The United States Supreme Court Molding The Constitution

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THE UNITED STATES SUPREME COURT

MOLDING THE CONSTITUTION

BY

LARRY E. SCHEEWE

SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF BACHELOR
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MOUNT SAINT CHARLES COLLEGE, HELENA, MONTANA
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The writer is indebted to the Reverend J.W. McCormick, under whose directions this study was made, for the splendid help and guidance in the treatment of the problem undertaken. I wish also to express my appreciation to Mr. A.K. Barbour and his able assistant, Mrs. Adeline Clarke of the Montana State Law Library, who were kind in rendering invaluable assistance in my search for suitable material. To Miss Bertha Coyle, who has played successfully the various roles of private secretary, stenographer, proof-reader, and many other like duties, whereby making my task much lighter, I wish most emphatically to extend my sincere thanks.

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William Wirt

I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as (Supreme Court Justice), according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.

Do not be surprised in being informed that you have just been appointed, and consequently sworn in, as a Supreme Court Justice carrying with it a high degree of independence, and providing good behavior is maintained, a lifetime appointment. It has probably been your experience to be on the receiving end of the decisions of the Court—sometimes pleased with the outcome, and probably many more times greatly perturbed. Nevertheless, we know there is another side to the question, and you having taken your oath of office, let us now venture to take up our position on the other side of the bench. The cloak that marks us as receivers slips from our shoulders, and in its stead is placed the dark robe of the court Justice. Court dignity has taken over our body, may justice prevail. Shall we view the other side?
I. THE IMPORTANCE OF THE JUDICIARY IN THE UNITED STATES

At the time when the Constitution was made, little was it realized the importance to which the judicial power would attain in the political system of the United States. Those great men, the Fathers of our Constitution, playing faithfully the role assigned to them by their people, could scarcely have foreseen the final result of their infant work. I do not wish to imply that the change has had any great effect upon the original form, for basically it is the same today as when it was originally designed and presented to the people back in the year 1787. There is, however, a noticeable change which has evolved in a rather peculiar, yet natural and above all, an interesting way. The present form of the Constitution is not so much the result of continuous building activity—adding to the structure by legislative workers—but more like a growing, expanding nucleus that has been cultivated and brought into definite use. This unveiling, resulting in such an interesting change, has taken place under the guiding hand of the United States Supreme Court; thus in a limited sense, we can truly say that the Supreme Court is molding the Constitution. Yes, molding it, but only insofar as it interprets the meaning implied in the written Articles and Amendments—and absolutely lacking the power to originate constitutional pro-
visions. The one peculiarity about our Supreme Court is
the fact that it has the extraordinary function of deter-
ing the very form of the Government whose laws it is
interpreting, which is possibly the reason why Beck calls
it a "super-Senate."

The relationship of the three governmental depart-
ments, one to the other, are quite readily understood by
most students of Political Science, yet I think it worthy
our attention to view more closely the finer points of
contact; yes, and of separation between the two depart-
ments that will bear important significance upon our chosen
subject. The Congress and the Judiciary are, broadly speak-
ing, separate units—yet the little in-roads and by-paths
which link them are there, and not always easily completely
recognized and understood. The Constitution of the United
States, in the brief article relative to the Judiciary,
makes but slight provisions for the structure of the fed-
eral courts. It created a Supreme Court, but the means for
further provisions was left to the Congress. Congress can
determine the number of judges appropriate for the Supreme
Court and, in addition, can create any additional tribunals
which appear as necessary for the transaction of federal
business. In reality then, we see the federal courts are
to some extent at the mercy of Congress. It is true that
Congress cannot abolish the Supreme Court at one stroke, reduce the salaries of the judges, nor can it remove any of them except by the process of impeachment; it may, however, by a circuitous route effect a revolution in the make-up of the Court. Congress may reduce the number of judges by making a provision that on the death or resignation of any of them the vacant post be abolished; or at the proper time it may increase the number of judges, thereby securing men known to entertain certain views pertaining to the constitutionality of particular measures. Moreover, Congress can refrain certain classes of cases from arising before the Supreme Court by failing to provide the necessary system of appeals. And a suggestion has been extended that Congress might make a provision requiring a vote of more than a mere majority of the judges to declare an act of Congress unconstitutional, but this idea has met stiff disapproval and has been attacked by lawyers as unconstitutional in itself. (1) Thus, it is quite obvious that in part the Supreme Court is to some extent at the mercy of Congress, yet, taken in the whole, we may say that the federal judiciary enjoys a high degree of independence from legislative interference.

