In the past few decades American institutions have struggled with the temptations of politics. Professions and academic disciplines that once possessed a life and structure of their own have steadily succumbed, in some cases almost entirely, to the belief that nothing matters beyond politically desirable results, however achieved. In this quest, politics invariably tries to dominate another discipline, to capture and use it for politics' own purposes, while the second subject-law, religion, literature, economics, science, journalism, or whatever-struggles to maintain its independence. But retaining a separate identity and integrity becomes increasingly difficult as more and more areas of our culture, including the life of the intellect, perhaps especially the life of the intellect, become politicized. It is coming to be denied that anything counts, not logic, not
objectivity, not even intellectual honesty, that stands in the way of the "correct" political outcome.

The process by which this is accomplished may vary from field to field, from universities to the media to courts. In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He must then choose between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time, solves an urgent human problem, and a faint crack appears in the American foundation. A judge has begun to rule where a legislator should.

The American people are tempted as well. Many of the results

2 INTRODUCTION

seem good, and they are told that the choice is between a cold, impersonal logic, on the one hand, and, on the other, morality and compassion. This has always been the song of the tempters, and now it is heard incessantly from those who would politicize the courts and the Constitution, as a necessary stage in the politicization of the culture at large.

The democratic integrity of law, however, depends entirely upon the degree to which its processes are legitimate. A judge who announces a decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result. Those who would politicize the law offer the public, and the judiciary, the temptation of results without regard to democratic legitimacy.

This strategy, however, contains the seeds of its own destruction. Since the politicization of the law has, for half a century, moved results steadily to the left, a very large number of Americans do not like those outcomes. Increasingly, they are not deceived by the claim that those results are compelled by the actual Constitution. This perception delegitimizes the law in their eyes. There are signs that law may be at a tipping stage in the public perception of its legitimacy. Americans increasingly view the courts, and particularly the Supreme Court, as political rather than legal institutions. Perhaps a lesson may be learned from another great institution: the press. The political coloration of news reporting is easier for the public to see than is that of judicial decision making, and, as the press has in fact become more political, it has lost legitimacy with large sections of that public. Something of the same thing may be happening to law, more slowly but perhaps as inexorably. Conservatives, who now, by and large, want neutral judges, may decide to join the game and seek activist judges with conservative views. Should that come to pass, those who have tempted the courts to political judging will have gained nothing for themselves but will have destroyed a great and essential institution.

The clash over my nomination was simply one battle in this long-running war for control of our legal culture. There may be legitimate differences about that nomination, but, in the larger war for control of the law, there are only two sides. Either the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes win. Until recently, the American people were largely unaware of the struggle

Introduction
for dominance in law, because' it was waged, in explicit form, only in the law schools. Now it is coming into the open.

In the clash of law and politics, the integrity of the law has already been seriously undermined and the quality of its future re- mains very much in doubt. The forces that would break law to a tame instrument of a particular political thrust are past midway in a long march through our institutions. They have overrun a number of law schools, including a large majority of America's most prestigious, where the lawyers and judges of the future are being trained. They have an increasing voice in our politics and in Congress. But the focus of the struggle, the commanding height sought to be taken, as indeed it partially has been, is control of the courts and the Constitution. The Constitution, or the law we call "constitutional" they are by no means identical is the highest prize, and control of the selection of judges is the last step on the path to that prize. Why? Because the Constitution is the trump card in American politics, and judges decide what the Constitution means. When the Supreme Court invokes the Constitution, whether legitimately or not, as to that issue the democratic process is at an end. That is why we witnessed the first all out national political campaign with respect to a judicial nominee in our country's history.

My chambers, as a federal court of appeals judge on the District were on the third floor of the United States and overlooked Constitution Avenue. Twice a year, clerks and secretaries, I watched massive marches that wide street, one by anti-abortionists and one by 'The reason for those parades was, of course, Roe Supreme Court's 1973 decision making abortion a, thus largely removing the issue from where it had rested for all of our history. Each group first gathers to demonstrate outside the White House, then forms, carrying placards and sometimes chanting, to begin the walk down Pennsylvania Avenue to Constitution Avenue to Capitol Hill. There the demonstrators march past the of Congress with hardly a glance and go straight to the Supreme Court building to make their moral sentiments known where they perceive those sentiments to be relevant. The demonstrators on both sides believe the issue to be moral, not legal. So far as they are concerned, however, the primary political branch of government, to which they must address their petitions, is the Supreme Court. There is something very disturbing about those marches, for, if the marchers correctly perceive the reality, and I think it undeniable that they do, a major heresy has entered the American constitutional system.

"Heresy ," Hilaire Belloc reminds us, "is the dislocation of some complete and self-supporting scheme by the introduction of a novel denial of some essential part therein. We mean by 'a complete and self-supporting scheme any system of affirmation in physics or mathematics or philosophy or what-not, the various parts of which are coherent and sustain each other."2 The American design of a constitutional Republic is such a "complete and self-supporting scheme." The heresy that dislocates it is the introduction of the denial that judges are bound by law.

The foundation of American freedoms is in the structure of our Republic. The major features of that structure are the separation of the powers of the national government and the limitation of national power to preserve a large degree of autonomy in the states. Both are mandated by the Constitution. These dispersions of power, viewed historically, have guaranteed our liberties as much as, perhaps more than, the Bill of Rights itself. The phrase "separation of powers," briefly put, means that Congress has "All legislative Powers," as those are defined in article I of the Constitution, while the President possesses "The executive Power," which is
outlined in article II, and article III sets forth the elements of "The judicial Power." Those powers are very different in nature, as those who adopted the Constitution recognized and intended. When powers are shared, as they sometimes are by the President and Congress, the Constitution is usually explicit on the subject: Thus, the Constitution specifies that the President may veto a bill enacted by Congress and that Congress may override the veto by a two-thirds vote of each House. Similarly, the President may negotiate treaties, but they must be ratified by a two-thirds vote of the Senate. There is no faintest hint in the Constitution, however, that the judiciary shares any of the legislative or executive power. The intended function of the federal courts is to apply the law as it conies to them from the hands of others. The judiciary's great office is to preserve the constitutional design. It does this not only by confining Congress and the President to the powers granted them by the Constitution and seeing that the powers granted are not used to invade the freedoms guaranteed by the Bill of Rights, but also, and equally important, by ensuring that the democratic authority of the people is maintained in the full scope given by the Constitution.

The Constitution preserves our liberties by providing that all

Introduction

of those given the authority to make policy are directly accountable to the people through regular elections. Federal judges, alone among our public officials, are given life tenure precisely so that they will not be accountable to the people. If it were otherwise, if judges were accountable, the people could, when the mood seized them, alter the separation of powers, do away with representative government, or deny basic freedoms to those out of popular favor. But if judges are, as they must be to perform their vital role, unelected, unaccountable, and unrepresentative, who is to protect us from the power of judges? How are we to be guarded from our guardians? The answer can only be that judges must consider themselves bound by law that is independent of their own views of the desirable. They must not make or apply any policy not fairly to be found in the Constitution or a statute. It is of course true that judges to some extent must make law every time they decide a case, but it is minor, interstitial lawmaking. The ratifiers of the Constitution put in place the walls, roofs, and beams; judges preserve the major architectural features, adding only filigree.

What does it mean to say that a judge is bound by law? It means that he is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment. The lay reader may wonder at the emphasis put upon this apparently simple point. Of course, the judge is bound to apply the law as those who made the law wanted him to. That is the common, everyday view of what law is. I stress the point only because that commonsense view is hotly, extensively, and eruditely denied by constitutional sophisticates, particularly those who teach the subject in the law schools.

In these matters, common sense is sound. As Joseph Story, who was both an Associate Justice of the Supreme Court and a professor of law at Harvard, put it in his famed Commentaries on the Constitution of the United States,

The reader must not expect to find in these pages any novel views, and novel constructions of the Constitution. I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts. ...Upon subjects of government it has always appeared to me, that meta- physical refinements are out of place. A constitution of government is addressed to the common sense of the people; and never was designed for trials of logical skill, or visionary speculation.
Introduction

Story might have been addressing today's constitutional cognoscenti, who would have judges remake the historic Constitution from such materials as natural law, conventional morality, prophetic vision, the understanding of an ideal democracy, or what have you. There is a remarkable consistency about these theorists. No matter the base from which they start, they all wind up in the same place, prescribing anew constitutional law that is much more egalitarian and socially permissive than either the actual Constitution or the legislative opinion of the American public. That, surely, is the point of their efforts.

What the theorists want are courts that make major policy, courts that build a new structure rather than maintain the original. Story knew better. When he came to the role of the courts under the Constitution, he said: "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties." Only by following that rule can our unelected guardians save us from themselves. Only in that way can the foundation of our freedoms, the separation of powers, be kept intact. Only so can judicial supremacy be democratically legitimate.

There is a story that two of the greatest figures in our law, Justice Holmes and Judge Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage) Hand, in a sudden onset of enthusiasm, ran after him, crying, "Do justice, sir, do justice." Holmes stopped the carriage and reproved Hand: "That is not my job. It is my job to apply the law. I meant something like that when I dissented from a decision that seemed to proceed from sympathy rather than law: "We administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit,. through the creation of new law."6

That is the American orthodoxy. The heresy, which dislocates the constitutional system, is that the ratifiers' original understanding of what the Constitution means is no longer of controlling, or perhaps of any, importance. A variety of reasons are given for this extraordinary proposition, and these will be examined later. The result is a belief, widely held and propagated in the law schools and even by some Justices of the Supreme Court, that judges may create new principles or destroy old ones, thus altering the principles actually to be found in the Constitution. Courts then not only share the legislative power of Congress and the state legislatures, in violation both of the separation of powers and of federalism, but assume a legislative power that is actually superior to that of any legislature. The innovations are announced in the name of the Constitution- though they have little or nothing to do with it-and are therefore intended to be, and are accepted as, final. Courts have behaved in this way on occasion throughout our history, but never so often as in the modern era; what is more ominous, never before has such behavior been so popular in the law schools, in the press, and in the opinions of elite groups generally. Heresy sometimes becomes so pervasive that it becomes the new orthodoxy.

The heresy described is not peculiar to any political outlook. When it has suited their purpose, conservatives as well as liberals have surrendered to its temptation. Given the chance, no doubt many conservatives would be delighted to succumb again. If I address the failings of
liberals more than those of conservatives, it is only because liberalism or ultraliberalism is currently in the ascendancy in constitutional theory and practice.

The orthodoxy of original understanding, and the political neutrality of judging it requires, are anathema to a liberal culture that for fifty years has won a succession of political victories from the courts and that hopes for more political victories in the future. The representatives of that culture hate the American orthodoxy because they have moral and political agendas of their own that cannot be found in the Constitution and that no legislature, or at least none whose members wish to be reelected, will enact. That is why these partisans want judges who will win their victories for them by altering the Constitution.

Americans, who know a great deal about presidents and something about Congress, are generally not well-informed about the third branch of government. They react, often in anger, to particular decisions but tend to regard them as aberrational rather than systemic failures. But the heresy of political judging is systemic. A great many judges subscribe to it, a large number of left-wing activists; groups promote it, many senators insist upon it, and in the legal academy this heresy is dominant. The orthodoxy of original understanding is regarded as passé, and signs that it is stirring and may achieve an intellectual revival are viewed with alarm as a reactionary threat. The reader will, I think, be amazed at how political, how simultaneously sophisticated and anti-intellectual, is much of what passes for constitutional scholarship today. It is not, in truth, scholarship it is, as one of its leading practitioners candidly states, the advocacy of political results addressed to courts. That is not what; most people mean by "law." But that bothers the academicians not

8 Introduction

a bit. A few years ago I was invited to a small seminar of professors of constitutional law. During the discussion I argued that, the constitution being law, there were some results courts could not legitimately achieve: rules cover some things and not others. A well-known Harvard law professor turned to me with some exasperation and said, "Your notion that the Constitution is in some sense law must rest upon an obscure philosophic principle with which I am unfamiliar." That attitude is common among our constitutional philosophers. It is fair to say, as Gary McDowell has, that in the law schools, "The question today is not so much how to read the Constitution as whether to read the Constitution."7

Those who now dominate public discourse on these matters recognize that, if the Constitution is law, departures from the principles the ratifiers understood themselves to be enacting are illegitimate. Yet such departures are essential if the results desired by the liberal culture are to be achieved through the courts. It follows that the Constitution cannot be law. Thus, the morality and politics of the intellectual or knowledge class, a class that extends well beyond the universities, can be made into constitutional law. The class I describe is not necessarily composed of people who are good at intellectual work. They are defined as a class because they work, however adroitly or maladroitly, with words and ideas. For reasons that will be discussed, they tend to have values antagonistic to a traditional, bourgeois society. It is not too much to say that these people see the Constitution as a weapon in a class struggle about social and political values.

