The Supreme Court of the United States

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At the 1949 term the Supreme Court of the United States disposed of slightly more than thirteen hundred cases. In the decade 1940-49 the average number of annual dispositions was more than twelve hundred.[1] These bare and arresting figures suggest a number of inquiries. How do these cases reach the Court and what is the process of deliberation and adjudication by which they are translated from items on the docket to controversies disposed of? What are the significant functions of the Court and what are the standards that guide it in the discharge of those functions? What is the larger rôle of the Court in the symbolism, attachment to which forms the basis of a constitutional system? These inquiries may be conveniently subsumed under three heads: (1) The Jurisdiction and Administrative Side of the Court; (2) The Court as Arbiter; (3) The Court as Symbol.

I. *The Jurisdiction and Administrative Side of the Court*

Article III of the Constitution of the United States provides that the judicial power of the United States "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish". The judges of all the federal courts hold office, by virtue of other provisions of Article III, during good behaviour; they are appointed by the President with the advice and consent of the Senate and their compensation may not be diminished during their continuance in office. While the bare existence of the Court is thus constitutionally secured, the size of the Court is left to Congressional legislation, as is the scope of its appellate jurisdiction. After setting forth the several classes of controversies over which the federal courts may be

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[1] For the statistics see Note, The Supreme Court, 1949 Term (1950), 64 Harv. L. Rev. 114, at p. 157.

given jurisdiction, Article III states: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Standing as it does at the apex of a hierarchy of state and federal courts, the Supreme Court is no ordinary court of last resort. Its special position does not fit easily into the well-worn epigram that trial courts search for truth and appellate courts search for error. Its contemporary province was marked out by the Judiciary Act of 1925, which in conception and drafting was largely the work of the Court itself under the aegis of Chief Justice Taft.[2]

The philosophy of the 1925 Act is that, on the whole, only controversies of general importance should find their way to the calendar of the Supreme Court of the United States. The technique for realizing this philosophy is the certiorari jurisdiction of the Court. One must recall that appellate cases may be taken to the Court by way of two routes: appeal and certiorari, depending on the nature of the case.[3] The avenue of appeal, which replaced the older writ of error, is reserved principally for cases from state courts in which the highest court of the State has held a state statute valid under the Federal Constitution. Other cases from the highest courts of the states — decisions holding state statutes unconstitutional, construing federal statutes, or involving federal privileges and immunities like full faith and credit to judgments of sister states — must take the avenue of certiorari. The functional difference between appeal and certiorari is that jurisdiction under the former is obligatory, under the latter discretionary with the Supreme Court.

The canons governing the Court's exercise of its discretion in granting or denying petitions for certiorari have been set out in Rule 38 of the Supreme Court Rules. Chief among the factors which will move the Court to grant certiorari are the general importance and novelty of the issues in the case, the existence of a conflict of decisions among the intermediate federal courts of

[2] Act of Feb. 13th, 1925, c. 229, 43 Stat. 936. See Frankfurter and Landis, The Business of the Supreme Court (1927) c. VII, which appeared earlier in (1927), 40 Harv. L. Rev. 834.

[3] Review of decisions of state courts is provided for in 28 U. S. C. § 1257; of federal courts of appeals, in *id.* § 1254. A very useful guide to the jurisdiction and practice of the Court is Stern and Gressman, Supreme Court Practice (1950).

appeals, or an apparent departure by the court below from a controlling authority of the Supreme Court. It should be added that the privilege of self-determination granted to the Court in its certiorari jurisdiction by the Act of 1925 has in practice been carried over to some extent to the disposition of appeals. Just as petitions for certiorari are granted or dismissed on the moving papers (the petition and the respondent's brief in opposition), and only the granted cases are set down for briefs and argument on the merits, so in administering its cognate jurisdiction on appeal the Court requires a statement of jurisdiction by the appellant (to which the appellee may oppose a motion to dismiss or affirm), and on the basis of these papers an appeal may be dismissed without argument "for the want of a substantial federal question". Thus a constitutional decision of a state court which is technically entitled to review but which would raise no issues requiring a full submission on the merits will not be allowed a place on the calendar for argument.

