulling in unison today; the third is not." Ibid.
\textsuperscript{12} "We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men." Id. at 564-65.
\textsuperscript{13} "[My proposal] . . . has two chief purposes . . . secondly, to bring to the decision of social and economic problems younger men who have had per-
inclined to yield office;\textsuperscript{14} of setting itself up as a super-legislature.\textsuperscript{15} The President went so far as to summon up the days of the bank failures during the Depression\textsuperscript{16} in a cleverly worded emotional appeal for passage of his bill.

The Democratic Platform of 1936 had spoken vaguely of a constitutional amendment "clarifying" legislative rights.\textsuperscript{17} The President now boldly asserted that this unclear hint had been an express statement that an amendment would be a weapon of last resort, to be used "only if every other possible means by legislation were to fail."\textsuperscript{18} In other words, the claim made by the President was that he had had a statute in mind all along.

The battle over the President's proposal was prolonged\textsuperscript{19} and severe.\textsuperscript{20} The New Deal forces suffered an early and serious defeat when the Senate Committee on the Judiciary

sonal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our National Constitution from hardening of the judicial arteries." \textit{Id.} at 565.

\textsuperscript{14} "But chance and the disinclination of individuals to leave the Supreme Bench have now given us a Court in which five Justices will be over 75 years of age before next June and one over 70. Thus a sound public policy has been defeated." \textit{Id.} at 566.

\textsuperscript{15} "The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress—a super-legislature, as one of the Justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there." \textit{Id.} at 564.

\textsuperscript{16} "We are at a crisis .... It is a quiet crisis. There are no lines of depositors outside closed banks. But to the far-sighted it is far-reaching in its possibilities of injury to America." \textit{Id.} at 563.

\textsuperscript{17} Proceedings of the Democratic National Convention (1936):

"We have sought and will continue to seek to meet these (national) problems through legislation within the Constitution.

"If these problems cannot be effectively solved by legislation within the Constitution, we shall seek such clarifying amendment as will assure to the legislatures of the several States and to the Congress of the United States, each within its proper jurisdiction, the power to enact those laws which the State and Federal legislatures, within their respective spheres, shall find necessary in order adequately to regulate commerce, protect public health and safety and safeguard economic security. Thus we propose to maintain the letter and spirit of the Constitution."

\textsuperscript{18} Radio address by President Franklin D. Roosevelt, March 9, 1937, in \textit{2 Commager, Documents of American History} 563, 565 (5th ed. 1949).

\textsuperscript{19} The matter was not definitively disposed of until August 1937: \textit{See Smith, The Present Situation in the Fight to Save the Court}, 23 A.B.A.J. 401 (1937); Wilkinson, \textit{The President's Plan Respecting the Supreme Court}, 6 \textit{Fordham L. Rev.} 179 (1937); S. Rep. No. 711, 75th Cong., 1st Sess. (1937), recommending rejection of the President's proposal: "We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle." \textit{Ibid.}
THE SUPREME COURT

1959 ]

recommended against passage. What made the action particularly portentious was that seven of the ten adverse votes were cast by Democratic Senators. Ultimately, the entire plan was scrapped in favor of an innocuous substitute not affecting the membership of the Supreme Court in any degree. The defeat of the President's plan was compounded of many factors. Chief among these were the death of the majority leader of the Senate, Senator Joseph T. Robinson of Arkansas, whose great prestige had made him an indispensable ally to the President in the struggle; the retirement from the Supreme Court, in June 1937, of Mr. Justice Willis Van Devanter of Wyoming; and the statesmanship of Mr. Chief Justice Hughes.

However, time and human mortality gave to President Roosevelt what the Congress of the United States would not. Before his own death on April 12, 1945, he had appointed eight new members of the Court and designated a new Chief.