Judges are by definition members of the intellectual class and, in addition, for professional and personal reasons, tend to be influenced by the culture of the law schools. Like most people, judges tend to accept the assumptions of the culture that surrounds them, often without fully understanding the foundations of those assumptions or their implications. If they can be persuaded to abandon the idea of original understanding, they are quite likely to frame constitutional rules that reflect the assumptions of modern liberal culture.
That has happened repeatedly in the past few decades. It probably explains, to cite only recent examples, the fact that the Supreme Court has approved reverse discrimination on the basis of sex and race under a statute that clearly forbids it, found a right to abortion in the Constitution without explaining even once how that right could be derived from any constitutional materials, and came within one vote of finding a constitutional right to engage in homosexual conduct. For a few years the Court even abolished the death penalty, though the Constitution several times explicitly assumes that penalty to be a matter of legislative choice. My point is not that these choices are necessarily morally or politically wrong; my point is simply that, under the Constitution, these are questions left for the people and their elected representatives, not for courts, to decide.

It seems significant that every departure from the original understanding on that list, be it a departure from the original meaning of a statute or of the Constitution, resulted in the judicial enactment, or attempted enactment, of an item on the modern liberal agenda. Though the Court once legislated results that may be called conservative (which was also an illegitimate judicial role), rarely, if ever, in the past fifty years has it done so. The abandonment of original understanding in modern times means the transportation into the Constitution of the principles of a liberal culture that cannot achieve those results democratically. This difference about the proper role of courts is what the battle over my confirmation was about underneath, but not what it was about in the public campaign.

The public campaign, designed to influence senators through public opinion polls, consisted of the systematic distortion of my academic writings and my judicial record and, it must be said, employed racial and gender politics of a most pernicious variety. The ferocity of the attack, the ideological stance of the assailants, and the tactics they used all showed that the opposition knew they were fighting over more than one judge. They were fighting for control of the legal culture. They knew that in reality and, perhaps even more important, symbolically, they must defeat a nominee who had for long expressed in writing the philosophy of original understanding and had tried to show the lack of any constitutional foundation for some of the liberal culture's most important victories. The liberal culture needed to preserve, if possible to intensify, and certainly to legitimate, the politicization of the Court and the Constitution.

These are matters worth discussing, for there will be many future nominees to the Supreme Court, and the philosophies of those who are confirmed will have much to do with the future of our constitutional form of government and with the direction of our politics and culture. One purpose of this book is to persuade Americans that no person should be nominated or confirmed who does not display both a grasp of and devotion to the philosophy of original understanding.

Nor should the American people put up with a political campaign about nominees that resorts to untruths or to a confirmation process in which senators demand that the nominee promise specified results. The way the campaign against my confirmation was waged, if it becomes the norm, will have long-term effects-effects on the judicial nomination process of the future, effects on the substance of our law, particularly our constitutional law, and effects upon the intellectual life of the law.
The liberal elites will not be satisfied with blocking the nomination of judges who may be expected to adhere to the historic principles of the Constitution. They intend to root that idea out of the intellectual life of the law, to make the philosophy of original understanding, and the associated idea of political neutrality in judging, disqualifying for the men and women who hold them. They have almost achieved that in the legal academic world; they are trying to achieve it in public discourse. They made much play with the claim that I was "outside the mainstream." But it is obvious from those who supported me, men and women whose legal careers define the mainstream, that the ultraliberal activists were, in actuality, trying to shift the mainstream radically to the left. If by vilification you can make people believe that the center is actually the extreme right, then you can get them to think that the left must be the center. That is the way the war for control of the legal culture is being fought.

But what I have just described is merely part of a larger war in our culture. As an integral part of that culture, law both reflects and influences trends and ideological movements there. In the last twenty-five years what we had thought were shared values and moral first principles have begun to disintegrate. There has always been a division between liberals and conservatives, of course, but part of liberal thought has evolved into something quite different from the liberalism of a quarter of a century ago. Now we seem to be experiencing in our law, our politics, and our culture something relatively new, a kind of restless and unprogrammatic radicalism that does not share but attacks traditional values and assumptions.

Thus, Alasdair Maclntyre states, "modern politics cannot be a matter of genuine moral consensus... Modern politics is civil war carried on by other means. If that is true and it may be increasingly true we may expect a politics that is increasingly polarized and divisive. Max Lerner wrote that he had not seen a time since the 1960s when our politics were so Jacobin.9 There is a ferocity and irresponsibility about political struggle as practiced by

11 INTRODUCTION

a wing of modern liberalism that results in large measure from the arrival on the national scene of the activists of the 1960s, who have brought their ideological baggage With them intact. The left activists of that generation and those whom they have swayed hold only contempt for the limits of respectable politics and indeed for political neutrality in any institution, including the federal judiciary. When courts are viewed as political bodies, we may expect judicial confirmations that are increasingly bitter. We may also expect a constitutional law that lurches suddenly in one direction or another as one faction or another gains the upper hand, a constitutional law that is seen as too crucial a political weapon to be left to nonpolitical judges, and certainly too important to be left to the actual Constitution.

The judicial assumption of ultimate legislative power is deceptive and difficult to resist because that assumption takes the form of a judgment handed down like other judgments, claims to be "constitutional," and leaves the appearance of the separation of powers intact. Those who deny the validity of a jurisprudence of original understand do not explicitly propose a rearrangement of our republican form of government. "The denial of a scheme wholesale is not heresy, and has not the creative power of a heresy ," said Belloc. "It is of the essence of heresy that it leaves standing a great part of the structure it attacks. On this account it can appeal to believers... Therefore, it is said of heresies that 'they survive by the truths they retain.'" We retain the reality of legislative and executive wide areas of life. Moreover, we retain the institution review because we have found that it does much good. These are the truths that make the misuse of judicial power all the more insidious. For that reason, it is crucial to recognize a heresy is and to root it out, for "heresy originates a new life of and vitally affects the society it attacks. The reason that heresy is not only, or principally, conservatism it is much more a perception that the
heresy, in so far as it gains ground will produce away of living and a social character at issue irritating, and perhaps mortal to, the way of living and the produced by the old orthodox scheme.

This book is not, therefore, ultimately about legal theory. It is about who we are and how we live; it is about who governs us about our freedom to make our own moral choices, and difference that makes in our daily lives and in the lives of generations yet to come.

A Word About Structure

The most active agent in transforming the federal courts has been the Supreme Court of the United States. For that reason, Part I of this book considers the increasing politicization of the Court and the Constitution in five chapters, four devoted to the Court from the beginning to the mid-1930s, the New Deal Court, the Court under Chief Justice Earl Warren, and the Court under Chief Justices Burger and Rehnquist. The fifth chapter draws conclusions about the path of the Court over time.

In recent decades, however, a new force has appeared in this arena: a herd of theoreticians of the Constitution, almost all of them professors of law. It is the enterprise of the large majority of this intelligentsia to justify the political behavior of the Court in the past and to provide theories that will draw the Court ever farther along the path of left-liberal Constitution rewriting. Part II is, therefore, devoted to theories of how constitutional judges should conduct themselves. It begins with a statement of the basic problem-defining the respective rights of majorities and minorities-that all theories of constitutional interpretation must solve. In the next two chapters I offer an argument that only by interpreting the Constitution according to the meaning it was understood to have when adopted can a judge solve the problem; I then turn to meet the numerous objections that have been offered to that conclusion. The next two chapters analyze the theories put forward by liberal and conservative theorists who want the Court to depart from the original meaning of the document. The theories of each set of revisionists are, and this may come as no surprise, found deficient, and seriously so. The following chapter examines some nonconstitutional ideas-both extreme moralism and extreme moral relativism-that have worked their way into constitutional decisions. I next argue that no theory that calls for

_departures from the original understanding can ever succeed. Part II closes with a chapter showing that rigorous legal reasoning is crucial to the maintenance of our form of government and our freedoms while a preference for “good results” over good reasoning subverts both the structure of government and freedom.

In Part III- I place my own experience as President Reagan’s nominee to a seat on the Supreme Court in the context of the wars that rage for control of our legal culture and our general culture, suggest what is at stake as those wars continue, and try to estimate what effects my experience may have on the future.

Because provisions of the Constitution are frequently discussed, that document is set out at the end of the book as an Appendix.
A popular style in complaining about the courts is to contrast modern judges with those of a golden or, at least, a less tarnished age. Many people have a fuzzy impression that the judges of old were different. They did things like "follow precedent" and "apply the law, not make it up." There is a good deal to be said for that view. The practice of judicial lawmaking has certainly accelerated spectacularly in this century, particularly in the past four or five decades. Nevertheless, the whole truth is rather more complicated.

From the establishment of the federal judiciary at the end of the eighteenth century, some judges at least claimed the power to strike down statutes on the basis of principles not to be found in the Constitution. Judges who claimed this power made little or no attempt to justify it, to describe its source with any specificity, or to state what principles, if any, limited their own power. No more have the activist judges of our time. Justifications for such judicial behavior had, for the most part, to await the ingenuity of modern law faculties. But the actions of the federal judiciary, and in particular those of the Supreme Court, have often provoked angry reaction, though rarely a systematic statement of the appropriate judicial role. The appropriate limits of judicial power, if such there be, are thus the center of an ancient, if not always fruitful, controversy. Its confused and unfocused condition constitutes a venerable tradition,

which is one tradition, at least, modern scholarship leaves intact. This part of the book traces the history of judicial revisions of the Constitution, identifies the social values revisionism served, and evaluates such justifications as were offered.

In a single volume, it is possible to examine only the most obvious or the most explicit revisions of the Constitution. But it is important to keep in mind that any court seen engaging in overt revisionism will, in all probability, have engaged in many more instances of disguised departures from the Constitution. A court that desires a result the law does not allow would rather, whenever possible, through misuse of materials or illogic, publish an opinion claiming to be guided or even compelled to its result by the Constitution than state openly that the result rests on other grounds. That is because popular support for judicial supremacy rests upon the belief that the court is applying fundamental principles laid down at the American founding. We would hardly revere a document that we knew to be no more than an open warrant for judges to do with us as they please.

Disguised or not, the habit of legislating policy from the bench, once acquired, is addictive and hence by no means confined to constitutional cases. The activist or revisionist judge, as we shall see, can no more restrain himself from doing "good" in construing a statute than when he purports to speak With the voice of the Constitution.
The values a revisionist judge enforces do not, of course, come from the law. If they did, he would not be revising. The question, then, is where such a judge finds the values he implements. Academic theorists try to provide various philosophical apparatuses to give the judge the proper values. We may leave until later the question of whether any of these systems succeed. The important point, for the moment, is that no judge has ever really explained the matter. A judge inserting new principles into the Constitution tells us their origin only in a rhetorical, never an analytical, style. There is, how-ever, strong reason to suspect that the judge absorbs those values he writes into law from the social class or elite with which he identifies.