Cases from the federal courts of appeals (of which there are ten, plus the Court of Appeals for the District of Columbia) typically reach the Supreme Court by certiorari. These intermediate federal courts are the appellate tribunals for the federal district courts, whose jurisdiction, partly concurrent with that of the state courts, extends to cases arising under the Constitution or federal laws and those between citizens of different states. In contrast to the review of state court decisions, where some constitutional or other federal question must have been the turning point in the judgment, the Supreme Court may review decisions of the federal courts of appeals on any issue, including a misapplication by the court of relevant state law.

In addition to the flow of cases from the state courts and the federal courts of appeals, there is a final group which reaches the Supreme Court on direct appeal from the federal district courts (of which there is at least one in every state). These rather exceptional opportunities for direct review are limited to cases in which a district court has held an Act of Congress unconstitutional; or has dismissed an indictment on the ground of construction of the governing criminal statute; or has decided a civil suit brought by the Government under the federal antitrust laws.[4] In addition, direct appeal to the Supreme Court will lie from the decision of a specially constituted three-judge district court, which must be convened to hear applications for injunction

[4] See 28 U.S.C. § 1252; 18 U.S.C. § 3731; 15 U.S.C. § 29; 47 U.S.C. § 401 (d).

against the enforcement of state or federal laws on the ground of unconstitutionality and to hear petitions to set aside certain orders of the Interstate Commerce Commission and a few kindred agencies.[5]

Nothing has been said of the original, as distinguished from the appellate, jurisdiction of the Supreme Court. In fact the original jurisdiction is narrowly confined and strictly construed. It extends principally to controversies between two or more states (in which the states must be the real parties in interest), between the United States and a state, and between a state and citizens of another state.[6] An occasional dispute over boundaries or apportionment of interstate waters or the ownership of minerals in the marginal sea is filed in the Supreme Court and, if a determination of facts is required, is referred to a special master for hearing and report.

With these dreary details of jurisdiction in mind, one can perhaps understand how the Court managed to dispose of upwards of thirteen hundred cases at the 1949 term. Actually less than one-tenth of the cases were decided with full opinion and less than one-sixth of the cases were decided on the merits. The other five-sixths were disposed of mainly by denial of petitions for certiorari.

While the device of statutory certiorari has enabled the Court to keep abreast of its docket and indeed to harry counsel into the argument of cases more rapidly after the grant of certiorari than counsel would sometimes choose, there is still some feeling within and without the Court that the opportunity for unhurried deliberation, full consultation and scholarly opinion-writing is inadequate. The Court can, within limits, control the volume of cases to be argued and decided on the merits; it cannot control the volume of petitions for certiorari and appeal papers filed by counsel. In recent years there has been some swelling of applications for certiorari owing to the Court's growing concern with the due process requirements of criminal procedure in state and federal courts, combined with its liberal practice in receiving petitions *in forma pauperis*.[7] Such petitions of late have reached a total of several hundred a term, and since ordinarily they reflect less careful technical skill in their preparation and are presented in type-

[5] See 28 U. S. C. §§ 1253, 2281-82, 2325.

[6] See 28 U. S. C. § 1251. Compare the majority and dissenting opinions in *Georgia* v. *Pennsylvania RR.* (1945), 324 U. S. 439.

[7] For the part played by Chief Justice Hughes in this development, and for an illuminating account of the administrative side of the Court, see McElwain, The Business of the Supreme Court as Conducted by Chief Justice Hughes (1949), 63 Harv. L. Rev. 5.

written rather than printed form the burden on the Court's time may be even greater than the proportionate number of these petitions would suggest.

The Court normally sits to hear arguments during two-week periods followed by two weeks of recess, from October to June. Since, as Mr. Justice Frankfurter has recently lamented, the English week-end has not made its way into the schedule of the Court,[8] conferences are held on Saturday for the consideration of cases argued during that week and for action on certioraris ready for disposition. Unlike the practice in some of our state courts, opinions are assigned not by rotation but by the Chief Justice, or, if he is in the minority, by the senior Associate Justice in the majority. As is evident to all readers of the Supreme Court Reports, the practice of framing dissenting opinions is freely indulged in, and of late years there has been a growing tendency to prepare special concurring opinions. Thus the practice stands midway between that of the seriatim opinions of the House of Lords and that of the unitary opinion of the Privy Council (lest, we are told, the Crown would be confused by conflicting advice).