The 1937 crisis saw the Court cast as the darling of the conservatives of the United States. Twenty years have wrought a great change in allegiances. The Court today to

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22 William H. King (D., Utah); Frederick Van Nuys (D., Ind.); Patrick McCarran (D., Nev.); Carl A. Hatch (D., N.M.); Edward R. Burke (D., Neb.); Tom Connally (D., Tex.); Joseph C. O'Mahoney (D., Wyo.).
24 Senator Robinson's stature as a Southern leader was most useful to the President. He had been Democratic vice-presidential candidate in 1928. On his sudden death in 1937, he was succeeded as majority leader by the late Alben W. Barkley of Kentucky.
25 Mr. Justice Van Devanter had served on the Court since 1910. He was succeeded by Mr. Justice Hugo Black of Alabama.
26 See Pusey, CHARLES EVANS HUGHES (1951), especially the chapter "Court-Packing Fight."
27 Hugo L. Black (1937); Stanley F. Reed (1938); Felix Frankfurter (1939); William O. Douglas (1939); Frank Murphy (1940); James F. Byrnes (1941); Robert H. Jackson (1941); Wiley B. Rutledge (1943).
28 Harlan Fiske Stone was designated in 1941 by President Roosevelt to succeed Charles Evans Hughes as Chief Justice of the United States.
29 Among the great spate of contemporary articles, consult the following: Pepper, The President's Case Against the Supreme Court, 23 A.B.A.J. 247 (1937); Lecher, The President's Supreme Court Plan, 23 A.B.A.J. 242 (1937); Knox, President's Proposals with Respect to the Federal Courts, 23 A.B.A.J. 413 (1937).
the professed conservative 30 is anathema, and to the liberal 31 the paramount guardian of American liberty. The present Chief Justice, for example, has been described from the conservative side as a "modern Thaddeus Stevens" and portrayed as guided solely by political expediency. 32 Impeachment of a number of the Justices has been proposed with conviction and enthusiasm, if not with hope of success. 33 To the opposing political brethren, however, the Court's approach and trend of decision has been inspiring.

The current intense anger against the Court stems from many sources. Decisions as to the segregation of the races in public schools, 34 the rights of American servicemen in foreign countries, 35 the power of the states to punish sedition, 36 and to act against believed subversive elements in their own governmental structure, 37 have all contributed to the felt dissatisfaction. Unprecedented construction of trade regulatory statutes, 38 as well as the inspection rights of the accused, 39 has intensified the feeling.

For good or ill, then, the Supreme Court of the United States is at this writing unwontedly prominent on the stage of history and in the literate public consciousness. The ultimate thrust of this prominence, the wisdom of the actions which brought it about, will almost certainly remain in the cauldron of debate for some little time. Perhaps the development is pernicious. Or perhaps it exemplifies in the highest degree Jefferson's comment to Madison, 40 Malo periculosam libertatem quam quietum servitutem. Whatever one's judgment as to its desirability, it remains a fact.

30 Typical are the strictures often found in the avowedly conservative weekly periodical National Review.
31 Speech by Senator Harry F. Byrd (D., Va.) during Civil Rights debate, 1957.
33 This is the course suggested by the Georgia Legislature.
It cannot be gainsaid that in any context a position of great prominence is a position of risk. This is not to suggest that the Court, in defining its area of operation or in selecting cases for decision, should play the part of the coward. But the inescapable dangers of its present posture should be considered. How well-equipped is the Court to withstand a public storm or a repetition of its 1937 ordeal? Alexander Hamilton's summary of the Court's share in the distribution of power in our federal system has never been surpassed for its terseness and its candor:

 Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

 This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power. . . .

 Certainly, the very seat and source of our Supreme Court's influence and authority in our national life lies in the doctrine of judicial review, as authoritatively expounded in *Marbury v. Madison* 42 by Chief Justice John Marshall. The assertion of the power was guilefully done. 43 Certainly,

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41 *The Federalist* No. 78 (McLean's ed. 1788) (Hamilton).
42 1 U.S. (1 Cranch) 368 (1803).
43 See Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 Mich. L. Rev. 538, 543 (1914): "The court was bent on reading the President a lecture on his legal and moral duty to recent Federalist appointees to judicial office, whose commissions the last Administration had not had time to deliver, but at the same time hesitated to invite a snub by actually asserting jurisdiction of the matter. It therefore took the engaging position of declining to exercise power which the Constitution withheld from it, by making the occasion an opportunity to assert a far more transcendent power."
though, it had much support in American and British history.\textsuperscript{44} The doctrine has caused wonderment and admiration in foreign observers. Thus, de Tocqueville was moved to say:

the Americans have acknowledged the right of judges to found their decisions on the Constitution rather than on the laws. In other words, they have permitted them not to apply such laws as may appear to them to be unconstitutional.