It is a commonplace that moral views vary both regionally within the United States and between socio-economic classes. It is similarly a commonplace that the morality of certain elites may count for more in the operations of government than that morality which might command the allegiance of a majority of the people. In no part of government is this more true than in the courts. An elite

17 The Supreme Court and the Temptations of Politics

Moral or political view may never be able to win an election or command the votes of a majority of a legislature, but it may nonetheless influence judges and gain the force of law in that way. That is the reason judicial activism is extremely popular with certain elites and why they encourage judges to think it the highest aspect of their calling. Legislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority’s sentiment. The judge is free to reflect the “better” opinion because he need not stand for reelection and because he can deflect the majority’s anger by claiming merely to have been enforcing the Constitution. Constitutional jurisprudence is mysterious terrain for most people, who have more pressing things to think about. And a very handy fact that is for revisionists.

The opinions of the elites to which judges respond change as society changes and one elite replaces another in the ability to impress judges. Thus, judicial activism has had no single political trajectory over time. The values enforced change, and sometimes those of one era directly contradict those of a prior era. That can be seen in the sea changes constitutional doctrine has undergone in our history. There will often be a lag, of course, since judges who have internalized the values of one elite will not necessarily switch allegiances just because a new elite and its values have become dominant. When that happens, when judges are enforcing values regarded by the dominant elite as passé, the interim between the change and the replacement of the judges will be perceived as a time of “constitutional crisis.” The fact of judicial mortality redresses the situation eventually, and new judges enforce the new “correct” values. This has happened more than once in our history. The intellectuals of the newly dominant elite are than highly critical of the activist judges of the prior era for enforcing the wrong values while they praise the activist judges of their own time as sensitive to the needs of society. They do not see, or will not allow themselves to see, that the judicial performances, judged as judicial performances, are the same in both eras. The Supreme Court that struck down economic regulations designed to protect workers is, judged as a judicial body, indistinguishable from the Court that struck down abortion laws. Neither Court gave anything resembling an adequate reason derived form the Constitution for frustrating the democratic outcome. So far as one can tell form the opinions written, each Court denied majority morality for no better reason than to elite opinion ran the other way.
In this chapter and the next, we shall see that the Supreme Court's activism was at various times enlisted in the protection of property, the defense of slave owners, the protection of business enterprise in an industrializing nation, the interests of groups in the New Deal coalition, and, today, the furtherance of the values of the elite or cluster of elites known as the "new class" or the "knowledge class." The point ought not be overstated. We are discussing a strong tendency, not invariable conduct. No Court behaves in this way all of the time, in every case. Few judges are so willful as that. The structure of the law does have force, and, in any event, most cases do not present a conflict between elite morality and the law's structure. Yet such occasions arise in important matters, and it is those occasions that give the Court of each era its distinctive style.

Part of any revisionist Court's style, in addition to the nature of the non constitutional values enforced, is the rhetoric employed. The Court of each era is likely to choose different provisions of the Constitution or different formulations of invented rights as the vehicles for its revisory efforts. These are different techniques for claiming that what is being done is "law." The shifts in terminology do not alter the reality of the judicial performance as such. Still, the rhetoric employed will often disclose what values are popular with the elites to which the Court responds. Thus, the Court's shift from the use of the word "liberty" in the due process clause, popular in the closing decades of the last century and the opening decades of this century, to the idea of equality in the equal protection clause signified a shift in dominant values. It also signified a change in the social groups to which the Court responded, a decline in the influence of the business class and arise in that of the New Deal political coalition and its intellectual spokesmen. Similarly, the change from "liberty of contract," used in striking down economic reform legislation, to the "right of privacy" employed to guarantee various aspects of sexual freedom, signals a change in dominant values from capitalist free enterprise to sexual permissiveness, and, again, a change in dominant elites from the business class to the knowledge class, though now with less concern than previously for the social values of those who made up the New Deal coalition.

CHAPTER 1

CREATION AND FALL

The First Principle of the Social Compact

The Constitution was barely in place when one Justice of the Supreme Court cast covetous glances at the apple that would eventually cause the fall. The occasion was the Supreme Court’s 1798 decision in Calder v. Bull. A probate court of Connecticut refused to accept a will. But the legislature invalidated the court’s refusal. The court then accepted the will, and those who would have inherited under the first decision appealed to the Supreme Court. They lost, but two Justices took the occasion to disagree profoundly about the scope and nature of judicial power. Justice Samuel Chase of Maryland was prepared to strike down laws that violated no provision of any constitution, federal or state. His extraordinary opinion as supported less by legal reasoning than by frequent recourse to the typographic arts.

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State… The purpose for which men enter into society will determine the nature and terms of the social compact. … An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority…. The genius, the nature, and the spirit, of the State Governments, amount to a prohibition of such acts of legislation; and the general principles of
law and reason forbid tem…. To maintain that our Federal, or State, legislature possesses such powers, if they had not been expressly retained; would, in my opinion, be a

20 THE SUPREME COURT AND THE TEMPTATIONS OF POLITICS

political heresy, altogether inadmissible in our free republican governments.

One gathers that Justice Chase felt strongly, and he certainly gave judicial activism an emotional, if not an intellectual, heritage. No modern Court has been quite so candid in claiming a power beyond any written law. But then no modern revisionist Court has offered any better explanation of its power than did Chase's italics. Chase was an intemperate and highly partisan judge, a trait that later led to his impeachment by the House, though he escaped conviction in the Senate. Given his later behavior, it seems likely that Chase identified the "great first principles of the social compact" with the politics of the Federalist Party. By 1798 the Jeffersonian Republicans had become an obvious threat at the polls, and it is possible Chase was preparing a rationale for defeating their legislation by summoning up an unwritten social compact known only to himself.

Justice James Iredell of North Carolina answered Chase.

If, then, a government...were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess the power to declare it so. ...The ideas of natural justice are regulated by no fixed standard: the ablest and the purest of men have differed upon the subject. ...2

In this case, the emphasis is mine, not the Justice's. It is noteworthy that the impulse to judicial authoritarianism surfaced and was resisted at the beginning of our constitutional history. The Justices' exchange did not affect the outcome of the case, but it set out opposing philosophies that remain with us today. It is somewhat disheartening, indeed, that, while the debate has grown increasingly complex, in almost two centuries the fundamental ideas have not been improved upon.

The Divided John Marshall

John Marshall, commonly thought the greatest judge in our history, was named the fourth Chief Justice of the United States in 1801.

21 Creation and Fall

Thomas Jefferson had just won the presidency but had not yet been sworn in, and President John Adams, fearful of Jefferson's principles, wished to preserve the national judiciary as a Federalist Party stronghold. The appointment of Marshall, who was Adams's Secretary of State, did much to accomplish that. The Federalists and the Republicans had very different ideas about how the young nation should develop. The Federalists stood for a much stronger national government than did the Jeffersonians. Today, it seems difficult to see the point in the struggle to draft and ratify the Constitution if Jefferson and his followers were correct. This conflict of visions probably does much to explain Marshall's performance as Chief Justice.

An explanation of some sort is required, for even those of us who deplore activism admire Marshall, and it is clear that Marshall was, in some respects, an activist judge. But his
activism consisted mainly in distorting statutes in order to create occasions for constitutional rulings that preserved the structure of the United States.

Although he may have deliberately misread the statutes, he did not misread the Constitution. His constitution ruling, often argued brilliantly, are faithful to the documents. Marshall’s tactic ay perhaps be understood, for the survival of the Union was probably in some part due to the centralizing and unifying force of Marshall and his Court. The threat was posed by the Jeffersonian’ insistence upon an extreme version of state sovereignty. For a time Jefferson viewed the Constitution as a mere compact among the states, leaving each state with the right to decide for itself whether actions of the national government were unconstitutional. Jefferson’s view of the power of judicial review was of a piece. He accepted judicial review that included review of the acts of the President and Congress, but he thought those branches had a right to decide for themselves whether to accept the Court’s ruling.

These positions would certainly have made the national government unworkable. Indeed, the centrifugal forces in the new nation were so great that at times Marshall and others despaired of the Union’s survival. Congress often behaved more like a bevy of ambassadors from separate nations than a national assembly. The Federalist judiciary was the one strong, centralizing branch of government. Marshall knew that and used his powers accordingly. Jefferson knew it too, and was determined to destroy the courts’ independence. It is against this backdrop that one must evaluate Marshall’s performance.

The Jeffersonians chose impeachment as the weapon to reduce the Federalist redoubt in the judiciary. They began with an easy target: John Pickering, a federal district judge in New Hampshire, who was apparently both insane and a drunkard. These characteristics may not, oddly enough, be sufficient grounds for impeachment. (Article II, section 4 requires "Treason, Bribery, or other high Crimes and Misdemeanors" for the removal of civil officers. But article III, section 1 states that judges "shall hold their Offices during good Behavior," and it is not settled whether that standard is different from the standard stated under the general impeachment provision.) The House impeached Pickering nonetheless, and the Senate convicted, thus removing him from office. The Federalists feared, correctly, that this was a trial run for the pursuit of more substantial prey. The Jeffersonians did in fact move on to the impeachment of a Justice of the Supreme Court, Samuel Chase. Chase, as we have seen, claimed the power to strike down laws that violated no provision of the Constitution but were, in his view, "contrary to the great first principles of the social compact." One wishes the House had impeached and the Senate convicted him for those sentiments. He was chosen instead as a likely opening for a full-scale assault on the Court because he seemed, for other reasons, the most vulnerable of the Justices. A fierce Federalist, he displayed a raging partisanship both on and off the bench. In the event, the Jeffersonians could not muster the two-thirds of the Senate necessary to convict, and Jefferson, calling impeachment "not even a scare-crow," realized that it was not a weapon that could reach John Marshall and the other Federalist Justices.

The Jeffersonian threat to the Court, which was obvious before the attempt on Chase, may have led Marshall to the then much-criticized opinion that has become his most famous. Marbury v. Madison, the 1803 decision that rationalized, though it was not the first to assume, the Court's power of judicial review, is a curious blend, an essay resting the power to invalidate statutes of Congress on the original understanding of the Constitution and yet reaching the question of that power without justification.

Marshall himself precipitated the case. While serving both as Chief Justice and Secretary of State, he neglected, in his latter capacity, to deliver commissions to some Federalist judges
appointed in a rush at the end of Adams's administration. One who failed to receive his commission was William Marbury, confirmed by the Senate for the post of justice of the peace for the District of Columbia.

23 Creation and Fall

Jefferson, annoyed at Adams's last-minute packing of the courts, directed his Secretary of State, James Madison, to withhold the undelivered commissions. Marbury and four others in the same situation brought an action in the Supreme Court, where Marshall now presided, seeking a writ of mandamus to compel Madison to deliver the commissions. (A writ of mandamus is a court order directing an official to perform his duty.) It was a very odd lawsuit, one with no chance of success, and it may have been a Federalist political gambit to embarrass the Republicans. Madison was so contemptuous of the suit that he did not even respond.

Marbury had clearly brought his case in the wrong court. Article III of the Constitution, which structures the federal judiciary, places the Court. These are cases that originate in lower courts and come to the Supreme Court for review. Other classes of cases are placed within the Court's original jurisdiction. These cases begin and end in the Court. Cases placed in the original jurisdiction are those likely to be especially politically sensitive, such as cases affecting ambassadors or cases in which a state is a party. Though Marbury had filed directly in the Supreme Court, his claim obviously did not qualify to be placed in its original jurisdiction and should have been dismissed out of hand.

Instead, Marshall delivered a long opinion, part of which was designed to embarrass the Jeffersonians for not delivering Marbury's commission, to which he had a legal right, according to Marshall. The other part was a lengthy disquisition on the power of the Court to strike down statutes that were inconsistent with the Constitution. In order to reach that issue, Marshall had not only to ignore the fact that his Court had absolutely no jurisdiction, he had as well to distort the statute in order to make it a fit subject for a holding of unconstitutionality. Congress had authorized the Supreme Court "to issue writs of mandamus, in case warranted by the principles and usages of law," to officers of the United States. There was nothing in the least controversial in this humdrum and inoffensive power to require an officer to do his duty. But Marshall argued, quite incorrectly, that a writ of mandamus could only be issued only in the exercise of the Court's original jurisdiction; hence, Congress had added to the Court's original jurisdiction, which was defined by the Constitution, and had thus impermissibly attempted to alter the Constitution by statute. The statute must, therefore, be struck down.