II. THE UNITED STATES CONSTITUTION

The United States Constitution is looked upon by many

authorities as a model of simplicity. If such is true, then why is our governmental management so complicated. The answer, I believe, is quite simple—the Supreme Court has filled more than 263 volumes in their lengthy opinions, and why? Not necessarily one of clarity but of adoption of the meaning to the ever changing conditions of human life. After all, this government of ours is not one of laws as is commonly advocated, but is a government of the people, by the people, and for the people. Not only did our forefathers realize and provide a broad, flexible, changeable plan for our written instrument of government, but the Justices coming in contact with the Constitution also recognize the necessity of such a versatile guiding hand. Men made our Constitution, men have made and enforce our laws. We are held in check by the Constitution and the laws flowing from that instrument. But if we are not satisfied with the law or even with the Constitution, or any part thereof, cannot we change them? Or, if need be, we can chuck the whole scheme of things in the wastebasket and undertake to write a new one. But the point is, could we make a better one? Surely we could define more clearly some of the vague clauses which appear in our Constitution, but again, do you think this would help? Yes, no doubt for the immediate future, but how about the
morrow beyond? The forming of a rigid Constitution would no doubt be defeating its own end.

Every citizen of the United States, be he ditch digger or the President of our great country, is sworn in some formal promise, though the wording may vary, to "bear true faith and allegiance to the United States of America and to serve honestly and faithfully against all their enemies whomsoever." The Congressmen and Judges, upon assuming office, swear that to the best of their ability, will preserve, protect, and defend the Constitution. Surely with so many people sworn as supporters, the Constitution does not lack defenders. But is it not possible that these sworn defenders are, in reality, enemies of the Constitution?

There seems to be no noticeable enemy, openly or secretly, against the Constitution—yet, it is quite evident that there are two enemies, whether foreign or domestic, who are at least to be feared. The first one is ignorance—ignorance of its contents, ignorance of its meaning, ignorance of the great truths on which it has been founded, and of the great things that have been done in its name. While the second enemy is indifference—the sort of indifference which leads many people, otherwise well enough behaved, to ignore both the rights and
duties of American citizenship.

Let us pause for a moment and ask this question:—
What is the Constitution? I dare say that if that question
were asked of the passer-by on the street or to the average
run of college students, the replies would be greatly varied
and, above all, very vague and incomplete, and in many cases
we would be set back by finding many who had not read it
through from beginning to end. Then ask ourselves the same
question—-are we competent of answering it fully? Yes,
possibly, but then again, no. Let us then try to condense
this "rule of life" in as short a space as possible. Viewed
as a whole the Constitution undertakes to lay down rules
and regulations for the life of the government on the one
hand and the life of the individual citizen on the other.
It describes not only the type of government the American
people choose to have, but also pertains to show what sort
of life an American citizen chooses to lead.

The cardinal rules which the Constitution lays down
are five in number and are as follows: First— As outlined
in the Declaration of Independence, "all governments de-
rive their just powers from the consent of the governed."
The people are the masters, the government and its officers
are merely their servants. The peoples' consent is ex-
pressed in the selection of representative officers to carry
on the duties of government in their name, being the expression of our understanding of the rule of popular sovereignty and representative government.

Second- The Government of the United States cannot exercise powers other than those expressly given to them by the people in the written Constitution. The rule of Constitutional limitation is the outgrowth of intentions to protect the rights of a minority however small as against the power of a majority however large. A lone man standing on his constitutional rights is, by this rule, stronger, than thousands.

Third- The rule of separation of powers is a safeguard against any man or group of men enjoying exclusive power, to have at one and the same time, to make law, to decide whether it has been violated and, finally, to execute judgement on the violator. Thus, our executive, legislative, and judicial powers have been separated to insure this freedom from exclusive central control.

Fourth- The National Government shall deal with affairs of a national interest, while the states shall have the right to deal with those of a local character, and to do so with a freedom not hampered by outside interference. Thus, our rule of local self-government.

Fifth- In order that these rules may be protected
and enforced, the Constitution provides that courts shall have the right to say that any Act of Congress, or legislature, or president, or governor, or any person whomsoever which contravenes the Constitution is null and void.

An interesting point to be observed is that with the exception of the Eighteenth Amendment, such restraints as the Constitution contains are imposed upon the Government, and that such rights as it describes are those of the citizens. Accordingly, the Constitution states two great fundamental rules to be applied to every citizen of the United States. The first is the rule of equality—every person born or naturalized in the United States shall have the rights and privileges which any other citizen enjoys. And the second rule is Freedom—every citizen who is willing to obey the laws and respects the rights of his fellow being shall be free to live his own life in his own way in pursuit of his own interests and desires.

Such are the basic constitutional rules;—as to their good and bad qualities, they have been the center of stormy comment down through their existence. They have withstood the battle—slightly changed possibly, but it is a changeable instrument—which is all to its favor. The question as to whether or not these rules are entirely satisfactory must, of course, be decided by this generation of people.
If they are willing to lead the life which the Constitution provides; if it is satisfactory—all well and good, they will support it. If it is not, they can change it in part, or cast it aside entirely and write something more to their liking. There is no fear, though, that it will be cast away very soon and, if ever it is—not without the clamorous chorus of a free, united, prosperous, and mighty people—secure of their Constitutional liberties—doubting of a better plan—wanting hearing.

III. PROVISIONS FOR JUDICIARY AS STATED IN THE UNITED STATES CONSTITUTION.

The framers of that great document, the Constitution, being truly wise men, separated almost completely the legislative from the judicial power and, again, in this Federal judiciary, they took precaution and limited its functions to purely judicial duties. The Constitution 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.