... Whenever a law that the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one peculiar to the American magistrate, but it gives rise to immense political influence.\textsuperscript{45}

And yet it should be carefully noted that the power has not gone unchallenged. It has been the subject of savage attack.\textsuperscript{46} Indeed, President Roosevelt brushed threateningly close to questioning its propriety, when, in one of his speeches in 1937 about the Court over the radio networks, he commented:

For nearly 20 years [after the adoption of the Constitution] there was no conflict between the Congress and the Court. Then, in 1803, . . . the Court claimed the power to declare it [a statute] unconstitutional and did so declare it. But a little later the Court itself admitted that it was an extraordinary power to exercise and through Mr. Justice Washington laid down this limitation upon it: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt."

But since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed

\textsuperscript{44} See Beard, The Supreme Court and the Constitution (1912); Melvin, The Judicial Bulwark of the Constitution, 8 Am. Pol. Sci. Rev. 167 (1914); The Federalist, Nos. 78, 80 (Hamilton); Thayer, Legal Essays (1908); Corwin, The "Higher Law" Background of American Constitutional Law, 42 Harv. L. Rev. 149, 365 (1928-1929).

\textsuperscript{45} De Tocqueville, Democracy in America 100-01 (1945 ed.).

\textsuperscript{46} See, e.g., I Boudin, Government by Judiciary (1932).
by the Congress and State legislatures in complete disregard of this original limitation.\textsuperscript{47}

The power to invalidate an act of Congress has, however, been sparingly exercised by the Court. Thus, out of 40,000 cases decided by the Supreme Court up to 1936, only eighty-four provisions of law were in some respect invalidated.\textsuperscript{48} This is a rather amazing statistical picture. These objective data, standing alone, would certainly tend to refute the picture of a Court intoxicated with power, thirsting to force its views on the coordinate branches of government. This conclusion becomes even more appealing when we consider that since 1937, the “new” Court, the Roosevelt-Truman-Eisenhower bench, has “declared invalid only three federal statutes, and not one of these three laws was a legislative measure of great significance.”\textsuperscript{49} As to the executive branch, the lesson rather harshly\textsuperscript{50} read to President Truman in Youngstown Sheet & Tube Co. v. Sawyer,\textsuperscript{51} wherein it was held that he was acting unconstitutionally when he had issued an order directing the Secretary of Commerce to take possession of and operate most of the nation’s steel mills, represents the leading example of really dramatic decision by the Court in the last twenty years in the area of challenge and rebuke to the coordinate branches. And this performance moved so eminent a scholar as Professor Edward S. Corwin to characterize it as “a judicial brick without straw.”\textsuperscript{52}

\textsuperscript{47}Radio address of President Franklin D. Roosevelt, March 9, 1937, in 2 COMMAGER, DOCUMENTS OF AMERICAN HISTORY 563, 564 (5th ed. 1949).
\textsuperscript{48}PROVISIONS OF FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES (Government Printing Office 1936).
\textsuperscript{49}SCHWARTZ, THE SUPREME COURT 26 (1957).
\textsuperscript{50}Thus, Mr. Justice Black, delivering the opinion of the Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952): “The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice.” Id. at 589. And Mr. Justice Jackson, concurring: “The appeal, however, that we declare the existence of inherent powers \textit{ex necessitate} to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.” Id. at 649-50.
\textsuperscript{51}343 U.S. 579 (1952).
\textsuperscript{52}Comment, 53 COLUM. L. REV. 53 (1953).
The relatively rare use of the power to strike down acts of Congress proves the accuracy of Professor Noel T. Dowling's\(^63\) colorful observation that only when it is driven to the wall does the Court turn and stab to death the statute. It also instills serious reservations as to the Court's real effectiveness as a brake on a program of legislation backed by overwhelming popular support. Indeed, speaking even of the 1933-1937 Court, perhaps the most vigorous of all in its resistance to what it deemed legislative incursion, former Justice Roberts, who had been a member of that Court, commented in 1951: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."