None of this made much sense. Congress had clearly not attempted to do what Marshall claimed. Mandamus is a well-known writ and had long been used by courts of appellate jurisdiction. There might well, for instance, be cases on appeal in which the Court would wish to issue mandamus to prevent an officer from taking an action that would render the case moot before the Court could decide it. Before and after *Marbury*, courts have found that and other occasions for the issuance of mandamuses in aid of appellate jurisdiction. In fact, the language that supposedly tried to add to the Court's original jurisdiction came at the end of a sentence in which Congress was explicitly dealing with the appellate jurisdiction of the Court. Marshall and his Court had, apparently, deliberately misread a clear statute in order to write an essay on the constitutional power of the Court to declare an act of Congress void.

Contrary to common belief, it was not the first time members of the Court had asserted that power. Eleven years before, in *Hayburn's Case*, 8 most of the Justices had refused to comply with a statute because it assigned them duties not of the judicial nature specified by the Constitution,
but no extensive explanations had been given. *Marbury* was decided after Pickering's impeachment but before his removal. Perhaps Marshall, knowing Jefferson's plans for the Court and the nation, was concerned to assert the Court's power more vigorously than the Justices had done in *Hayburn's Case* and to provide an intellectual foundation for judicial supremacy. If so, many commentators since have thought the foundation inadequate to support the structure. That is not to deny that the power claimed exists; there are better arguments than Marshall's for the legitimacy of judicial review.

The good news about *Marbury* is that Marshall placed the Court's power to declare laws unconstitutional directly upon the fact that the United States has a written Constitution. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" He said that the theory of every government with a written Constitution "must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution. ..." Moreover, "it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts." Chase's speculations in *Calder v. Bull* were ignored.

Yet only seven years later, Marshall appeared to adopt, almost in passing, something very like Chase's position on principles of natural justice as a source of judicial power. The Georgia legislature, all but one of whose members appear to have been corrupted (and that member happened to be absent), sold millions of acres along the Yazoo River for prices that ranged between one cent and one and one-half cents per acre, an extraordinarily inadequate price. The Yazoo land fraud, as it came to be called, was the only issue in the next election; the rascals were relieved of any further concern with the people's affairs, and the next legislature rescinded the land grant. In the meantime, however, many of the original purchasers, who had themselves corrupted the prior legislature, resold to others who were apparently innocent. A purchaser sued his seller because the rescission of the grant derived him of the land and the seller held his money. The case, *Fletcher v. Peck* eventually came to the; Supreme Court.

Marshall thought the rescinding statute necessarily rested on a proposition he was unable to accept. "The principle is this; that a legislature may, by its own act, devest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient." Before coming to the conclusion that that principle was foreclosed by article I, section 10 of the Constitution, which provides that "No State shall... pass any... Law impairing the Obligation of Contracts" II Marshall suggested another ground of invalidity: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation[?]" He said it was "well worthy of serious reflection" whether transferring the property of an individual to the public "be in the nature of the legislative power" Marshall speculated that a court might enforce an inherent, but unwritten, limit on the legislative power arising from the nature of society and government. This is a remarkable performance, since Marshall, who intended to rely upon a provision of the federal Constitution, had to go well out of his way to float the idea that a court might strike down a statute even where "the constitution is silent."

But Marshall's speculations are tepid compared to the opinion of Justice William Johnson of South Carolina. He began with the
sweeping pronouncement: "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity." Marshall at least had suggested extra-constitutional power only over the legislature and left God alone. Given Johnson's extravagant beginning, one reads on with considerable anticipation. Unfortunately, the principle that controls both Georgia and the deity seems too confused for general application.

When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his is his country's.

That passage, which is thrown into utter incoherence by its last sentence, was, apparently, clearer to Johnson than article I, section 10. "I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts." Just so. Fletcher v. Peck was, however, the end of the Marshall Court's flirtation with the idea that legislative acts could be overturned on grounds of natural justice or the nature of government and society. Moreover, none of the Justices-Chase, Marshall, and Johnson who suggested that laws not barred by the Constitution might never the less be invalidated by the Court ever gave a reason for that conclusion or ever described how the Court should go about identifying the extra-constitutional principles that might apply. There was no theoretical argument even remotely comparable to the extended justification in Marbury for conventional review under the express provisions of the Constitution.

Aside from writing an extensive opinion in Marbury, attacking Madison and arguing for judicial review, in a case where the Court had no jurisdiction and where he had to misrepresent a statute in order to make his point, Marshall repeatedly ignored the actual legal materials before him in order to make points he thought important

In Gibbons v. Ogden (1824), he wrote an opinion for the Court striking down a New York statute that granted a monopoly to operate steamboats on the state's waters. He strongly suggested the possibility that the power over commerce, given to Congress by the Constitution, though Congress had not exercised it, was sufficient to invalidate the law by its mere existence. That suggestion would have meant that the judiciary should assume a power that the Constitution lodges in Congress, and later in the century the suggestion was picked up, so that even today the Court does what Marshall suggested. But he went on in Gibbons to hold that Congress had in fact exercised the commerce power, thus preempting New York's law, by providing for the licensing of vessels in the coastal trade. Though the license was rather clearly intended only to exempt American ships from the burdens Congress imposed on foreign ships, Marshall, in a feat of construction reminiscent of his distortion of the mandamus statute in Marbury, construed the license as federal permission of unimpeded passage on all navigable waters of the United States.

Yet, five years later, in Wilson v. Black Bird Creek Marsh Co., he upheld Delaware's power to authorize a private company to block a navigable waterway with a dam. He made no mention of either his suggested inference from the existence of the congressional commerce power of the coasting license, which was present in this case as well. Without explanation, and without
authorization by Congress, Marshall simply decided which state regulations of commerce were reasonable and which were not.

It remains true, of course, that Marshall was a great judge and a powerful expositor of the Constitution. His opinion in McCulloch v. Maryland (1819), upholding the power of Congress to establish the Second Bank of the United States, and denying the power of the state to tax the bank’s notes, is a magnificent example of reasoning from the text and the structure of the Constitution. An in Barron v. Baltimore (1883), Marshall wrote an excellent opinion refusing to apply the prohibitions of the Bill of Rights to the states, drawing inferences from the constitutional text, structure, and history. Yet, as David Currie, who very much admires Marshall, has said, “time and again he seems to have been writing a brief for a conclusion reached independently of the Constitution.” He seems, nonetheless, to have reached few conclusions that could not be justified by the Constitution. More objection may be taken to his way with statutes. But he seems to have abused them in order to create occasions for constitutional rulings that appeared essential to solidify the national power the Constitution had attempted to create. It would be wrong for those of us who have never faced the possible failure of the entire enterprise that is the United States to be too easily critical of Marshall's performance. It must be remembered that centrifugal forces remained strong in the United States throughout Marshall's tenure on the Court. Before he left, John C. Calhoun was elaborating his philosophy of virtual state independence, and not even the position of the Court was as secure as we have now come to take for granted. President Andrew Jackson is said to have remarked after the Court decided a land case in favor of an Indian tribe: "John Marshall has made his decision. Now let him enforce it!" The state involved ignored the decision, and Jackson did leave it unenforced. If these conditions provide some justification, by the same token it would be a mistake for us to take Marshall's performance, in all its aspects, as a model for judges now that the basic structure and unity of our nation have been accepted. And it is well to remember that, when Marshall wrote his major essay justifying judicial power to strike down legislation, he did so on the ground that the Constitution is a written document, that it is law, that it governs courts as well as legislatures, and that its principles are those contemplated by the ratifiers and the framers who produced it.

Chief Justice Taney and Dred Scott: The Court Invites a Civil War

After Marbury, the Supreme Court did not hold another major federal statute unconstitutional for fifty-four years. If Marshall's cause was nationalism, that of the Supreme Court in 1857 was regionalism, and in Dred Scott v. Sandford the politics and morality of the Justices combined to produce the worst constitutional decision of the nineteenth century. Speaking only of the constitutional legitimacy of the decision, and not of its morality, this case remained unchallenged as the worst in our history until the twentieth century provided rivals for that title.

The Court headed by Chief Justice Roger Taney of Maryland was dominated by Southerners, and to the South in 1857, as for many years previously, the overriding question of national politics was the "peculiar institution" of slavery. Slavery was attacked and defended on principles of morality, and the South had increasing
cause to fear that the rising population and prosperity of the North would soon make it dominant and bring an end of the institution upon which the South’s prosperity rested. The problem became particularly acute for both sections of the nation as Americans who moved west and settled territories petitioned congress for admission to the Union as states. The balance of power in the Union would be determined by whether the new states were admitted as slaves or free.

The crisis came to a head when Missouri sought statehood. Congress ultimately admitted Missouri as a state where slavery was permitted but balanced that by admitting Maine as a free state and by prohibiting the introduction of slavery into the rest of the territory acquired by the Louisiana Purchase north of Missouri’s southern border. This was the Missouri Compromise of 1820. Congress subsequently followed the practice of admitting paired slave and free states so that the balance of power in the Senate was not altered. Though not satisfactory to the more ardent opponents and defenders of slavery, North and South, this compromise, whatever its morality, had the beneficial political result of allowing the United States to develop with a degree of stability. There is a body of dubious opinion that, had the slavery question been permitted to simmer without exploding, ultimately the institution would have declined and disappeared. Abraham Lincoln was once of that view, “resting in the hope and belief that (slaver) was in course of ultimate extinction,”22 a view he later abandoned. We may discuss the Court’s performance, however, without assessing the accuracy of that belief.

Taney, a Southern partisan, resented the arrogance of the North on the slavery issue and most especially resented the principle, insulting to the South, that lay beneath the North’s acceptance of the Missouri Compromise: slavery is an evil and must be limited so long as it cannot be ended. In 1857 he got the chance to make his resentments and his adherence to the cause of the slave states into constitutional law.

Dred Scot was a slave taken by his owner into the free state of Illinois and then to federal territory where slavery had been forbidden by the Missouri Compromise. Having been returned to Missouri, Scott sued for his freedom on the theory that he became free when taken to soil where slavery was outlawed. He first sued in the Missouri courts, where precedent was on his side, and initially won, only to have the decision overturned by the Missouri Supreme Court. Scott turned to the federal courts, lost in the trial court and appealed to

30 THE SUPREME COURT AND THE TEMPTATIONS OF POLITICS

the United States Supreme Court, where Taney and a Southern majority awaited him.

The Court produced a welter of opinions. It is sometimes unclear how many Justices joined Taney's "opinion of the Court" on the various grounds he advanced. The case takes up 241 pages in the Reports. There is no need to examine all of its dubious arguments; it was quite evident not only that Scott was to remain a slave but that Taney intended to read into the Constitution the legality of slavery forever. When he was done he had denied the power of the federal government to prevent slavery in any state or territory and the power of the federal government to permit a state to bar slavery within its territory. This, of course, had the result of declaring the Missouri Compromise unconstitutional. It had been repealed in 1854, but Taney's ruling was not entirely gratuitous, because Scott had been in free territory while the Compromise was in effect. What was important was the significance of the ruling for the future. The crucial passage comes near the end of his opinion, and it is as blatant a distortion of the original understanding of the Constitution as one can find.
Taney was determined to prove that the right of property in slaves was guaranteed by the Constitution. He led up to his crucial point by noting, unexceptionably, that when the federal government enters into possession of a territory, "It has no power of any kind beyond [the Constitution]; and it cannot...assume discretionary or despotic powers which the Constitution has denied to it." He illustrated his point: "[N]o one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances."

All well and good. But there is no similar constitutional provision that can be read with any semblance of plausibility to confer a right to own slaves. It may well have been the case that the federal government could not then have freed slaves in states where the law allowed slavery without committing a taking of property for which the fifth amendment to the Constitution would have required compensation. But that is a far different matter from saying that the Constitution requires the federal government or a state government to permit and protect slavery in areas under its control. The definition of what is or is not property would seem, at least as an original matter, a question for legislatures.