Amid all the shifts of doctrine that have occurred in the more than a century and a half of the Court's life, one principle has been steadfastly professed: that the Court will decide only an actual case or controversy and will not render an advisory opinion or a judgment in a non-adversary proceeding.[9] This is the central paradox of the Court's jurisdiction and functions: Its special rôle is to resolve questions of general importance transcending the interests of the litigants and yet it will do so only where necessary to adjudicate a conventional legal dispute between the parties.[10] Faced with this paradox, it is not surprising that on occasion the Court has wavered in its fidelity to the principle of abstention. Occasionally the Court has been moved by the gravity of the issues and the pressures for settlement to pass upon constitutional questions in cases that seem to have been something

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[8] Address by Mr. Justice Frankfurter, The Health of the Society (1950), 1 J. Soc. Pub. Teachers of Law 363-64.

[9] A *locus classicus* for this principle and its corollaries is the concurring opinion of Brandeis J. in *Ashwander* v. *T. V. A.* (1936), 297 U. S. 288, at p. 341; see also Rutledge J. in *Rescue Army* v. *Municipal Court* (1947), 331 U.S. 549.

[10] Indeed, not until the Judiciary Act of 1937 was the United States allowed to intervene as of right in private litigation involving a challenge to the constitutionality of an Act of Congress. The 1937 Act was the upshot of the President's unsuccessful effort to reorganize the Court; the Act also contains provisions for three-judge district courts and direct appeal to the Supreme Court in certain constitutional cases. Act of Aug. 24th, 1937, c. 754, 50 Stat. 751.

less than bona fide adversary proceedings calling for the exercise of traditional judicial power.

The sorry consequences of certain of these departures have doubtless confirmed the Court in the wisdom of its professed canons of self-limitation. Looking back on the *Dred Scott* decision,[11] which by holding unconstitutional an Act of Congress forbidding slavery in the territories foreclosed one mode of compromise of the gathering tensions before the Civil War, it can be seen that the decision might have been avoided on the ground that the jurisdiction of the federal district court resting on diversity of citizenship was established by a collusive transfer of ownership of the slave. Looking back on the Income Tax cases[12] which held that a tax on income from property was a tax on the property itself and thus a direct tax which had to be apportioned according to population under the Constitution, it is evident that the decision could have been avoided by recognizing that there was no equity jurisdiction in the suit by a stockholder to enjoin his corporation from paying the tax, inasmuch as there was an adequate remedy at law by way of payment and claim for refund It is noteworthy that these two cases were among the three which Charles Evans Hughes characterized as the principal self-inflicted wounds of the Court.[13] Noteworthy too is the fact that although in 1935 Congress enacted a Declaratory Judgments Act, the statute is limited to "cases of actual controversy" and the Supreme Court has been chary of permitting it to enlarge the standing of litigants to raise constitutional issues.[14]

Back of the formal bases for the Court's self-denying ordinance — the requirement of "case" or "controversy" in Article III of the Federal Constitution and the doctrine of separation of powers — lies the conviction that the framework of a traditional adversary proceeding furnishes a safeguard against premature or ill-advised decisions in the constitutional field. Especially is this true of issues of constitutionality which turn, as they increasingly do, on questions of fact and degree and application to persons and circumstances.

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[11] *Dred Scott* v. *Sandford* (1857), 19 How. 393.

[12] *Pollock* v. *Farmers Loan & Trust Co.* (1895), 157 U. S. 429, 185 U. S. 601.

[13] Hughes, The Supreme Court of the United States (1928) 50-54. The third of the ill-starred triad was *Hepburn* v. *Griswold* (1870), 8 Wall. 603, overruled in *Legal Tender Cases* (1871), 12 Wall. 457.

[14] See, *e.g.*, *Electric Bond & Share Co.* v. *S. E. C.* (1938), 303 U. S. 419, at p. 443; cf. Note, Declaratory Judgments, 1941-1949 (1949), 62 Harv. L. Rev. 787, 867-74.

II. *The Court as Arbiter*

The determination of common-law controversies forms a steadily diminishing portion of the Supreme Court's jurisdiction. It is true that one of the sources of its jurisdiction is review of cases originating in the district courts under the diversity of citizenship clause and that for a century, during the reign of *Swift* v. *Tyson*,[15] the federal courts were at liberty to develop a federal common law independent of that of the states. Since the overruling of *Swift* v. *Tyson* in 1938[16] these common-law cases are transformed into efforts to ascertain the applicable state law; if the lower federal courts have made a diligent effort to do so the Supreme Court will let the matter rest without review. With the proliferation of federal regulatory and revenue measures and the need for uniformity of interpretation, the task of statutory construction has taken an increasing share of the Court's business. But it is in the area of constitutional law that the Court performs its most distinctive function.