The low incidence of invalidation of congressional acts is one of the consequences of what the Court itself has described as its over-all policy of "strict necessity" in disposing of constitutional issues.\(^65\) Speaking of this policy, the Court has said:

Time and experience have given it sanction. They also have verified . . . that the choice was wisely made. Any other indeed might have put an end to or seriously impaired the distinctively American institution of judicial review.\(^66\)

It is not disrespectful to suggest that the Hamiltonian comments as to the Court's place among the three branches,\(^67\) the vulnerability of the Court's appellate jurisdiction to congressional restriction or abolition,\(^68\) and the numerous\(^69\) at-

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\(^63\) The author had the privilege of studying Constitutional Law under Professor Dowling, formerly Harlan Fiske Stone Professor of Constitutional Law at Columbia University School of Law. Mr. Dowling has been succeeded in that post by Mr. Herbert Wechsler.

\(^64\) Roberts, The Court and the Constitution 61 (1951).


\(^66\) Id. at 572. (Emphasis added.)

\(^67\) Article III, Section 2, of the Constitution reads in part: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make." (Emphasis added.) See Rottschaefer, Constitutional Law 418 (1939).

\(^68\) Thus Franklin D. Roosevelt on March 9, 1937, in a radio address, found in 2 Commager, Documents of American History 563, 566 (5th ed. 1949): "Is it a dangerous precedent for the Congress to change the number of
tempts by strong Presidents to change the composition of the Court's personnel, have all contributed to what has over the years revealed itself as a certain professed judicial diffidence. The lines of the policy were carefully delineated by Mr. Justice Brandeis in his noted concurring opinion in *Ashwander v. Tennessee Valley Authority*: 60

The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions. On this ground it has in recent years ordered the dismissal of several suits challenging the constitutionality of important acts of Congress. .

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding .

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." .

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." .

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground on which the case may be disposed of. .

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. .

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. .

the Justices? The Congress has always had, and will have, that power. The number of Justices has been changed several times before—in the administrations of John Adams and Thomas Jefferson, both signers of the Declaration of Independence, Andrew Jackson, Abraham Lincoln, and Ulysses S. Grant." 60 297 U.S. 288 (1936).
7. When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.\footnote{Ashwander v. TVA, 297 U.S. 288, 345-48 (1936). See also Frankfurter, \textit{Law and Politics} 25 (1939):}

It is submitted that the basic issue presently dividing the critics from the friends of the Court is the genuineness of this professed judicial reluctance to make definitive constitutional rulings. Most of the current strictures put upon the Court rest on the premise—perhaps inarticulated, perhaps even unrealized—that it is arrogating power to itself in fields never envisioned by the Framers or by Justices of an earlier day and not to this day authorized by the Constitution, as properly interpreted.

In exploring this question, the nub of present controversy, it must be acknowledged that the Court, in time of war and, occasionally, in hours of domestic emergency, has acted with a reluctance, or even a timidity, that has reached the bounds of the dismaying. Certainly, the decision in the Japanese relocation case\footnote{Korematsu v. United States, 323 U.S. 214 (1944).} sustaining the forcible removal from their homes of American citizens of Japanese ancestry, under Executive Order, offers sorry confirmation of the ancient maxim, \textit{Inter arma silent leges}. It forcibly brings to mind Mr. Jefferson's comment: "In times of peace the people look most to their representatives; but in war, to the executive solely."\footnote{Letter from Thomas Jefferson to Caesar A. Rodney, 1810.} It will forever stand in unhappy contrast to the courageous position taken by Chief Justice Taney in
Ex parte Merryman, in an earlier war. There the Court moved decisively to force President Lincoln to release from military custody a civilian unlawfully detained.

Nor is the decision of the Court in In re Yamashita, sustaining the power of a military commission to try Japanese General Yamashita for violations of the laws of war after the hostilities had stopped, calculated to thrill the reader. Only the dissenting opinion of Mr. Justice Rutledge strikes a redeeming note. Most disturbing of all was the failure anywhere in the lengthy bill of charges to allege that the General had authorized any of the atrocities committed by the troops under his command, or indeed that he even had knowledge of them.

Similarly distressing was the holding by the Court in Falbo v. United States that in a prosecution under the Selective Service Act of 1940, proof that the draft board in question had acted wholly without basis in fact was not even admissible as a defense. These decisions stand ill in the annals of a people that experienced such revulsion from Chancellor von Bethmann-Hollweg's support of the German invasion of Belgium in 1914 on the ground that necessity knows no law.