How, then, can there be a constitutional right to own slaves where a statute forbids it? Taney created such a right by changing the plain meaning of the due process clause of the fifth amendment. He wrote: "[T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."

The first sentence quotes the guarantee of due process, which is simply a requirement that the substance of any law be applied to a person through fair procedures by any tribunal hearing a case. The clause says nothing whatever about what the substance of the law must be. But Taney's second sentence transforms this requirement of fair procedures into a rule about the allowable substance of a statute. The substance Taney poured into the clause was that Congress cannot prevent slavery in a territory because a man must be allowed to bring slaves there. The second sentence is additionally dishonest because it postulates a man who had "committed no offence against the laws," but a man who brings slaves and keeps them in a jurisdiction where slavery is prohibited does commit an offense against the laws. Taney was saying that there can be no valid law against slaveholding anywhere in the United States.

How did Taney know that slave ownership was a constitutional right? Such a right is nowhere to be found in the Constitution. He knew it because he was passionately convinced that it must be a constitutional right. Though his transformation of the due process clause from a procedural to a substantive requirement was an obvious sham, it was a momentous sham, for this was the first appearance in American constitutional law of the concept of "substantive due process," and that concept has been used countless times since by judges who want to write their personal beliefs into a document that, most inconveniently, does not contain those beliefs.

Taney did just that, and created a powerful means for later judges to usurp power the actual Constitution places' in the American people.
It is clear that the text of the due process clause simply will not support judicial efforts to pour substantive rather than procedural meaning into it. As Professor John Hart Ely put it, "there is simply no avoiding the fact that the word that follows 'due' is 'process.' ...[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms--sort of like 'green pastel redness.' " More than a century after Taney's legerdemain, Justice Hugo Black demonstrated in his In re Winship dissent that the constitutional phrase "due process of law" descended from the Magna Carta's guarantee that no freeman should be deprived of his liberty except by the law of the land. Due process was satisfied, therefore, when government proceeded "according to written constitutional and statutory provisions as interpreted by court decisions." When the Court poured substantive content into this procedural provision, Black said, "our Nation ceases to be governed according to the 'law of the land' and instead becomes one governed ultimately by the 'law of the judges.' " He preferred to put his "faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges." The latter is always, and only, what the notion of substantive due process means. But the Supreme Court will not abandon the notion, despite demonstrations of its utter illegitimacy, precisely because it is an ever flowing fount of judicial power.

Professor David Currie wrote that Dred Scott "was at least very possibly the first application of substantive due process in the Supreme Court, the original precedent for Lochner v. New York and Roe v. Wade." Lochner employed substantive due process to strike down a state law limiting the hours of work by bakery employees. Roe used substantive due process to create a constitutional right to abortion. Lochner and Roe have, therefore, a very ugly common ancestor. But once it is conceded that a judge may give the due process clause substantive content, Dred Scott, Lochner, and Roe are equally valid examples of constitutional law. You mayor may not like the judge's politics or his morality, but you have conceded, so far as the Constitution is concerned, the legitimacy of his imposing that politics and morality upon you. Lenin is supposed to have written: "Who says A must say B." In that he was logically correct. Who says Roe must say Lochner and Scott. This is vehemently denied by today's proponents of judicial policymaking, but the denial is hollow and merely means that they like the policies now being made.

Justice Benjamin Curtis of Massachusetts dissented in Dred Scott, destroyed Taney's reasoning, and rested his own conclusions upon the original understanding of those who made the Constitution. At one point, complaining of divergent views on congressional power offered by counsel, he wrote: "No particular clause of the Constitution has been referred to. ... One argument "rested upon general considerations concerning the social and moral evils of slavery, its relations to republican Governments, its inconsistency with the Declaration of Independence and with natural right." A second was drawn from "the right of self-government, and the nature of the political institutions which have been established by the people of the United States." The third rested upon "the equal right of all citizens to go with their property upon the public domain," so that a regulation excluding slavery from a territory was an "unjust discrimination."

The weight of these considerations, when presented to Congress, Curtis said, was not the concern of the Court. "The question here is, whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. ...To allow this to be done with the
Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations."

Curtis went on to make essentially the same argument that Iredell had made in response to Chase, an argument that should have been conclusive: "Political reasons have not the requisite certainty to afford Tules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." But Curtis's argument did not prevail then, and it does not deflect willful courts today.

Shortly afterward, Curtis resigned from the Supreme Court and returned to Boston to practice law. His motives were said to be partly financial and partly a loss of confidence in the Court. It would be good to think that he might have borne the financial sacrifice had Dred Scott not convinced him that the Court, far from being a serious judicial body, had become hopelessly political, and that he wanted no part of it. Since only one other Justice, John McLean of Ohio, had sided with him, Curtis was entitled to think he could not affect the balance of the Court.

The ruling in Dred Scott at once became an explosive national issue. As historian Don Fehrenbacher noted, Taney had ruled "in effect that the Republican party was organized for an illegal purpose. ...No doubt it contributed significantly to the general accumulation of sectional animosity that made some kind of national crisis increasingly unavoidable."31 There is something wrong, as somebody has said, with a judicial power that can produce a decision it takes a civil war to overturn.

34 THE SUPREME COURT AND THE TEMPTATIONS OF POLITICS

The Spirit of the Constitution and the Establishment of Justice

Salmon P. Chase of Ohio was one of Lincoln's rivals for the Republican presidential nomination in 1860. Lincoln, once in office, made Chase Secretary of the Treasury. Among his accomplishments in that office was to help finance the Union's efforts in the Civil War by helping to make paper money legal tender of the United States. In 1864, Lincoln appointed him Chief Justice of the United States. Within a few years Chase wrote for a Court majority in Hepburn v. Griswold..32 holding that the Constitution forbade making paper legal tender. The decision may well have been correct, though Chase's opinion does not persuade one of that. Of interest for present purposes is that Chase swept to his conclusion with arguments that justify absolutely unlimited judicial power.

In 1860, a Mrs. Hepburn gave a promissory note for 11,250 "dollars" to one Griswold. At the time the note was made, and when it fell due in 1862, gold and silver coins were the only legal tender of the United States. A few days later Congress authorized the issuance of paper money and made it legal tender for the payment of all public and private debts. In 1864, having been sued on the note by Griswold, Hepburn tried to pay the principal and interest with paper money, which Griswold refused because that currency was worth a good deal less than the gold and silver he had been entitled to previously. The question in the suit became whether the act making paper money legal tender for debts already incurred was constitutional.
The Supreme Court thought not, and Griswold received full value. That seems only fair, but the Court had some difficulty in explaining why that fairness was constitutionally mandated. Chase cited Marshall for the proposition that a claimed congressional power must be "consistent with the letter and spirit of the Constitution." Chase skirted the question of the "letter" in favor of the question whether Congress's statute was "consistent with the spirit of the Constitution." With that maneuver he was free of constraint and broke into the open field. It required only a little rhetoric to go the rest of the way. "Among the great cardinal principles of that instrument, no one is more conspicuous or more venerable than the establishment of justice." What was intended by "justice" was "happily, not a matter of disputation. It is not left to inference or conjecture, especially in its relations to contracts." The principle to be applied found "expression in that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice, that 'no State shall pass any law impairing the obligation of contracts.' " Chase admitted, as he had to, that the provision bound only the states, not the federal government. But that was a minor difficulty since "we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency."

This would be an incredible performance had we not seen its like so many times since. The Constitution contains not only guarantees of liberty but also powers of government over individuals, including the power to define crimes and punish for them. It would appear to have a number of "spirits," not all of them of the same character. Matters are not helped by Chase's taking as expressing the "spirit" a clause in the Preamble, which is entirely hortatory and not judicially enforceable, stating that a purpose of the Constitution was to "establish Justice." If that states a criterion for judicial review, every judge is free to decide which laws are just and which not. Subjectivism is given free rein. Worse than that, however, there are any number of "spirits" within the Preamble itself: other stated purposes are to "form a more perfect Union," "insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." 33 That is a cornucopia of "spirits" for a judge to draw upon in making up his own Constitution. His freehand methodology permitted Chase to say that a provision barring the impairment of the obligation of contracts, which he admitted did not apply to the case, nevertheless applied to the case.

Not satisfied with this, Chase suggested that the legal tender law violated the "spirit" of the fifth amendment's prohibition of the "taking" of private property for public use without just compensation. He closed with a rousing Dred Scott finale. The statute, Chase said, deprived Griswold of property without due process of law. That there may have been a legitimate way to reach the same result (the power given Congress in article I, section 8, "To coin Money" may well have been intended to exclude paper money) hardly redeems Chase's irresponsibility.

**Judicial Activism in the Service of Property and Free Enterprise**

After the Civil War the nation entered upon a long period of growth and industrialization. The judicial devotion to private property and limited government, which had been evident from the
beginning of the Republic, now began to face the challenge of new kinds of legislation, some of it designed to further economic development through public expenditures, some of it designed to curb what were thought to be the abuses of a free enterprise system. The Constitution did not easily lend itself to all that the judges' philosophy of the proper role of government and the limits of democratic choice might suggest.

In a great burst of constitution-making prompted by the Civil War, the nation from 1865 to 1870 adopted three major constitutional amendments designed, primarily, to provide the recently freed slaves with the same civil and political rights as all free citizens. The thirteenth amendment prohibited slavery and "involuntary servitude"; the fifteenth guaranteed the right to vote regardless of "race, color, or previous condition of servitude." But the fourteenth amendment, adopted in 1868, became and has remained the great engine of judicial power. The critical language of that amendment, for our purposes, is contained in three clauses: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The privileges and immunities clause, whose intended meaning remains largely unknown, was given a limited construction by the Supreme Court and has since remained dormant. The due process clause, now made applicable to the states, was, of course, copied from the fifth amendment, which applied only against the federal government. Unlike the other two clauses, it quickly displayed the same capacity to accommodate judicial constitution-making which Taney had found in the fifth amendment's version. The creative use of the equal protection clause for the same purpose had to await the Warren Court of the mid-twentieth century.

In 1869, Louisiana chartered a corporation and gave it a monopoly of slaughterhouses, landings for cattle, and stockyards in a large area that included New Orleans. Butchers precluded from practicing their trade, except on the corporation's land and terms, challenged the law under the thirteenth and fourteenth amendments. The Supreme Court, splitting five to four, sustained the law in the slaughter-House Cases. Justice Samuel Miller's opinion for the Court said that the text and history of the three post-Civil War amendments disclosed a unity of purpose, "the freedom of the slave race, the security and firm establishment of that freedom, and the protection from the oppressions of those who had formerly exercised unlimited dominion over him." He interpreted privileges and immunities as referring to rights already protected elsewhere in the Constitution and thus, in effect, adding nothing. Of the due process clause, according to Miller, "it is sufficient to say that under no construction of that provision (as already contained in the fifth amendment) that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." Moreover, "[w]e doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class or on account of their race, will ever be held to come within the purview"of the equal protection clause. The fourteenth amendment thus had little reach beyond the protection of those who had been slaves. Though some have complained bitterly about this, Miller was following a sound judicial instinct: to reject a construction of the new amendment that would leave the Court at large in the field of public policy without any guidelines other than the views of its members. He said of the argument by the complaining
butchers, "[S]uch a construction. ..would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights. ..." In a word, the history of the fourteenth amendment gave judges no guidance on any subject other than the protection of blacks. Beyond that, the Justices had nothing more to apply than their personal views. That, Miller thought, was reason enough to confine the amendment almost entirely to the subject of race.

What is striking about the Slaughter-House Cases is not the caution displayed by the majority but rather the radical position of the four dissenters. Justice Stephen Field wrote for them all, stating that the first clause designated "those [privileges and immunities] which of right belong to the citizens of all free governments." These were "natural and inalienable rights" and included "the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons." Field actually supported his constitutional position with a quotation from Adam Smith to the effect that hindering a working man from employing his skills as he thinks proper is "a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him." One may be an unyielding admirer of Adam Smith, and of that moral principle in particular, without supposing that Smith wrote the fourteenth amendment or that judges are entitled to enforce The Wealth of Nations because its principles should have been in the Constitution.