Standing at one remove from the resolution of conflicting pressures and interests through legislation, the Court serves perforce as an arbiter of state and national power and of the claims of Government against the individual. In terms of the formalities of the Constitution, the Court is above all concerned with the commerce clause[17] as the instrument of a working federalism and with the Bill of Rights and the Fourteenth Amendment as guarantees of an open society.

It should be said at once that in approaching these profoundly important and delicate tasks the Court is governed less by canons of construction than by philosophic moods. By philosophic mood is not meant personal idiosyncrasy but rather that fusion of a sense of history, of the logical faculty, and of the practical ends in view which must in some subtle balance serve the judge in the judicial process. In its most enduring and memorable work, the Court has been careful not to read the provisions of the Constitution like a last will and testament, lest indeed they become one. Instead the justices have been guided by the basic canon of Marshall, calculated to turn the mind away from canons: "This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of

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[15] (1842), 16 Pet. 1.
[16] *Erie RR* v. *Tompkins* (1938), 304 U. S. 64.
[17] Art. I, s. 8: "The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;"

human affairs".[18] It was in the tradition of Marshall that Holmes gave expression to his philosophy of constitutional adjudication, when in speaking of the scope of the treaty-making power he said:[19]

> . . . when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

The procedural guarantees, in Holmes's view, were to be similarly taken:[20]

> . . . the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

In the same tradition Chief Justice Hughes, dealing with the obligation of contract clause, voiced the organic conception of the Constitution:[21]

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.

The commerce clause—the mechanism by which, as has been said, the Court strives to maintain a working federalism—has furnished a vivid illustration of the Court's response to the task of constitutional decision. Three interrelated problems are presented: the scope of the power of Congress, the extent of the power of the states in the silence of Congress, and the effect upon state power of an exercise of Congressional authority. The first problem was dramatized in the early New Deal period. A majority of the Court, over the protests of Justices Brandeis, Stone and

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[18] *McCulloch* v. *Maryland* (1819), 4 Wheat. 316, at p. 413.
[19] *Missouri* v. *Holland* (1920), 252 U. S. 416, at p. 433.
[20] *Gompers* v. *U. S.* (1914), 233 U. S. 604, at p. 610.
[21] *Home Bldg. & Loan Assn.* v. *Blaisdell* (1934), 290 U.S. 398, at pp. 442-43.

Cardozo, and on occasion of Chief Justice Hughes, attempted to measure the extent of national authority by such talismanic phrases as "direct" and "indirect" effects on interstate commerce. In so doing they struck down, for example, an Act regulating labour relations in the bituminous coal industry, although a conspiracy on the part of miners to stop the flow of shipments had been recognized as falling within the federal antitrust laws.[22] One need not have been an historical determinist to predict that no simple verbal antinomy and no infusion of the law of torts into constitutional law was powerful enough to stem the tide of national power over activities local in character but having palpable effects on national trade and transportation. Nor need one be a cynic, professing that a switch in time saved nine when the President's Court reorganization plan was introduced, to understand the course of decision from 1937 on, sustaining every measure of national control over the economy.[23]

The problem of state power in the silence of Congress had given rise in the mid-nineteenth century to similar brave but doomed efforts at solution through phrases. For a time it was thought that state laws promoting local health or safety could be sustained because they were not regulations of commerce even though to the pragmatic eye they had all the effects on interstate trade that would have flowed from the same measures if designated commercial. The Court has long since abandoned the merely verbal criteria and has sought, on a highly particularistic basis, to weigh the local benefit and need against the burden on commerce with other states. In the silence of Congress a state may enforce a full-crew law against an interstate railroad; but it may not apply a maximum-train-length statute to such a carrier.[24] The difference can be found only in an estimate, based on a detailed record, of the balance in each case between local safety and the consequences to interstate traffic.[25] Similarly, no monosyllabic answer can be given to the question whether a state may impose

[22] *Carter* v. *Carter Coal Co.* (1936), 298 U.S. 238 (Cardozo, Brandeis and Stone JJ. dissenting); cf. *Coronado Coal Co.* v. *United Mine Workers* (1925), 268 U.S. 295 (conspiracy under antitrust laws). For a particularly vigorous dissent by Hughes C.J. from a restrictive commerce-clause decision see *Railroad Retirement Bd.* v. *Alton RR.* (1935), 295 U.S. 330, at p. 374.