By that provision we have "one Supreme Court," in which is vested "the judicial power of the United States." The
Constitution provides for a Supreme Court and authorizes Congress to establish it. "Congress has power to create but has no power to destroy. Congress cannot destroy the judiciary any more than the judiciary can destroy Congress." (2) The next section states definitely the jurisdiction of this court with the provision that:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; --to all cases affecting ambassadors, other public ministers and consuls; --to all cases of admiralty and maritime jurisdiction; --to controversies to which the United States shall be a party; --to controversies between two or more States; --between a State and citizens of another State, (2) between citizens of the same State claiming lands under grants of different States, and between a state, or the citizens thereof, and foreign States, citizens or subjects.

Still further specific powers are granted the Court with Congress having slight control, that is, in regulating desired changes--the Constitution providing that:

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 to fact, with such exceptions, and under such regulation as the Congress shall make.

Yet this is not the complete provision made by the Con-

(2) Beard, op.cit., page 264.
(3) Changed by the Eleventh Amendment.
stitution. An essential element in any dual form of government is the understanding and arranging of the supremacy of the national law—being definitely states as follows:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

That, with the exception of a few minor details, is the entire provision made by the Constitution for the creation and function of the Judiciary department of the United States government. That constitutes the mere skeleton of our court, the plans are completed, the superstructure is in the making.

Most writers are inclined to believe that those men, after having finished the document which had taken them four months of struggling to settle the controversies, could not have possibly nursed any idea that their finished product would long survive. But the fact remains that it has survived. Almost a century and a half later, the Constitution intact, still remains and has, apparently, everything in its favor for it to continue in its glory.

When we stop to analyze the reasons for its phenom-
enal existence, we must lay much importance to the fact that our farsighted ancestors placed the judiciary department almost entirely free and independent of the other two departments of our government. Many argue that this independence, together with the supreme power of checking the other governmental departments, has worked a great handicap upon the efficiency of the Legislative department. These same critics hold that the framers of the Constitution were unaware of the power they were placing in the Supreme Court and that this same unlimited power will eventually be the cause of the collapse of our Government. It seems feasible for me to believe, though, that those old timers were fully aware of what they were doing. The conditions enveloping the country at the close of the Revolutionary war,—the jealous guarding of their new found liberty and freedom,—are evident in the document they created. They prized their new finding and with precaution made certain, insofar as possible, that their coveted freedom was not taken away. The concentration of power in any one group of men would, they believed, defeat their purpose. They expressed their belief in the philosophical view that a people are best governed who are least governed. The fact that our Government has endured the stormy voyage over a long period of years would tend to prove that
there must be some good points in their belief.

IV. THE BUSINESS OF THE U. S. SUPREME COURT

The general public has, during the last decade, and more so than ever before, become court-minded. Insofar as the courts deal in private controversies, the interest of the public is not necessarily aroused, except in an occasional case of dramatic human appeal. While on the other hand, the issues brought before the Supreme Court which are essentially political will inevitably attract the public eye and bring about public discussion. The Supreme Court has, in keeping with its business, become involved in many political controversies. Every issue, having two sides and naturally supporters for either side, has in many cases caused severe criticism to be flung at this ruling body of man—and too, not always without good cause. By the very nature of its place in the American scheme of government, the Supreme Court is the stream of public affairs. The decisions handed down often times are far reaching—affecting every person abiding under the Constitution, one way or another, directly or indirectly, and even to the extent of those unborn, future American citizens.

The importance of such a body as the Supreme Court is easily recognized; and in order to have a better under-
standing of it, one must delve into the nature of the Courts business. We know that it has no legislative abilities whatsoever, but it is primarily a check on the other governmental departments. Felix Frankfurter summarizes it when he says:

In our system of government, the Supreme Court is the final authority in the relationship of the individual to the state and to the United States, and of the forty-eight States to one another and to the United States. While the Court thus deals primarily with problems of government, it does not itself initiate acts of government. What it does is to define limitations of power. It marks the boundaries between State and national action. It determines the sphere of legislative and executive conduct. This involves a very complex process of adjustment, formally accomplished by finding meaning for language in the Constitution and sometimes for purposes derived from the Constitution but unexpressed in its language. (4)

Many difficulties are encountered by the Supreme Court in the performance of its business. We know it must meet various situations, possibly passing judgment in one afternoon upon cases that are as varied as can be imagined. While, on the other hand, these same cases may be of such nature as to require not only the mere interpretation of the Constitution, but the application of a general principle underlying the Constitution to a modern social or industrial problem.

In a broad general way we can place the cases that come before the Supreme Court into two classes. In one class

would fall those cases which can be settled by the Supreme Court with a strict interpretation of the written constitution; that is, in the Constitution there are provisions of a definite limitation, so well defined that there is seldom a testing of its true worth, but is accepted in its full force. If the Supreme Court were to deal only in cases falling into this class, little would be the public disturbance and, consequently, little would be the criticism flung at the court. The general public realize the necessity of a final authority, realize that we could not successfully carry on our scheme of government without a recognized national judiciary or something equivalent to it.