Justice Joseph Bradley, in an additional dissent, agreed that the Louisiana law abridged the privileges of citizens and also deprived the butchers of liberty and property without due process of law. "Their right of choice is a portion of their liberty; their occupation is their property." Bradley, like the Taney of Dred Scott, thus converted a constitutional requirement of just procedures into a prohibition of legislation whose substance he disliked. The difference is that Bradley's principles are admirable and Taney's despicable; but that is not a constitutional difference where nothing in the document authorizes judges to apply either principle. Bradley also found the statute in violation of the guarantee of the equal protection of the laws. The presence of three distinct clauses was apparently, in Bradley's view, an embarrassment of riches; anyone of them was adequate as a vehicle for his political views. Indeed, he apparently did not even need the fourteenth amendment, for, in a passage reminiscent of Chase in Calder v. Bull, Bradley said, "even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words. ..." Speaking of the dissents in the Slaughter-House Cases, David Currie said, "The fundamental-rights notion reflects once again the incessant quest for the judicial holy grail; perhaps at long last we have discovered a clause that lets us strike down any law we do not like."38

Bradley also protested the limitation of the amendment almost entirely to blacks. "They may have been the primary cause of the Amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed." This, too, as we shall see, can be read as an almost illimitable discretionary power in the courts.

The Slaughter-House Cases pose the interesting question of the appropriate judicial response to a constitutional provision whose meaning is largely unknown, as was, and is, the meaning of the privileges and immunities clause. It is quite possible that the words meant very little to those who adopted them and that, as Charles Fairman said, the clause came from Representative Bingham of Ohio. "Its euphony and indefiniteness of meaning were a charm to him."4o Whether that is the case or not, that the ratifiers of the amendment presumably meant something is no reason for a judge, who does not have any idea what that something is, to make up and enforce a meaning that is something else.
The *Slaughter-House Cases* were a narrow victory for judicial moderation and, in the event, proved only a temporary one. The idea that there are rights that are not in the Constitution and yet are enforceable by courts had been gaining ground in some state courts. For example, in 1870 the Wisconsin Supreme Court, in *Whiting v. Sheboygan & Fond du Lac Railroad Co.*, did without citing constitutional provision in point, held that the state legislature could not authorize taxes to aid the construction of a privately owned railroad even though a majority of the people should vote in the affirmative. The court simply limited the purposes for which people could be taxed according to the court's political philosophy: "It is obvious, if public benefits and advantages of this kind, and which maybe properly called incidental, constitute a public use which will justify a resort to either of these sovereign powers of government, that then all distinction between public and private business, and

40 THE SUPREME COURT AND THE TEMPTATIONS OF POCS

public and private purposes, is obliterated, and the door to taxation is opened wide for every conceivable object by which the public interest and welfare may be directly or in any wise promoted. Such a doctrine would be subversive to all just ideas of the powers of government and destructive of all rights of private property, leaving every man's estate to be held by him as a mere grace or favor received at the hands of the legislative body."

Michigan's Supreme Court, in *People v. Township of Salem*, an 1870 opinion by the distinguished Judge Thomas Cooley, struck down a similar law saying that "there are certain limitations upon this power [to tax], not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words." It was beyond the power of the state to furnish capital to set private parties up in business or to subsidize a going business since "when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger." Therefore, "the first and most fundamental maxim of taxation is violated by the act in question." The "first and most fundamental maxim of taxation," rather curiously had not been included in the constitution that gave the power to tax.

So appealing was this political philosophy disguised as constitutional law that, astonishingly, Justice Miller, who in the *Slaughter-House Cases*, refused to become a "perpetual censor" on all state legislation, one year later, in 1874, became just that. *Loan Association v. Topeka*, involved a Kansas statute which permitted cities to issue bonds and donate them to private businesses to encourage them to set up in the cities. The bonds would, of course, be paid out of tax revenues. Miller would have none of it. Like the state court judges, he insisted that people could not be taxed except for a public purpose, and it was up to the courts not only to impose this limitation but to define what such a purpose was. Unless such a limitation were imposed on the legislative power by judges, government would hold the lives, liberty, and property of its citizens subject to the most absolute despotism; "a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." It was not enough to have a Constitution that limited the powers of government and guaranteed specific freedoms of persons; it was

41 unnecessary to have still further limitations invented by judges. "There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the
name." No provision of any constitution was invoked for this remarkable performance. Miller closed with a recitation of state cases upholding the same principle and seemed to view with particular approbation a decision by the Supreme Judicial Court of Massachusetts striking down taxation to provide funds to aid owners to rebuild "after the disastrous fire in Boston, in 1872, which laid an important part of that city in ashes."

The sole dissenter in Loan Association was Justice Nathan Clifford, who wrote that...

...the better opinion is that where the constitution of the State contains no prohibition upon the subject, express or implied, neither the State nor Federal courts can declare a statute of the State void as unwise, unjust, or inexpedient, nor for any other cause, unless it be repugnant to the Federal Constitution. Except where the Constitution has imposed limits upon the legislative power the rule of law appears to be that the power of legislation must be considered as practically absolute, whether the law operates according to natural justice or not in any particular case, for the reason that courts are not the guardians of the rights of the people of the State, save where those rights are secured by some constitutional provision which comes within judicial cognizance; or, in the language of Marshall, C. J., "The interest, wisdom, and justice of the representative body furnish the only security in a large class of cases not regulated by any constitutional provision."

Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism.44

Of course the power claimed by the Loan Association majority would the government into a "judicial despotism"; in some degree,

42 THE SUPREME COURT AND THE TEMPTATIONS OF POLITICS
it has. The despotism is selective; it does not operate on all subjects of life all of the time. But it is there, ready to hand, when judges feel strongly enough. Clifford made the case for the correct judicial role about as well as it can be made. The security furnished by "the interest, wisdom, and justice" of the legislature is at least as good as that provided by free-ranging judges, with the added advantage that legislative despotism, if you, with Justice Miller, are pleased to call it that, can be cured at the polls. But logical demonstrations based upon the character of our republican form of government, in which courts do not rule as they see fit, is, apparently, no match for the passions of judges. In such behavior, of course, judges are encouraged not only by those who share their politics but by lawyers who see in the absence of law, and the existence of unguided judicial discretion, always the possibility of winning.

Indeed, Justice Miller saw what was happening and yet could not bring himself to cut it short. In Davidson v. New Orleans,45 an 1877 decision, he managed to say both that the due process clause of the fourteenth amendment was satisfied by a fair judicial procedure and also that it was not, because the clause had substantive content. He and the Court held that "it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." Yet, a few pages earlier, he said that "a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if
effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision." So a fair judicial proceeding would not be enough; the clause prohibits some undefined category of substantive legislation, of which Miller offered only one instance. The bar was thus invited to continue challenging the substance of statutes under the due process clause and simultaneously kept in the dark as to what the Court thought that clause might cover. Given that performance, it required considerable gall for Miller to write, in the same brief opinion: "[T]here exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuc

Creation and Fall 43
cessful litigant in a State court. ..of the merits of the legislation. ..." On the basis of Miller's own performance, that view of the clause was not a "misconception" but a perfectly rational litigating stance. And so it proved. Substantive due process, though it had originated in the judicial desire to protect slavery, had now been validated as constitutional doctrine. Perhaps "doctrine" implies too much of rationality and intellectual rigor. Since the clause was designed only to require fair procedures in implementing laws, there is no original understanding that gives it any substantive content. Thus, a judge who insists upon giving the due process clause such content must make it up. That is why substantive due process, wherever it appears, is never more than a pretense that the judge's views are in the Constitution. That has been true from Dred Scott to today.

The doctrine took a new turn in Allgeyer v. Louisiana.46 Justice Rufus Peckham, writing for a unanimous Court, held that the word "liberty" in the due process clause meant "liberty of contract." The real Constitution, in an altogether different provision, had been interpreted to prevent states from impairing the obligation only of existing contracts. Now, Peckham invented a provision preventing states from forbidding the making of new contracts that the Justices thought worthy. Louisiana enacted a statute imposing fines on persons who did any act to effect marine insurance with any company that had not complied with the laws of the state. Allgeyer made an open marine insurance contract with a New York company calling for insurance to go into effect when he notified the company that a shipment was being made. He wrote a letter from New Orleans notifying the company of a shipment of cotton and the state levied fines upon him because the company had not complied with Louisiana law. Peckham conceded that Louisiana could put such conditions as it pleased upon doing business within the state but insisted that it could not punish the mailing of a letter from the state, where the cotton was, to bring insurance coverage into effect. He said, in a passage conspicuous for its circularity, "To deprive the citizen of such a right as herein described without due process of law is illegal." Why did the statute lack due process? "Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendant had a right to perform." Where in the Constitution is this right to be found? Why, in the due process clause. How do we know that this right is in

44 THE SUPREME COURT AND THE TEMPTATIONS OF POLITICS
the due process clause? Because Peckham and his brethren put it there. "The liberty mentioned in that amendment means. ..the right of the citizen to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Louisiana, through its legislature, had already decided that what Allgeyer did was unlawful. So Peckham's rule that citizens are free to do whatever is "lawful" meant that, without the assistance of any constitutional provision, he and not the legislature would decide what was lawful and what was not. The assumption of authority was open-ended and ad hoc, so it was not
too surprising that Peckham wrote, "When and how far [the state's legislative] power may be
legitimately exercised with regard to these subjects must be left for determination to each case as
it arises." This was lawlessness. The Court made up an entire new set of freedoms, including a
liberty to enter into contracts the legislature had prohibited, then refused to say what contracts
were protected, but promised to go from case to case deciding in each whether the legislature or
the Court would govern.

Peckham was as good as his word. In 1905 he wrote an opinion whose name lives in the law as
the symbol, indeed the quintessence, of judicial usurpation of power: *Lochner v. New York*.47 To
this day, when a judge simply makes up the Constitution he is said "to Lochnerize," usually by
someone who does not like the result. A New York statute set maximum daily and weekly hours
for bakers. Six Justices struck the law down, calling statutes of this nature "mere meddlesome
interferences with the rights of the individual." "The general right to make a contract in relation to
his business is part of the liberty of the individual protected by the Fourteenth Amendment. ...The
right to purchase or sell labor is part of the liberty protected. ...unless there are circumstances
which exclude the right." Peckham thought it proper to limit hours where the nature of the work
made that reasonable, but baking, in his view, was not such work. Peckham employed another
concept that judges have found useful in overturning legislation, the concept of "the police
power." That is a term historically given the general powers of legislatures. The better view of
state legislative power is that, as Justice Iredell said in *Calder v. Bull*, it encompasses the power to

make any enactment whatever that is not forbidden by a provision of a constitution.48 In such
cases, as Chief Justice Marshall said, the protection of citizens lies in the "interest, wisdom, and
justice" of their elected representatives. But a different view of the police power, to which
Peckham subscribed, came into being: that the power had inherent limits independent of any
constitutional prohibition, and that judges could enforce those limits by invalidating legislation
even where the Constitution was silent. That idea, of course, gave judges free rein to decide what
were and were not proper legislative purposes.

Four Justices dissented in *Lochner*, but three of them accepted the notion that there was a
liberty of contract to be found in the due process clause of the fourteenth amendment. Even the
dissent of Justice Oliver Wendell Holmes, Jr., which has become famous in the law, was flawed
in this manner. "I strongly believe," he wrote, "that my agreement or disagreement has nothing to
do with the right of a majority to embody their opinions in law. It is settled by various decisions
of this court that state constitutions and state laws may regulate life in many ways which we as
legislators might think as injudicious or if you like as tyrannical as this, and which equally with
this interfere with the liberty to contract. ...The liberty of the citizen to do as he likes so long as he
does not interfere with the liberty of others to do the same, which has been a shibboleth for some
well-known writers, is interfered with by school laws, by the Post Office, by every state or
municipal institution which takes his money for purposes thought desirable, whether he likes it or
not."49

Holmes went on in an oft-quoted passage: "[A] constitution is not intended to embody a
particular economic theory, whether of paternalism and the organic relation of the citizen to the
State or of laissez-faire. It is made for people of fundamentally differing views. ..." But he spoiled
it all by adding, "I think that the word liberty in the Fourteenth Amendment is perverted when it
is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational
and fair man necessarily would admit that the statute proposed would infringe fundamental
principles as they have been understood by the traditions of our people and our law." So Holmes,
after all, did accept substantive due process, he merely disagreed with Peckham and the majority
about which principles were fundamental. Nor did he explain why a free people could not decide

Creation and Fall 45
to exchange or abandon principles supported by tradition but not by the Constitution. There was no Justice on the Court who was not prepared to substitute his opinions for those of elected representatives at some point. The difference was merely about when that point was reached.