[23] A vivid account of the Court's performance before and after the Court plan is contained in Mr. Justice (then Attorney General) Jackson's book, The Struggle for Judicial Supremacy (1941). The current scope of national power under the commerce clause is perhaps sufficiently revealed by *Wickard* v. *Filburn* (1942), 317 U. S. 111 (sustaining acreage quotas for wheat, including wheat consumed on the farm).

[24] Compare *Missouri Pac. RR.* v. *Norwood* (1931), 283 U.S. 249, with *Southern Pac. Co.* v. *Arizona* (1945), 325 U. S. 761.

[25] In the *Southern Pacific* case, *supra* footnote 24, the printed record extends to 4,088 pages.

a licence requirement upon an interstate business; if the grant of the licence turns on factors of commercial competition it will probably be struck down while if it turns on the financial reliability or sanitary standards of the enterprise in its dealings with local customers it may well be sustained.[26]

There is, finally, the problem of the effect of affirmative Congressional action on the authority of the states. This effect, in turn, has a double aspect. On the one hand an Act of Congress which "occupies the field" supersedes inconsistent state legislation. But what is meant by the quoted phrase turns once more on a precise analysis of the national policy and the practical effect of the state law on the carrying out of that policy.[27] On the other hand, Congress may elect to use its power not to extend but to contract the scope of national authority. That is, Congress may authorize the states to act upon interstate commerce in ways that would be held to be precluded in the silence of Congress. This technique presents theoretical difficulties that were serious enough to lead President Taft to veto on constitutional grounds the Webb-Kenyon Act, which permitted any state to penalize the importation into it of intoxicating liquors.[28] Various objections could be raised: that Congress may not "delegate" its power over interstate commerce; that Congress may not "regulate" commerce in a non-uniform way; and that since in certain other clauses, notably with respect to state taxation of imports and exports,[29] the Constitution explicitly permits the states to act with the consent of Congress, the maxim *expressio unius* precludes validation by consent under the commerce clause. These objections have been unavailing. The theoretical justification is perhaps best put in terms of the paramount standard of the intention of Congress: In the silence of Congress the Court must hazard the putative intention, while when Congress speaks the judgment of the Court yields to that of Congress in striking a balance between national and state interests. Congress may "regulate" by silence, by extension of its authority or by permissive sanction to the states.

The result has been an enormously flexible and resourceful federalism. Its value can be seen in the treatment of public control of insurance. For a long time it was generally supposed that

[26] Compare *H. P. Hood & Sons* v. *DuMond* (1949), 336 U. S. 525, with *Milk Board* v. *Eisenberg Co.* (1939), 306 U. S. 346; and *Buck* v. *Kuykendall* (1925), 267 U. S. 307, with *Robertson* v. *California* (1946), 328 U. S. 440.

[27] See Note, "Occupation of the Field" in Commerce Clause Cases, 1936-1946 (1946), 60 Harv. L. Rev. 262.

[28] The Act was passed over the veto and was sustained in *Clark Distilling Co.* v. *Western Md. Ry.* (1917), 242 U. S. 311.

[29] Const., Art. I, s. 10.

the making of insurance contracts was not interstate commerce. In 1944, departing from a body of dicta and assumptions, the Court held that the business of insurance was interstate commerce subject to the Sherman Antitrust Act.[30] This decision placed in some jeopardy the complex pattern of state legislation which had been worked out on the premise that insurance was not interstate commerce. A solution was found, making the best of both worlds of regulation, when Congress promptly enacted a law in the pattern of the earlier legislation on intoxicating liquors, authorizing the states to tax and regulate insurance without regard to its interstate character.[31]

Co-operative federalism has taken many forms, not all of them stemming from the commerce clause. Under the power to tax and spend, Congress may make grants to the states upon conditions which are relevant to the federal purposes. Congress may provide a credit for taxpayers against federal taxes on condition that payments are made by the taxpayer under appropriate conditions to his state; this has furnished the co-operative pattern of federal-state unemployment insurance legislation, under which premiums paid to a federally approved state fund are credited against the employer's federal social security tax.[32] Modes of co-operation have been worked out also in the sphere of judicial administration. The federal district courts regularly hear diversity of citizenship cases instituted there or removed from a state court, where the cause of action may rest wholly on state law. Conversely, Congress may require the state courts to entertain causes of action under federal law, at least where the state tribunals have competence to adjudicate comparable cases under their own law.[33] The interlacing patterns may be wanting in clarity and sharpness but they serve to meet the basic need for modes of organization that avoid both the balkanization of a loose confederation and the ultimate centralization of a unitary state. Within wide limits the United States may experiment with the processes of federalism. And, as Mr. Justice Johnson observed more than a century ago, "The science of government . . . is the science of experiment".[34]