In the field of internal affairs, it is difficult to resist the conclusion that the decision in Norman v. Baltimore & O.R.R., sustaining the 1933 Joint Resolution of Congress declaring "gold clauses" calling for payment in that medium to be against public policy, was unaffected by what a Washington wit termed at the time "pragmatic sanctions." Open to the same criticism is Home Bldg. & Loan Ass'n v. Blaisdell, endorsing a state mortgage moratorium law against attack under the contract clause.

More recently, and in an entirely different area, the area of what we might call "Cold War Litigation," the Court's

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64 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).
66 Id. at 41.
67 320 U.S. 549 (1944).
68 54 Stat. 885 (1940).
69 Compare the later decisions as reviewed by McGranery, D.J., in Ex parte Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952).
70 294 U.S. 240 (1935).
71 290 U.S. 398 (1934).
upholding of severe disciplining and imprisonment for contempt of the attorney for the so-called first-string Communists is bound, in view of all the circumstances, to stir misgivings even, and perhaps especially, among the most conservative of our people. It is difficult to read the appendix of Mr. Justice Frankfurter in this case without a stabbing pang of regret that matters were permitted to develop as they did. And yet the episode has gone largely unnoticed, even in the most compendious compilations. In some casebooks it has not even been deemed worthy of a citation. Our particular feelings as to the Communist movement in the United States—and I for one would have been happier, had Bolshevism been strangled in the cradle—must never be permitted to obscure the peril and the glory of the lawyer in defending the hated cause. Surely Mr. Justice Murphy was right when he cautioned us—in immemorial terms—that the advocate must always cut cleanly through the screen of transitory emotions to defend his cause, whatever the cost and the reproach may be.

Thus, we have recorded some displays by the Court of caution or restraint believed to be excessive and unwarranted. Were this behavior characteristic of the Court, it would not figure largely in the national consciousness today. It is the alleged reaching by the Justices for power not properly theirs that is at the base of the current strife concerning the Court. It is submitted that if this improper reaching has occurred, it has been very principally with respect to federal-state relations.

Upon the death of the beloved Louis D. Brandeis, Mr. Justice Stone, in delivering his eulogy, was impelled to say, "Justice Brandeis revered this Court as . . . the indis-

73 Id. at 42.
74 See, e.g., the exceedingly brief reference in the two-volume work, Freund, Sutherland, Howe, & Brown, Constitutional Law, Cases and Other Problems (1943).
75 E.g., Dodd, Cases on Constitutional Law (5th ed. 1954).
77 Falbo v. United States, 320 U.S. 549, 561 (1944) (dissenting opinion).
78 Mr. Justice Brandeis (1856-1941) served as an Associate Justice from 1916 to 1939.
pensable implement for the maintenance of our federal system.” 79 Surely a beautiful sentiment. But has the Court been an implement of maintenance or destruction?

Enough has been developed herein to demonstrate that with respect to the Executive and to the National Legislature, the Court has on the whole 80 followed a policy of conservatism and caution during the last twenty years. But with respect to State power the Court has felt no inhibiting influence. Perhaps the theme of recent times was never better expressed than when Mr. Justice Stone, in United States v. Darby, 81 rather insouciantly declared of the Tenth Amendment:

Our conclusion is unaffected by the Tenth Amendment which provides: “The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people.” The amendment states but a truism that all is retained which has not been surrendered. 82

Perhaps Mr. Justice Stone's use of lower case type when speaking of the states, a use unjustified by the original text of the Constitution, 83 was symbolic. The Tenth Amendment had been judicially executed and quickly and quietly interred in a constitutional graveyard, probably to waken nevermore. Much might be said of the Stone comment, from the viewpoint of respect for tradition, scholarly analysis, or concern for the future. Perhaps it suffices to put next to Mr. Stone's statement the words of the great Marshall in Marbury v. Madison:

It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it. 84

In concluding this article, we turn now to examine various facets of our federal system concerning which the Court has, in recent years, taken decisive action:

79 317 U.S. XLVIII (1942).
80 The Youngstown opinion must be borne in mind here, of course. See Comment, 53 Colum. L. Rev. 53 (1953); see also Watkins v. United States, 354 U.S. 178 (1957).
81 312 U.S. 100 (1941).
82 Id. at 123-24.
84 Marbury v. Madison, 1 U.S. (1 Cranch) 368, 387 (1803).
(1) The Commerce Clause. Long regarded as a restriction on the States rather than as an affirmative grant to the Congress, the commerce clause has, since 1937, become the source of a virtually all-inclusive federal power. Beginning in NLRB v. Jones & Laughlin Steel Corporation and culminating in Wickard v. Filburn, the Court has given us an interpretation of the clause which leaves no litigable restraints on the Congress in this area. If Congress now wishes to regulate an activity under the commerce power, it would be folly for one who felt himself aggrieved even to question its assertion. Professor Dowling summarizes the development:

But if, as has been said, the line of development of national power was fixed by the Gibbons and Darby cases, it needs now to be said that Wickard v. Filburn went to the end of the line—possibly overran it. The upshot of the case was to establish the competency of Congress, through quotas for marketing, to impose its regulation on a single farmer in respect of the amount of wheat grown on his own farm solely for consumption there. No element of production of goods for the market, whether interstate or intrastate, was present. But farm production and consumption might be considered, in the aggregate, as constituting a threat to the stability of the market as a whole. The wheat "overhangs" the market; a rise in price might draw it in. Even if not marketed, it supplies a need which would otherwise be reflected by purchase in the open market. The case swept out all notions, such as prevailed when the original Agricultural Adjustment Act was held invalid in United States v. Butler, that production was beyond the reach of Congress; it swept in the full-fledged doctrine that Congress has power to "deal with the economic affairs of the country generally; it almost swept the Court out of the job of acting as a check to the power of Congress. Effective restraints on the exercise of the commerce power by Congress "must proceed from political rather than judicial processes." That is the way suggested in the opinion, with never a questioning, much less dissenting, voice from any quarter.

This sweeping definition and extension of the federal commerce power, standing alone, would inevitably trouble

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86 301 U.S. 1 (1937).
87 Wickard v. Filburn, supra note 85.
some observers as to the future of our federal system. Chief Justice Marshall, in *McCulloch v. Maryland*,[^80] took to be beyond sensible consideration the notion of a central government for the United States, saying:

No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.[^60]

Nevertheless, in this undramatic area of the commerce clause, unknown to the general public, the Court has worked enormous change toward the result considered unworthy of discussion by Marshall, change which affects the average citizen in the highest degree even in his obliviousness. Undoubtedly, many will wave aside the Marshall comment as an unimportant relic of the past. Those who feel so would do well to read how Bertrand Russell—to summon a surprise witness—speaks of them:

> Our age is the most parochial since Homer.... It is in the chronological sense that we are parochial: as the new names conceal the historic cities of Prague, Nijni-Novgorod, and Pekin, so new catchwords hide from us the thoughts and feelings of our ancestors, even when they differed little from our own. We imagine ourselves at the apex of intelligence, and cannot believe that the quaint clothes and cumbrous phrases of former times can have invested people and thoughts that are still worthy of our attention. If Hamlet is to be interesting to a really modern reader, it must first be translated into the language of Marx or of Freud, or, better still, into a jargon inconsistently compounded of both.[^91]

(2) The Equal Protection Clause—Race Relations. In *Brown v. Board of Education*,[^62] the Supreme Court held that segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprives the children of the minority group of the equal protection of the laws guaranteed by the Fourteenth Amendment. *Bolling v. Sharpe*[^93]

[^60]: Id. at 420.
reached the same conclusion under the due process clause of the Fifth Amendment, with respect to the public schools of the District of Columbia. Very recently, the Court held that Girard College in Philadelphia was a state agency and hence subject to the Brown rule. Held for naught was a will provision establishing the college but restricting admission to "poor white male orphans."

However unwise, from a point of view of plain construction of documents, the decision in the Girard College case may be, Brown and Bolling seem handsomely justified by morality and by a logical interpretation of the phrase "equal protection." The second Brown decision, moreover, shows a keen awareness by the Court of the explosive social problems involved, and a distinct rejection of any insistence upon hasty or ill-considered implementation of its decision.

The storm beats loudest and wildest about the Court in this area. Yet the writer does not believe that these decisions represent any usurpation by the Justices. With all due allowance for the sectional problems and passions raised by them, it seems irrefutable that separateness in facilities denies equality and breeds a feeling of inferiority among the segregated "that may affect their hearts and minds in a way unlikely ever to be undone."