But the real rub comes when the Supreme Court has to pass judgment on the cases that fall into the other class. In this division most of the cases involving constitutional interpretation are listed. The broad and undefined clauses of the Constitution allow room for broad differences of opinion and, as a consequence, individual judgments as to policies are correspondingly broad. A few simple constitutional terms such as "liberty" and "property," phrases like "regulate Commerce . . . among the several States" and "without due process of law" are subject to the judgments influenced by powerful economic, social, and industrial facts. Charles M. Hough, in one of his lectures at Cornell
University in 1918, referring to the phrase, "due process of law," said: "May I remind you that the phrase is of convenient vagueness; forty years ago our highest court said that it could not be defined, or at all events, definition was declined because it was better to ascertain meaning in each case by a process of judicial inclusion and exclusion." (5)

The cases which require settlement under these vague clauses involve tremendous and delicate problems. Their content is derived without, not revealed within, the Constitution. And when the Justices endeavor to settle these controversies, in a large part, the human element steps in, and when this move is made, legislative activity is said to follow. At this point the "very complex process of adjustment" at times comes to woe. It is quite evident then that the fate of these laws, being judged, depends a great deal upon adequate information brought before the court concerning the economic and industrial data which underlies their legislation. In referring to this point, Frankfurter and Landis say:

But the words of the Constitution on which their solution is based are so unrestrained by their intrinsic meaning, or by their history, or by tradition, or by prior decisions, that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution, but from reading life. It is most revealing that members of the Court

are frequently admonished by their associates not to read their economic and social views into the neutral language of the Constitution. (6)

The Constitution, we realize, is a changing instrument. The Supreme Court is, not only in its personnel, but especially in its functioning, a changing thing. The changing economic and political situations necessitate the changing laws to meet these problems. "The Supreme Court's function," said Chief Justice Taft in a hearing before the Committee on the Judiciary House of Representatives, "is for the purpose of expanding and stabilizing principles of law for the benefit of the people of the country; passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal." (7)

This trend of combat is easily traced in the cases passed upon by the Supreme Court throughout its existence. Many factors enter into the elements of changing times and changing minds, which can best be seen when we bring to our attention the important cases that have been influential in the historical development of the Court. These historical making decisions have been law-making as well; the underlying principle or point of dispute has been interpreted as being right or wrong by the Justices and these judicial

(6) The Business of the Supreme Court, page 310.
(7) Quoted in Frankfurter and Landis, op. cit., page 257.
decisions, based upon the provisions laid down by our written Constitution, have evolved into our Constitu-
tional law. No other country in the world leaves to the judi-
ciary the powers which our Judiciary exercises over us. Most of the problems of modern society, whether concerning industry, agriculture, or finance, racial interaction or the eternal conflict between liberty and authority, are sooner or later legal problems for solution by our courts and, ultimately, by the Supreme Court.

The essentially political significance of the Supreme Court's share in the operations of the Union can hardly be overemphasized. No one can come in contact with the Court's career without marveling at its potent effect upon the political development of the Nation, and without concluding that the Nation owes most of its strength to the determination of the Judges to maintain the National supremacy. Though, from time to time, Judges have declared that the preservation of the sovereignty of the States in their proper sphere was as important as the maintenance of the rights vested in the nation; nevertheless, the Court's actual decisions at critical periods have steadily enhanced the power of the National Government. Try to surmise what would have been the conditions today had the Judges adopted or continued to hold to narrow views of National supremacy instead of
the broader views of sovereignty of the individual States which were undoubtedly held by most of the framers of the Constitution.

We must remember, though, that the Court is not an organism dissociated from the conditions and from the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education, and environment and by the impact of history past and present; and as Justice Holmes has said:

"The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which Judges share with their fellow-men, have had the syllogism in determining the rules by which men should be governed."

(8)

V. HISTORICAL DEVELOPMENT OF SUPREME COURT

We can look upon the first half century of the Supreme Court as its golden age, for it was during this period that the greatest work was done. The superstructure which was to rise from the mere foundation as set forth by the Fathers of the Constitution, was under the masterly guidance of that great leader, John Marshall, who served as Chief Justice

from 1801 to 1835. From the beginning of the Court, which was in 1790, to the time when Marshall took his place on the bench in 1799, very little of importance had passed. Up to that time the Court had rendered only six decisions involving constitutional questions. John Moore lavishes Marshall with just praise when he says:

The coming of Marshall to the seat of Justice marks the beginning of an era which is not yet ended, and which must endure so long as our system of government retains the essential features with which it was originally endowed. With him really began the process, peculiar to our American system, of the development of constitutional law by means of judicial decisions based upon the provisions of a fundamental written instrument and designed for its exposition and enforcement. By the masterful exercise of this momentous jurisdiction, he profoundly affected the course of the national life and won in the knowledge and affections of the American people a larger and higher place than ever had been filled by any other judicial magistrate. (9)

It is interesting to note that before Marshall became Chief Justice, the high office had been three times resigned, and had been declined by four leading men—all in a period of twelve years. But since "the Chief Justice," (which when used without a proper name has taken the stand of referring to him alone), ascended the bench, there has never been a resignation or a declination of the place. By his high judicial quality, his breath of view, his prophetic insight into the indispensable basis for our national growth, and his demonstration of what was the inescapable

function of the Supreme Court in the frame work of the Constitution, he clothed the office with a dignity and power which no man could decline.