When we turn from problems of federalism to the relations between the individual and his government, we find that the

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[30] *United States* v. *South-Eastern Underwriters Assn.* (1944), 322 U.S. 533.
[31] The Act was sustained in *Prudential Ins. Co.* v. *Benjamin* (1946), 328 U. S. 408.
[32] *Steward Machine Co.* v. *Davis* (1937), 301 U. S. 548.
[33] *Testa* v. *Katt* (1947), 330 U. S. 386 (Price Control Act).
[34] *Anderson* v. *Dunn* (1821), 6 Wheat. 204, at p. 226.

experimental mood of the Court now tolerates the widest range of legislation save in one sphere. Within the past fifteen years social and economic legislation of state or nation has almost never been struck down under the due process clause of the Fifth or Fourteenth Amendment; but legislation restricting the freedom of speech or assembly or religion has frequently succumbed to the prohibitions of the First Amendment and of the Fourteenth, which has absorbed and made applicable to the states the provisions of the First.[35] The difference in treatment has been justified in a number of ways. It has been pointed out that the guarantees of the First Amendment are more explicit than the standards of reasonableness which the courts have drawn from the vague language of the due process clause;[36] that freedom of expression is the matrix, the indispensable condition, for the flourishing of other freedoms;[37] and that restrictions on liberty of expression tend to clog the very political processes which are normally relied on for peaceful change and which offer a democratic alternative to the judicial veto of legislation.[38] This is not the place to explore the problem of the double standard of judicial review. It may simply be noted as a fact that there has been a Copernican revolution since the late nineteenth and early twentieth century: whereas formerly the Court (always over the dissents of some of its most respected members) was quick to strike down novel measures of economic and social reform in the name of due pro-

[35] Amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law;"

Amend XIV: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

For examples of the absorption and of the judicial veto in this field, see *Near* v. *Minnesota* (1931), 283 U. S. 697 (press); *Hague* v. *C. I. O.* (1939), 307 U.S. 496 (assembly); *Schneider* v. *State* (1939), 308 U. S. 147 (speech and press); *Murdock* v. *Pennsylvannia* (1943), 319 U. S. 105 (religious proselytyzing); *West Virginia Board of Educ.* v. *Barnette* (1943), 319 U. S. 624 (religious observance; flag salute); *McCollum* v. *Board of Educ.* (1948), 333 U. S. 203 (establishment of religion; "released time" in public schools).

Cf., however, *Kovacs* v. *Cooper* (1949), 336 U. S. 77 (sound trucks); *Hughes* v. *Superior Court* (1950), 339 U. S. 460 (picketing); *American Communications Assn., C. I. O.* v. *Douds* (1950), 339 U. S. 382 (non-Communist oath for labour union officers), in each of which the control was upheld. A recent survey of civil-liberties cases is contained in Reppy, Civil Rights in the United States (1951). I have tried to suggest the complexities in these civil-liberties cases in a small volume, On Understanding the Supreme Court (1949), especially chapter 1, "Concord and Discord".

[36] See Black J. in *Bridges* v. *California* (1941), 314 U. S. 252, at p. 263.

[37] See Cardozo J. in *Palko* v. *Connecticut* (1937), 302 U. S. 319, at pp. 326-27.

[38] See Stone J. in *United States* v. *Carolene Products Co.* (1938), 304 U. S. 144, at p. 152, n. 4.

cess of law and was slow to assimilate the First Amendment freedoms into the Fourteenth, today no real barrier is raised against legislative experiments in the economy but very severe obstacles face legislative restrictions on experimentation in ideas.