Admittedly, the segregation decisions have badly strained federal-state relations. These strains will, however, in all probability prove temporary. Taking the larger view,

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96 "Once . . . a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner . . . . [T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." Id. at 300-01 (Warren, C.J.).
they seem certain to give way to a strengthened national fabric.

(3) State Action Against Internal Subversion. In Pennsylvania v. Nelson, the Court held that the federal act prohibiting the knowing advocacy of the overthrow of the Government of the United States by force and violence superseded the enforceability of the Pennsylvania act prescribing the same conduct. This was done in the face of a strong disclaimer by the Department of Justice that the administration of the various state laws had hampered or impeded enforcement of the federal act. In Slochower v. Board of Higher Education, the Court ruled that a city had no right to require its employees either to give evidence regarding facts of official conduct within their knowledge or to give up the positions they hold. To paraphrase the dissent of Mr. Justice Harlan, New York was not permitted to say that it would not employ teachers who refused to cooperate with public authorities when asked questions relating to official conduct.

Taken in conjunction with Schware v. Board of Examiners and Konigsberg v. California, overruling state judgment and state standards with regard to admission to the Bar of their own courts, these decisions strike heavily at state power. A state cannot punish subversion. It cannot compel its employees to testify as to their official conduct. It cannot control the membership of its local Bar. Matters of more intimate concern to the well-being, even the existence of the states, are difficult to conceive.

Further, in Sweezy v. New Hampshire, the Court denied to a state the right to probe subversive activities within its borders by utilizing the State Attorney General as a one-man legislative committee under a broad grant of power. The dissenting opinion of Mr. Justice Clark (joined in by Mr. Justice Burton) complained:

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100 350 U.S. 551 (1956).
The short of it is that the Court blocks New Hampshire's effort to enforce its law. I had thought that in Pennsylvania v. Nelson, 350 U.S. 497 . . . (1956), we had left open for legitimate state control any subversive activity leveled against the interest of the State. I for one intended to suspend state action only in the field of subversion against the nation and thus avoid a race to the courthouse door between federal and state prosecutors . . . . I thought we had left open a wide field for state action, but implicit in the opinions today is a contrary conclusion. They destroy the fact-finding power of the State in this field and I dissent from this wide sweep of their coverage.104

(4) Other Areas. Were space to permit, it would be easy to dilate at length upon other areas wherein the Supreme Court has struck deeply into state power. No doubt, many students of political and constitutional history regard this as a healthy, as well as an inevitable, development. No doubt they will assure us that Hegel's zeitgeist is here at work. But at least let us be clear that the blows have been struck.

In the fields of state taxation of interstate commerce,105 state permission of released time or other religious programs as part of a public educational system,106 state efforts to police obscene or blasphemous publications or other forms of expression,107 the Court has spoken with an unsure and confusing, if not conflicting, voice. State power is hobbled, if not by restriction, then at least by the gravest uncertainty. The dimensions of future development are obscure.

So ends this brief survey of the place of the Supreme Court of the United States in contemporary American life. In its ending, it may be useful to us, as a guide to perspective and a reminder of our heritage, to reflect upon the words of Daniel Webster, delivered in another time of crisis, but strong with meaning for us today:

Under the present Constitution, wisely and conscientiously administered, all are safe, happy, and renowned. The measure of our

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104 Id. at 269 (dissenting opinion).
country's fame may fill all our breasts. It is fame enough for us all to partake in her glory, if we will carry her character onward to its true destiny. But if the system is broken, its fragments must fall alike on all. Not only the cause of American liberty, but the grand cause of liberty throughout the whole earth, depends, in a great measure, on upholding the Constitution and Union of these States. If shattered and destroyed, no matter by what cause, the peculiar and cherished idea of United American Liberty will be no more forever.... A common fate awaits us. In the honor of upholding, or in the disgrace of undermining the Constitution, we shall all necessarily partake. Let us then stand by the Constitution as it is, and by our country as it is, one, united, and entire; let it be a truth engraven on our hearts, let it be borne on the flag under which we rally, in every exigency, that we have one Country, one Constitution, one Destiny.108

108 Address by Daniel Webster, Niblo's Saloon, New York, N.Y., March 15, 1837, reprinted in 2 WRITING AND SPEECHES OF DANIEL WEBSTER 193 (1903).