John Bryce, viewing Marshall in regard to his splendid work in the development of the written instrument, has said the Constitution "seemed not so much to rise . . . . to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed." (10) "In every line of his great opinions he made the nation to live," (11) said Chief Justice Taft in a radio address following the unveiling of a bust of Marshall in the hall of fame in 1925. "He found the Constitution paper," said John W. Davis at this same dedication exercise, "and he made it power; he found it a skeleton, and he clothed it with flesh and blood." (12) For this unrivalled achievement there has been conceded to Marshall by universal consent the title of "Expounder of the Constitution of the United States;" and the general approval with which his work is now surveyed is attested by the tributes recently paid to his memory.

A full review of the questions of constitutional law decided by the Supreme Court during Marshall's term of service would involve comprehensive examination of the founda-

(11) Ibid, page 381.
tions on which our constitutional system has been reared; but we may briefly refer to certain leading cases by which fundamental principles were established. In an early opinion, Marshall discussed and decided the question whether an act of Congress repugnant to the Constitution is void. This question was then by no means free from difficulties and doubts. The Constitution, as well as Federal statutes and treaties, were to be the "supreme law of the land"—but as to the designed power of the courts to declare un-constitutional a Federal statute, the instrument was silent. Was this silence in designing such power intentional?

The first important case just referred to was Marbury v. Madison. (13) The decision handed down in this case attracted much attention and created many disputes. To the public of 1803, the case represented the determination of Marshall and his associates to interfere with the authority of the Executive, but to the lawyers of today, the significance of Marshall's opinion lies in its establishment of the power of the Court to adjudicate the validity of an act of Congress—the fundamental decision in the American system of constitutional law.

The case vividly presented is as follows: President Adams nominated William Marbury to office of the Justice of Peace for the District of Columbia. The nomination was

(13) Marbury v. Madison (1803), 1 Cranch 137.
confirmed by the Senate, the commission was signed by the President, and the seal affixed by the secretary of State. President Jefferson succeeding Adams, directed his Secretary of State, James Madison, to withhold the commission claiming it was not complete until delivered. Marbury then moved for a writ of mandamus to compel delivery.

In the course of the judgment, delivered by Marshall, opinions were to the effect that the Court had no power to grant the writ, because the Federal statute by which the jurisdiction was sought to be conferred was repugnant to the Constitution of the United States. A decision of first importance was this opinion since its assertion of the final authority of the judicial power, in the interpretation and enforcement of our written constitution came to be accepted almost as an axiom of American jurisprudence. In the course of his reasoning, Marshall expressed the following principles as underlying his opinion. In the first statement he was expounding on the people's "original right" when he said:

This original and supreme will organizes the government, and assigns their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and those limits may not be mistaken, or forgotten, the constitution is written . . . . . . It is a proposition too plain to be
contested, that the constitution controls any legis­

tative act repugnant to it; or, that the legislature

may alter the constitution by an ordinary act.

* * * * *

It is emphatically the province and duty of the
judicial department to say what the law is . . . If
two laws conflict with each other, the courts must
decide on the operation of each.

* * * * *

If, then, the courts are to regard the constitu­
tion; and the constitution is superior to any ordinary
act of the legislature, the constitution, and not such
ordinary act, must govern the case to which they both
apply.

Those, then, who controvert the principle that
the constitution is to be considered, in court, as a
paramount law, are reduced to the necessity of main­
taining that courts must close their eyes on the con­
stitution, and see only the law.

* * * * *

that a law, repugnant to the constitution is void;
and that courts, as well as other departments, are
bound by that instrument.

In subsequently applying this rule, Marshall affirmed
that the Court ought never to declare an Act of Congress
to be void "unless upon a clear and strong conviction of
its incompatibility with the Constitution."

Only two years after the decision of Marbury v. Madison,
the argument presented in United States v. Nicholls that,
"the authority and legal rights of the Court to declare a
law of this State or of the United States to be unconstitu-
tional is not doubted, but it must be on the clearest and plainest grounds, not on the grounds of expediency." (14)

In the case of Cohens v. Virginia, (15) Marshall established the subordination of State tribunals to the Supreme Court in all Federal relations. In this case a writ of error was obtained from the Supreme Court of the United States to a court of the state of Virginia, in order to test the validity of a statute of that State which was supposed to be in conflict with a law of the United States. Virginia contended that the Supreme Court could exercise no supervision over the decisions of the State tribunals, and that the clause in the Judiciary Act of 1789 which purported to confer such jurisdiction was invalid.