It is hard to say why *Lochner* rather than *Allgeyer* became the symbol of judicial usurpation of power. Perhaps the reason is that to the modern liberal mind it is essential that the state have the power to protect labor while the regulation of the details of the insurance business are unimportant. Or perhaps it is that Holmes who, oddly enough, given most of his views, is a hero to liberals, wrote a dissent in *Lochner*. The fact remains, however, that, as judicial performances the two are indistinguishable and equally unjustifiable assumptions of power. But, even with *Lochner*, the Court had not yet hit its stride. It will be possible to discuss only a few representative cases. Both federal and state courts were producing lots of *Lochners*.

*Adair v. United States*, So in 1908, struck down, under the due process clause of the fifth amendment, a federal statute banning "yellow dog" contracts—contracts by which an employee agreed not to join a union-on interstate railroads. In 1915, *Coppage v. Kansas* held unconstitutional a similar state law. *Adkins v. Children's Hospital*, a 1923 decision, invalidated a District of Columbia law setting minimum wages for women. The statute was defended on the ground that women needed special protection. The majority opinion argued that the passage of the nineteenth amendment, giving women the vote, meant that their civil inferiority was almost at a "vanishing point," which in turn meant that their liberty of contract was equal to that of men. This enabled Holmes, in dissent, to give the case its one memorable remark: "It will need more than the 19th Amendment to convince me that there are no differences between men and women."

The Court went on to strike down a Washington law forbidding employment agencies to collect fees from workers; a Pennsylvania enactment forbidding corporate ownership of pharmacies unless all the corporation's shareholders were licensed pharmacists; and Oklahoma statute treating the manufacture of ice as a public utility, and requiring any would-be entrant into the business to obtain from the state a certificate of public convenience and necessity. Many of these laws were pernicious. The pharmacy law was designed merely to prevent consumers from enjoying, and pharmacists from suffering, the competition of lower-cost services and medicines. The ice statute.

*Creation and Fall* 47 was an attempt to give existing ice manufacturers monopoly profits at the expense of consumers. The minimum wage law has the effect of putting less skilled workers out of work and limiting the competition of others with unionized labor. Perhaps there ought to have been a constitutional provision invalidating those laws. But there was not, and the Court had no business striking them down.

The Court's use of the concept of substantive due process was not limited to the protection of economic liberty, however. Immediately after the end of World War I, Nebraska and other states, including Iowa and Ohio, enacted laws that made it a criminal offense to teach a child who had not passed the eighth grade any language other than English. One Meyer was convicted in
Nebraska of teaching a ten-year-old child attending a Lutheran parochial school to read German. The Supreme Court of Nebraska, in upholding the statute, made its purpose clear: foreigners who came to this country often reared and educated their children in the language of their native land; the children thus thought in that language and hence were inculcated with ideas and sentiments contrary to the best interests of the United States; for that reason, the children must be taught no language other than English.

In *Meyer v. Nebraska*, the Supreme Court of the United States, in an opinion by Justice McReynolds, who is usually derided as a reactionary, and over a dissent by Justice Holmes, often mistakenly viewed as a liberal, held the statute unconstitutional under the due process clause of the fourteenth amendment. McReynolds began with the usual litany about the liberties protected by the due process clause—freedom from bodily restraint, the right to contract, to engage in the common occupations, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of one's own conscience, and "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Some of the listed freedoms, of course, are protected explicitly by other clauses of the Constitution. To the degree that McReynolds would apply them against the states through the due process clause, he was anticipating the later doctrine of "incorporation." But he did not articulate that technique here.

McReynolds's opinion was short and uninformative. He did not doubt the power of the state to compel attendance at some school, require that schools give instruction in English, and prescribe a curriculum for schools it supports. But the prohibition went too far: "Mere knowledge of the German language cannot reasonably be regarded as harmful." Holmes, today viewed as a civil libertarian, dissented because he thought the statute reasonable: "Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school."

Two years later, in 1925, another case involving the states' power over education came to the Supreme Court in *Pierce v. Society of Sisters*. Oregon's new Compulsory Education Act made it a misdemeanor for any parent to send a child who had not completed the eighth grade to any school other than a public one. The Society of Sisters operated primary schools that taught the subjects usually taught in the public schools and also provided systematic religious instruction and moral training according to the tenets of the Roman Catholic Church. The Hill Military Academy conducted primary schools in which the courses of study conformed to state requirements and also gave military instruction and training. Both institutions challenged the act under the fourteenth amendment. Justice McReynolds's opinion for a unanimous Court stressed that there was no challenge to the power of the state to require attendance at some school, that certain studies be taught, and that nothing be taught that was manifestly inimical to the public welfare. The state could, of course, regulate, inspect, test, and supervise to ensure that its regulations were followed. The statute failed, however, under the doctrine of *Meyer v. Nebraska*. "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

This last sentence suggests that McReynolds could have decided *Meyer* and *Pierce* in the same way by using an actual constitutional value rather than a judge-invented one. That was what Justice Hugo Black later attempted when he persuaded the Court that the fourteenth amendment incorporated, and so enforced against the states, various provisions of the Bill of Rights.
Whatever the historical merits of that approach, it had the potential of confining judges to rights specified in the Constitution. In the end, Black's strategy was unavailing. Court majorities accepted the power to enforce both the actual rights incorporated and new rights of their own invention.

In both Meyer and Pierce, it seems plain, the state was attempting to prevent the teaching of ideas not officially approved. In Meyer, learning German, or any other foreign language, at an early age was thought by the state to pose the danger of the inculcation of foreign ideas contrary to the best interests of the United States. Similarly, in Pierce the state wanted to do more than ensure that certain subjects and ideas were taught; it wanted to make sure that other ideas were not taught. Indeed, though it swept more broadly, the law was largely the product of anti-Catholic prejudice. So viewed, both of these decisions could have been laid under the guarantee of freedom of speech in the first amendment, and the application of Oregon's statute to the Society of Sisters might have been invalidated as well under that amendment's guarantee of the free exercise of religion.

It is unfortunate that the Court chose to use the undefined notion of substantive due process instead, because that notion, which is wholly without limits, as well as without legitimacy, provided a warrant for later Courts to legislate at will. The use of substantive due process to invalidate economic regulations became highly unpopular. The fact that it had been used in Meyer and Pierce to defend real constitutional rights lent a spurious legitimacy to later decisions using the due process clause to create new rights which are neither mentioned nor implied anywhere in the Constitution or its history.

In his 1905 Lochner opinion, Justice Peckham, defending liberty from what he conceived to be "a mere meddlesome interference," asked rhetorically, "[Are we all ...at the mercy of legislative majorities?" The correct answer, where the Constitution is silent, must be "yes." Being "at the mercy of legislative majorities" is merely another way of describing the basic American plan: representative democracy. We may all deplore its results from time to time, but that does not empower judges to set them aside; the Constitution allows only voters to do that.

By the 1930s, with the deepening of the Depression and a consequent spectacular alteration of political forces, voters put in power an administration that had to change the Court's performance radically in order to accomplish its ends.

18

Effects for the Future

What does the political campaign against my confirmation promise for the future of the nomination process? What does the possible permanent deterioration of that process mean for the future of the Court and the Constitution? It is too soon to be certain, but some important tendencies are apparent.

Some of what happened is specific to my situation and not necessarily instructive. I was nominated by a President who had lost much of his political power on Capitol Hill both because of the approaching end of his term and because he had been badly damaged in the Iran-Contra
affair. This was an opportune time for the Democrats to administer a defeat to Ronald Reagan. (The President himself generously took that view in my conversations with him, but I prefer to take some of the credit and to think that I qualified as a target in my own right.) The Republicans, moreover, had lost control the Senate in the 1986 elections. Finally, the liberals, who have ways regarded the federal judiciary as their particular ally in government, needed to stop my confirmation in particular. Because of my writings I had become perhaps the most visible proponent of adhering to what the Constitution actually says and of pointing out that where he Constitution is silent, the people must decide through legislation. That view is anathema to liberals who have come to view the courts is the branch that will enact their policies when legislatures won't. Quite aside from the effect of my vote on the Court, I was a symbol that they needed to destroy. They needed to prove that a liberal imperialistic Court is legitimate and that any other view is outside that they insist is "the mainstream."

A political attack of similar dimensions mayor may not happen I future nominees, but even so it seems likely that the way the campaign and the hearings were conducted will have long-term effects - effects on the judicial nomination process of the future, effects upon the substance of our law, particularly our constitutional law, and effects upon the intellectual life of the law.

Because I had written on relevant subjects, I was subjected to intensive questioning about what I had said years before. Some of the senators regard this as a precedent for inquiring into the nominees' views even if he has not written or otherwise created a track record. The confirmation hearings to which Justice Kennedy was subjected are hardly conclusive on the question of how the Senate and the Judiciary Committee will approach these matters in the future. Kennedy was questioned about his views and felt obliged to give answers. The fact that he was permitted to give quite general answers does not mean that others will be. The Senate cannot stage too many of these circuses consecutively. Some senators, particularly the Southern Democrats, knew they eventually had to confirm a nominee perceived as being conservative. Moreover, the activist groups that had spent millions and months in a hysterical campaign against me could not reach that peak of frenzy twice in a row. When some of the groups wanted to mount such a campaign against Justice Kennedy, one senator said, "Nobody wants to go through that again. There's just too much blood on the floor. But, after some time has passed, they may well be able to mount such a campaign against a future nominee.

The greatest impact of what occurred, however, may not be simply the precedent set but what the knowledge that such a campaign is always possible will do to the calculations of other actors in the process.

The senators are now accustomed to insisting upon answers to doctrinal questions. If they continue that practice, they will effectively compel nominees to make campaign promises or face the possibility of rejection. It is amusing that some senators claimed that the White House imposed a litmus test for the President's nominees. No one in the Administration asked me a single question about my views on any topic of law. They were satisfied that they knew my approach to judging. By contrast, various senators not only asked my views but insisted that I adopt what they thought the correct position. At one point we counted about seventeen propositions that senators wanted me to agree to, some of them highly controversial. I did not agree to them and lost votes as a result. If senators are able to get future nominees to agree, the Senate and not the Supreme Court will come to control the substance of our constitutional law. Perhaps "control" is too strong a word, but the Senate will certainly influence Supreme Court decisions in a variety of areas. That is not our constitutional form of government. If the Court has often erred by encroaching upon the legislative domain, it is equally inconsistent with the American constitutional design when the Senate encroaches upon areas left to the legitimate authority of the Court.
But there is another way in which this episode may affect both the course of the law and the intellectual life of the law. It is impossible to know how many opinions, articles, and books will be written differently because of this episode. That some will seems certain. My 1971 article in the Indiana Law Journal was, even before the hearings, one of the most discussed and cited law review articles in our history. It accomplished what I, as a professor, had hoped: It generated debate and fresh theoretical inquiry. But despite its explicitly tentative and speculative nature, and despite years of a subsequent record in public service, that article, in badly misrepresented form, became the single most effective weapon used against me. I remain glad that I wrote it. Most of it still seems to me entirely correct. But it is possible to wonder what the effect will be on men and women who observed the political use made of an academic writing.