III. *The Court as Symbol*

The prestige of the Court has fluctuated widely during its history. It has never escaped the tensions that beset an evolving society. Indeed, it has reflected and articulated those dilemmas and has contributed in the process to the anthology of statesmanship. In part the special quality of its contribution derives from the fact that the Court must generalize and particularize at the same time; its relative detachment provides an opportunity for dispassionate reflection which, however, can never be far removed from the concrete instances of conflict that obtrude themselves for decision. In part the special quality of its contribution doubtless rests on the tradition of free dissenting opinions. At all events, the rôle of the Court in the intellectual history of the country has nowhere been better recognized than by the philosopher Alexander Meiklejohn, who has written:[39]

> And to us who labor at that task of educating Americans it becomes, year by year, more evident that the Supreme Court has a large part to play in our national teaching. That court is commissioned to interpret to us our own purposes, our own meanings. To a self-governing community it must make clear what, in actual practice, self-governing is. And its teaching has peculiar importance because it interprets principles of fact and of value, not merely in the abstract, but also in their bearing upon the concrete, immediate problems which are, at any given moment, puzzling and dividing us. But it is just those problems with which any vital system of education is concerned. And for this reason, the court holds a unique place in the cultivating of our national intelligence. Other institutions may be more direct in their teaching influence. But no other institution is more deeply decisive in its effect upon our understanding of ourselves and our government.

It is no doubt inescapable that our strongest Presidents should have clashed repeatedly with our strongest Justices. Marshall managed to bring the Court safely through the storms of Jeffersonian and Jacksonian criticism. Taney, at the end of his judicial career, set himself hopelessly but resolutely against the martial rule countenanced by Lincoln during the Civil War. Theodore Roosevelt campaigned for the recall of judges and of judicial decisions. Franklin D. Roosevelt, his programme of reconstruction thwarted by a solid phalanx of five, struck out at the Court and

[39] Meiklejohn, Free Speech (1948) 32.

succeeded in educating the profession and the public, whether in agreement or disagreement, on the problems raised by judicial supremacy in a popular government.

It is as true as most truisms to say that the quality of the institution depends not alone on its traditions but on the character of the individuals who man it. Partisan considerations in the appointment of justices have, on the whole, been subordinated. This is not to say, of course, that the general outlook of an appointee has been or should be irrelevant in his selection, but only that narrow political or geographic factors have not been allowed to predominate.[40] A partisan-minded chief executive might reflect sardonically on the unreliability of members of the Court: Story, appointed as a Madisonian Republican, outdid even Marshall in his nationalism, Holmes's lack of enthusiasm for the Sherman Antitrust law bitterly disappointed the expectations of Theodore Roosevelt, and McReynolds, elevated by Wilson from the Attorney Generalship, scarcely proved to be a Wilsonian Democrat. When Holmes's place fell vacant, considerations of geography were urged on President Hoover in the interest of the selection of a Westerner. As is known, Mr. Hoover finally took the advice of Senator Borah of Idaho, who assured him that to the people of that State the most acceptable appointment would be that of Judge Cardozo of New York; in yielding to this wisdom Mr. Hoover performed what was probably the most popular act of his presidency.

That the Court has survived storms and stresses and has over the years strengthened its position has been due, basically, to its tradition of self-scrutiny, re-examination and self-correction. Mr. Justice Brandeis put concisely the reasons back of this tradition:[41]

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare *National Bank* v. *Whitney*, 103 U. S. 99, 102. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

[40] On the history and practice see John P. Frank, The Appointment of Supreme Court Justices: Prestige, Principles and Politics, 1941 Wis. L. Rev. 172, 343, 461.

[41] *Burnet* v. *Coronado Oil & Gas Co.* (1932), 285 U. S. 393, at pp. 406-08 (dissenting). The opinion of Brandeis J. collects the decisions which overruled precedents; see also the valuable article by Sharp, Movement in Supreme Court Adjudication — A Study of Modified and Overruled Decisions (1933), 46 Harv. L. Rev. 361, 593, 795. Mr. Justice Douglas has recently put in extreme terms the responsibility for judicial re-examination: Douglas, Stare Decisis (1949), 49 Col. L Rev. 735 (containing a table of 30 overruling cases in the period 1937-1949).

> The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Chief Justice Taney, witnessing the erosion of doctrine which he thought he had established, was able to convey the sustaining spirit of a living institution:[42]

> After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.[43]

[42] *Passenger Cases* (1849), 7 How. 282, 470.

[43] Anyone interested in the subject of this paper will do well to read the article on the Supreme Court by Mr. Justice (then Professor) Frankfurter in (1932), 14 Encyclopaedia of Social Sciences 474-481, reprinted in substance in (1949), 3 Parl. Affairs 55-71.