Chief Justice Marshall in his decision commented upon this argument: if the Constitution had provided no tribunal for the final construction of itself or of the laws or treaties of the nation, then the Constitution and the laws and treaties might receive as many constructions as there were States. He then proceeded to demonstrate that such a power of supervision existed maintaining that the general government, though limited as to its object, and that such a right of supervision was essential to the maintenance of that supremacy. After citing that the Constitution and the laws made thereof—together with the

(14) U.S. v. Micholls (1805), 4 Yeates, 251.
treaties—as being the supreme law of the land, Marshall said:

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution, and if there be any who deny its necessity, none can deny its authority.

The case of McCulloch v. Maryland (16), brought before the court in 1819, involved in particular two questions; first, of the power of the United States to incorporate a bank, and second, of the freedom of a bank so incorporated from State taxation or control. The case was argued before the Supreme Court by the most eminent lawyers of the day; Pinkney, Webster, and Wirt appearing for the bank, and Luther Martin, Joseph Hopkinson, and Walter Jones for the State of Maryland.

The unanimous opinion of the court as delivered by Marshall is regarded as his greatest and most carefully reasoned opinion. It asserted not only the power of the Federal government to incorporate a bank, but also the freedom of such a bank from the taxation, control, or obstruction of any state. Realizing the limitations of power, Marshall acknowledged that there was no expressed power in the Constitution—yet there was found a power

(16) McCulloch v. Maryland (1819), 4 Wheat. 316.
necessarily implied, since it was necessary for the accomplishment of the objects of the Union. This principle was extended by Marshall in these ever immortal words: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

"A case could not be selected from the decisions of the Supreme Court of the United States," comments Kent, "superior to the one of McCulloch v. Maryland, for the clear and satisfactory manner in which the supremacy of the laws of the Union have been maintained by the court and undue assertion of State power overruled and defeated." (17)

The importance of this decision was at once appreciated; and it was reprinted in full by many newspapers throughout the country, irrespective of their concurrence in its doctrine. The reaction of the public toward unsatisfactory reasons was on sectional and political lines only. On the day after the delivery of the opinion, Judge Story wrote: "it excites great interest, and in a political view is of the deepest consequence to the Nation. It goes to establish the Constitution upon its great original principles." (18)

In the broad sweep of that great judgment in Gibbons v. Ogden, (19) he put the arterial circulation of interstate

commerce under the complete control of Congress and freed it from interference by the States. This case, together with Marbury v. Madison, and McCulloch v. Maryland are looked upon by many as almost as important as the Constitution itself.

The Legislature of New York granted an exclusive right to Chancellor Livingston and Robert Fulton for a term of years to navigate the waters of the State with steam. The validity of this statute had been maintained by the judges in New York, and an injunction had been issued restraining other persons from running steamboats between Elizabethtown, New Jersey, and the city of New York, although they were enrolled and licensed as coasting vesselers under the laws of the United States.

The Supreme Court, speaking through Marshall, held the New York statute to be unconstitutional. The Constitution invests in Congress the power "to regulate commerce with foreign nations and among the several states." The term, "commerce," Marshall declared to embrace all the various forms of intercourse, including navigation, and he affirmed that "whenever commerce among the States goes, the judicial power of the United States goes to protect it from invasion by State legislation."

With very few exceptions, Marshall's great constitutional
opinions continue to be received as authority, and with
the same few exceptions, his opinions "can scarcely perish
but with the memory of the Constitution itself." John B.
Moore speaking of Marshall and his associates in regard to
their work and characters has said:

The great Chief Justice and his associates have
in no way fallen short of this measure of their trust;
for, no matter how deeply the court may, as an insti-
tution, have been planted in the affections of the
people, and no matter how important it may be to the
operation of our system of government, its position
and influence could not have been preserved had its
members been wanting either in character, in conduct,
or in attainments. (20)

Time and space will allow us no more devling into even
a brief detailed account of the various cases. If, perchance,
the reader is interested in a more minute account of these
or like cases, a usable brief is available in Gerstenberg's
Constitutional Law. But as for our present purpose we can
only mention the few important ones and then hurry along.
The few cases cited were no doubt most influential in the
molding of our Constitution and, subsequently, very instru-
mental in the directing of the affairs of our country—they
deserve the mentioning.

VI. THE SUPREME COURT AND OUR PRESENT DAY PROBLEMS.

But let the Magic Carpet carry us away from the days of

(20) John Lord, op.cit., page 362.
Marshall on down to our present day affairs. We realize the days of old had their stupendous problems—every age has its share—and we, of this age, the Lord knows, have our quota of difficulties, and naturally I would be inclined to say that at least ours are more complex. They involve more people, affect greater territories, and are subject to abundant forces—unheard of before.

Industrial, social, and political difficulties confront us on all sides, and as I have before mentioned, all these controversies, sooner or later, find their way into the court and, subsequently, to the Supreme Court. In particular, the Minimum Wage law has been before the Court at various times, in slightly different lights. A wage law in New York was denounced as unconstitutional, while two cases in Oregon were passed upon; one, a minimum wage law for women, was upheld while the other, for men, was defeated by a five to four decision of the United States Supreme Court.