In the short run, the pool of potential nominees is likely to shrink and change in composition. A president who wants to avoid a battle like mine, and most presidents would prefer to, is likely to nominate men and women who have not written much, and certainly nothing that could be regarded as controversial by left-leaning senators and groups. People who have thought much about the role proper to judges are likely, however, to have written or spoken on the subject. The tendency, therefore, will be to nominate and confirm persons whose performance once on the bench cannot be accurately, or perhaps even roughly, predicted either by the President or by the Senate.

In the longer run, the anticipation that campaigns such as this may be waged is likely to affect both the course of the law and the intellectual life of the law. There are in this country a great many men and women who are potential Supreme Court nominees; there are a great many more who imagine that they are potential nominees; and many more than that who may be unwilling early in their careers permanently to rule out the possibility of a federal judgeship. It is quite conceivable that some lower court judges may be affected in the decisions they make and in the opinions they write. The panel's decision and my opinion in American Cyanamid, the case of the women given the option of sterilization, was, for example, ruthlessly misrepresented. Perhaps a judge faced with a similarly exploitable issue will decide the case the other way and write an opinion filled with popular sentiments. I am sure most judges will not consciously yield to that temptation, but the career hazards involved in deciding a case according to the law ought not even be in the back of any judge's mind. Now, I fear, that is inevitable.

Lawyers and professors have been encouraged to think twice or three times about what they write. Criticizing the reasoning of a politically popular decision, particularly one popular with the senators and activist groups of the left, may be a significant hindrance to attaining a career on the bench. I have already learned of instances of lawyers withdrawing articles from magazines for this very reason. One magazine had two such episodes. One lawyer withdrew an article he had submitted altogether, explicitly on the grounds of my experience, and the other, at last report, was resisting editorial changes that would make his points clearer.

My nomination did not, of course, create these trends. It merely brought them into the open in a way that had never previously occurred but was bound to happen sooner or later as conservative presidents, armed with the nomination power, begin to threaten the liberal hegemony over the courts. This book has traced the increasingly political nature of the Supreme Court, which reached its zenith with the Warren Court, and the increasing, by now almost overwhelming, politicization of the law schools, where much constitutional scholarship is now only politics. When the Court is perceived as a political rather than a legal institution, nominees will be treated like political candidates, campaigns will be waged in public, lobbying of senators and the media will be intense, the nominee will be questioned about how he will vote, and he will be pressed to make campaign promises about adhering to or rejecting particular doctrines.
This is a logical development as law becomes politicized. Why, then, since the Warren Court began over thirty years ago, did the development not occur sooner? One answer is that it did, but some earlier battles, while essentially political, were not overtly so. Judge Clement Haynesworth's defeat in the Senate was very largely political but was presented as concern about a quite trivial ethical matter. The old forms and procedures had considerable staying power because to engage in ideological battle is to admit publicly that the Court is at least partially politicized and that you accept that condition. In my case, after the most minute scrutiny of my personal life and professional record, all that was available to the opposition was ideological attack, and so politics came fully into the open. I had criticized the Warren Court, and this was the revenge of the Warren Court.

Though I hope it is not true, the forms and restraints of the Senate confirmation process in which the nominee was judged on professional ability and integrity alone have probably been weakened. It will be easier in the future to be explicitly ideological in support of or opposition to a nominee. But whether that ideological testing is overt or covert, it will continue so long as courts are seen as political. And they will be seen that way so long as their behavior invites such a perception.

There seems to be no immediate prospect that the steady politicization of the law and its institutions will slow, much less be reversed. Too many people have come to see as crucial the capture of the law and its deployment as a political weapon. This explains the recent battles over lower court appointments and even over appointments to the Department of Justice. One effect of the political struggle over my nomination was to heighten awareness of what is at stake, and the effects may be seen everywhere. When the Supreme Court recently handed down rather moderate civil rights and abortion decisions, we witnessed an explosion of inflammatory rhetoric from activist groups surpassing in violence anything witnessed for over thirty years. Insults to particular Justices and threats of civil disobedience were bandied freely.

Nor should this be surprising. We have been moving in this direction for a long time. No legal system can produce increasingly political results without at some point ceasing to be, or earning the respect due, a legal system. Groups that have been taught to see the courts as their reliable political ally, as their branch of government, react in fury when courts begin to apply law instead. The Supreme Court is our preeminent symbol of the rule of law. If the Court comes to seem illegitimate, the legitimacy of law itself declines and the moral obligation to obey it is cast into doubt. What the future holds in this respect is unclear. What is clear is that we have come close to a tipping point and we must draw back.

**Conclusion**

The Constitution has been many things to Americans. It has been and remains an object of veneration, a sacred text, the symbol of our nationhood, the foundation of our government's structure and practice, a guarantor of our liberties, and a moral teacher.

But the Constitution is also power. That is why we see political struggle over the selection of the judges who will wield that power. In our domestic affairs and even to some degree in our foreign dealings, the Constitution provides judges with the ultimate coercive power known to our political arrangements. In the hands of judges, words become action: commands are issued by courts, obeyed by legislatures, and enforced by executives. The reading of the words becomes freedoms and restrictions for us; the course of the nation is confirmed or altered; the way we live and the ways we think and feel are affected.

It will not do to overstate the matter. We are an incredibly complex and intricate society and no power is without checks, some obvious and direct in operation, some subtle and intangible.
But a major check on judicial power, perhaps the major check, is the judges' and our understanding of the proper limits to that power. Those limits may be pressed back incrementally, case by case, until judges rule areas of life not confided to their authority by any provision of the Constitution or other law. We have, in fact, witnessed just that process. The progression of political judging, judging unrelated to law, has been recounted in this book. This progression has greatly accelerated in the past few decades and now we see the theorists of constitutional law urging judges on to still greater incursions into Americans' right of self-government.

This is an anxious problem and one that can be met only by understanding that judges must always be guided by the original understanding of the Constitution's provisions. Once adherence to the original understanding is weakened or abandoned, a judge, perhaps instructed by a revisionist theorist, can reach any result, because the human mind and will, freed of the constraints of history and "the sediment of history which is law," can reach any result. As we have seen, no set of propositions is too preposterous to be espoused by a judge or a law professor who has cast loose from the historical Constitution.

The judge's proper task is not mechanical. "History," Cardinal Newman reminded us, "is not a creed or a catechism, it gives lessons rather than rules." No body of doctrine is born fully developed. That is as true of constitutional law as it is of theology. The provisions of the Constitution state profound but simple and general ideas. The law laid down in those provisions gradually gains body, substance, doctrines, and distinctions as judges, equipped at first with only those ideas, are forced to confront new situations and changing circumstances. It is essential, however, that the new developments always be weighed in the light of the lessons history provides about the principles meant to be enforced. Doctrine must be shaped and reshaped to conform to the original ideas of the Constitution, to ensure that the principles intended are those which guide and limit power, and that no principles not originally meant are invented to deprive us of the right to govern ourselves. The concept of original understanding itself gains in solidity, in articulation and sophistication, as we investigate its meanings, implications, and requirements, and as we are forced to defend its truths from the constitutional heresies with which we are continually tempted.

Among the stakes is the full right of self-government that the Founders bequeathed us and which they limited only as to specified topics. In the long run, however, there may be higher stakes than that. As we move away from the historically rooted Constitution to one created by abstract, universalistic styles of constitutional reasoning, we invite a number of dangers. One is that such styles teach disrespect for the actual institutions of the American nation. A great many academic theorists state explicitly, and some judges seem easily persuaded, that elected legislators and executives are not adequate to decide the moral issues that divide us, and that judges should therefore take their place. But, when Americans are morally divided, it is appropriate that our laws reflect that fact. The often untidy responses of the elected branches possess virtues and benefits that the "principled" reactions of courts do not. Our popular institutions, the legislative and executive branches, were structured to provide safety, to achieve compromise when we are divided, to slow change, to dilute absolutisms. They both embody and produce wholesome inconsistencies. They are designed, in short, to do the very things that abstract generalizations about moral principle and the just society tend to bring into contempt. That is a dangerous civics lesson to teach the citizens of a republic. As Edmund Burke put it:

All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter. We balance inconveniences; we give
and take; we remit some rights, that we may enjoy others; and, we choose rather to be happy citizens, than subtle disputants.

It may be significant that this passage is from Burke's speech on *Moving His Resolutions for Conciliation With the Colonies*, delivered to Parliament in 1775. The English government elected to stand on abstract principles of sovereignty and lost the American colonies.

The attempt to define individual liberties by abstract moral philosophy, though it is said to broaden our liberties, is actually likely to make them more vulnerable. I am not referring here to the freedom to govern ourselves but to the freedoms from government guaranteed by the Bill of Rights and the post-Civil War amendments. Those constitutional liberties were not produced by abstract reasoning. They arose out of historical experience with unaccountable power and out of political thought grounded in the study of history as well as in moral and religious sentiment.

Attempts to frame theories that remove from democratic control areas of life our nation's Founders intended to place there can achieve power only if abstractions are regarded as legitimately able to displace the Constitution's text and structure and the history that gives our legal rights life, rooted-ness, and meaning. It is no small matter to discredit the foundations upon which our constitutional freedoms have always been sustained and substitute as a bulwark only the abstract propositions of moral philosophy. To do that is, in fact, to display a lightmindedness terrifying in its frivolity. Our freedoms do not ultimately depend upon the pronouncements of judges sitting in a row. They depend upon their acceptance by the American people, and a major factor in that acceptance is the belief that these liberties are inseparable from the founding of the nation. The moral systems urged as constitutional law by the theorists are not compatible with the moral beliefs of most Americans. Richard John Neuhaus wrote that law is "a human enterprise in response to human behavior, and human behavior is stubbornly entangled with beliefs about right and wrong..." Law will not be recognized as legitimate if it is not organically related to "the larger universe of moral discourse that helps shape human behavior." Constitutional doctrine that rests upon a parochial and class-bound version of morality, one not shared by the general American public, is certain to be resented and is unlikely to prove much of a safeguard when crisis comes.

Robert Bolt's play about Thomas More, *A Man For All Seasons*, makes the point. When More was Lord Chancellor, his daughter, Margaret, and his son-in-law, Roper, urged him to arrest a man they regarded as evil. Margaret said, "Father, that man's bad." More replied, "There is no law against that." And Roper said, "There is! God's law!" More then gave excellent advice to judges: "Then God can arrest him. ...The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal. ...I'm not God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester.

Roper would not be appeased and he leveled the charge that More would give the Devil the benefit of law.

MORE. Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER. I'd cut down every law in England to do that!

MORE. ...Oh? ...And when the last law was down, and the Devil turned round on you-where would you hide, Roper, the laws all being flat? ..This country's planted thick with laws from coast to coast-man's laws, not God's-and if you cut them down - d'you really think you could stand upright in the winds that would blow then? ...Yes, I'd give the Devil benefit of law, for my own safety's sake.

This is not a romanticized version of the man, for the historic More is reported to have said of his duty as a judge: "If the parties will at my hands call for justice, then, all were it my father stood..."
on the one side, and the Devil on the other, his cause being good, the Devil should have right...6 It is a hard saying and a hard duty, but it is the duty we must demand of judges.

Judges will always be tempted to apply what they imagine to be “God’s law,” cutting a great road through man’s law. When they have done, when man’s law has been thoroughly weakened and discredited, and when powerful forces have a different version of God’s law or the higher morality, may we find that the actual rights of the Constitution and the democratic institutions that protect us may have all been flattened.

The difference between our historically grounded constitutional freedoms and those the theorists, whether of the academy or of the bench, would replace them with is akin to the difference between the American and the French revolutions. The outcome for liberty was much less happy under the regime of the abstract “rights of Man” than it has been under the American Constitution. What Burke said of the abstract theorists who produced the calamities of the French Revolution might equally be said of those, judges and professors alike, who would remake our constitution out of moral philosophy: “This sort of people are so taken up with their theories about the rights of man that they have totally forgotten his nature.” Those who make and endorsed our Constitution knew man’s nature, and it is to their ideas, rather than to the temptations of utopia, that we must ask that our judges adhere.