This controversy brings to our attention the question—Shall we adopt our laws to changing economic conditions? If we answer point blank—Yes!—immediately the consequent doubt arises—Is it constitutional? And in these various suggested laws you will find many supporters who will prove to you that it is unconstitutional. Or, again, if we should
answer, No!—we can expect plenty of opposition rising up to challenge your contentions.

But then, why should law be adjusted to economic conditions? Should not, rather, law be the expression of justice? Is there no such thing as perfect justice, immutable, unchangeable, the same yesterday, today, tomorrow? That point is hard to decide, but at least one point is obvious. Human experience is always teaching and reteaching us that the law of the Court and the legislature should be adjusted, not necessarily to economic conditions, but these conditions good or bad, not necessarily to the needs of human progress, but rather to the common felt sense of justice. The law which does not accord with the preponderating felt sense of justice is an evil thing. If enforced, it weakens that sense of obligation to the social will on which public order and individual liberty so largely depend. The very nature of these problems reveals to us that there is no complete solution. It is hard to say, yet it follows that our laws can never be the expression of perfect justice. There will always be a gap between what man believes to be right and what at the time is essential to the upward progress of the race; there will always be a gap between the law and man's felt sense of justice. The task of each generation of Justices, it seems, is to make
these gaps as narrow as possible. If they become too wide, human progress is impossible. This general principle, of course, not only applies to the Supreme Court Justices, but also the Judges in our numerous inferior courts.

What then is the reason for the general failure to recognize the part played by the Court in making the law? The answer is found in the way in which the Court operates. The case presented before the Court is addressed by the Justice in this manner: what, according to the Constitution and laws of the United States, should be the judgment?—Not: What change should I make in the law in order to benefit the people under the present economic conditions. We cannot place the whole fault on our Supreme Court: They are sworn to support the Constitution of the United States and that is what they are doing—to the best of their ability. If changes are needed, they should be through Constitutional Amendments, and not directed at the court. If we need a minimum wage law, and it appears as being a mainstay in the solution of a grave social problem, then, why not have it made into an amendment? It's possible.

John Ryan enumerates four passable ways to obtain a remedy for the cure of underpaid workers. First—the Federal Constitution could be amended, thereby enabling Con-
gress and the state legislatures to enact minimum wage laws—but he points out that this would possibly take at least twenty-five years. The second suggestion is that members of the Supreme Court might undergo an educational program which would change their social and ethical philosophy so as to show them the unreasonable inference of freedom of contract. Third, in the course of time, the personnel of the court might change whereby a majority of the Court would have the required social and ethical philosophy. And finally—the requirement of more than a majority vote of the Supreme Court in their decisions. (21)

The Supreme Court's greatest admirers admit that it is human and hence, not infallible in origin, character, and pronouncements. And we respect the right to criticize the court: helpful and worthy discussions are entitled to rank as real criticism—while mere fault-finding, ridicule, scorn, and suspicion are hardly worth classification with the word, criticism. Now, as to the many suggestions that have been made as to ways in which the Supreme Court may be brought to the point of perfection: The one based upon the idea—if the Constitution is fundamentally sound, then the more criticism, the more secure will its position be made—will be revealed first.

Criticism of decisions of the Supreme Court is inevit-

(21) Ryan - Distributive Justice, pages 268-70.
able, but what avail is criticism after decision has been pronounced? Forcible resistance to such decisions is unthinkable. As it is, criticism of Constitutional Amendments on Court decisions amount to little more than grumbling and belittlement of the Court which attempts to be the greatest possible human tribunal. But, is it not plausible that debates of high order and scholarly discussions should be encouraged in the field of law. And these discussions should not be after, but before the question has been finally disposed of. Before the question goes before the Supreme Court, why can't it be debated and discussed from all angles, constitutional, legal, social, religious, educational—all these views could readily be exposed by the legal scholars, college debating societies, political clubs, and the like, not for the purpose of stirring up endless dissension, but with the aim of shedding all possible light on the question before its final submission to the court of last resort. (22)

The two practices which have already been tried can be suggested toward this phase of procedure. The first one is from the drafting of the German Civil Code. An invitation for all to give legitimate criticism before this code was placed in its final form resulted in the publishing by the government of replies that filled six volumes. And the point of interest was that a surprising number of helpful

(22) For further discussion see H.W. Humble, "Criticism in the Field of Constitutional Law."
suggestions were received from persons not looked upon as learned. The second analogy is taken from the tradition in the Roman Catholic Church. Before the Pope makes any declarations *ex cathedra* concerning Church doctrine, a full discussion takes place as a rule before various church bodies and, only after having had the benefit of cautious deliberation, is any declaration attempted, thereby, once and for all placing at rest all further controversy. Examples are pointed out by E.W. Humble where great minds have erred, and the interesting part again is that an unlearned person, whose name is now entirely forgotten, pointed out the error.

Because of the broadness of the questions which confront the Supreme Court, it has often been urged that the Supreme Court should include in its membership experts along other lines, though not lawyers. Would this do? It looks improbable, for though it is an excellent plan to have all sides revealed, yet, in the final analysis the question before the Court is one of law.

The proposed plan of full discussion may be opposed by reason that such a plan would arouse too much feeling and, consequently, would endanger the decision of the Supreme Court instead of settling it. But would it—it is more likely that there would be too little discussion of a monotonous public
question. Nevertheless, this plan is a rare one insofar as it does not involve new legislation, nor does it advocate an amendment. It merely asks for cooperation of agencies that are already functioning in the field of American government: would they respond?

Then, for those suggestions of seeking an amendment curbing the power of the Supreme Court, by requiring concurrence of seven judges in any opinion involving the validity of State statutes or acts of Congress. Such an Amendment would possibly be defeated as unconstitutional in itself. "When we consider that there have been proposed no less than 1736 amendments to the Constitution," said Mr. Justice Lurton in 1900, "of which only 16 have been adopted, and that only 6 of the whole number proposed to deprive the Supreme Court of its jurisdiction, we may assume that this jurisdiction has not been regarded as a source of particular danger." (23)

In the history of our country, we find that the rejection of a law as unconstitutional has frequently led to proposes of constitutional amendments and twice feeling was so intense as to secure such amendments. The case of Chisholm v. Georgia, decided in 1792, led to the Eleventh Amendment, barring suits by an individual against a State except by the latter's consent. The Income Tax Cases,

which in effect denied the Federal Government power to levy income taxes, that is, in proportion to the population, led to the adoption of the Sixteenth Amendment. While in another famous case, the Dred Scott case, the bitterness caused was very instrumental in promoting the Civil War.

The Supreme Court on previous occasions has placed voluntary limitations upon the exercise of its own power which has been adopted as a rule of practice. This is expressed in the words of Judge Iredell in 1798, when he stated that, "as the authority to declare a statute void, is of a delicate and awful nature, the Court will never resort to that authority but in a clear and urgent case." (24) Many suggest that the Court impose a further voluntary limitation on its power, by announcing that it would decline to regard the unconstitutionality of a statute as decisively—"plain," "clear," or "unmistakable," in any case in which one or more Judges should consider the statute to be valid. The adoption of such a practice would render impossible most of the "five to four" decisions which have been so productive of lessened popular respect.

It has also been suggested that the voluntary elimination or restriction of the new increasing practice of filing dissenting opinions would tend to strengthen public confidence; on the other hand, such opinions are often of high value in

the future development of the law and legislation. More radical suggestions have been made for Constitutional Amendments establishing an elective Court or a Court appointment for a term of years; but such propositions have never yet found any substantial support, since it follows that they could only result in making the Judiciary less independent and more politically partisan.

The proposal, advanced at various times when intense party passions were flourishing, that the Court should be increased in number in order to overcome a temporary majority for or against a certain measure, the good sense of the American people has always given a decided disapproval. Even the partisan politician sees the disaster in the long run of such a practice. No institution of government can be devised which will be satisfactory at all times to all people. But it may truly be said that, in spite of necessary human imperfections, the Court today fulfills its function in our National system better than any instrumentality which has ever been advocated as a substitute.

In the final analysis, the ultimate success or failure of the Supreme Court depends entirely upon the Justices that are behind this powerful unit. "The Judges of the Supreme Court of the land must be not only great jurists," said Theodore Roosevelt, "they must be great constructive
statesmen, and the truth of what I say is illustrated by every study of American Statesmanship." (25) May not we use John M. Keyne's qualifications of a master-economist as a standard for the individual Supreme Court Justice and especially the Chief Justice who—

must possess a rare combination of gifts. He must reach a high standard in several different directions and must combine talents not often found together. He must be mathematician, historian, statesman, philosopher in some degree. He must understand symbols and speak in words. He must contemplate the particular in terms of the general and touch abstract and concrete in the same flight of thought. He must study the present in the light of the past for the purpose of the future. No part of man's nature or his institutions must be entirely outside his regard. He must be purposeful and disinterested in a simultaneous mood; as aloof and incorruptible as an artist, yet sometimes as near the earth as a politician. (26)

It is essential then that appointments should be made only after searching alertness has been constantly active in the quest for the designed qualities in a Justice—the outcome is in their hands.

May we close with the eloquent appeal written in 1856 at a time when American institutions seemed shaken:

Admit that the Federal Judiciary may in its time have been guilty of errors, that it has occasionally sought to wield more power than was safe, that it is as fallible as every other human institution. Yet, it has been and is a vast agency for good; it has averted many a storm which threatened our peace, and

(26) Frankfurter and Landis, op. cit., page 318.
has lent its powerful aid in uniting us together in the bonds of law and justice. Its very existence has proved a beacon of safety... and now let us ask ourselves, with all its imagined faults, what is there that can replace it? Strip it of its power, and what shall we get in exchange? Discord and confusion, statutes without obedience, Courts without authority, an anarchy of principle and a chaos of decision, till all laws at least shall be extinguished by an appeal to arms.
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VITA

The writer of this thesis, Larry E. Soheewe, was born in Helena, Montana, November 28, 1905. He attended the public and parochial schools of that city and made his high school course at Helena High School, graduating from that institution in June, 1927. The following September he entered Mount St. Charles College where he pursued his course of studies until June, 1930, at which time he withdrew, but reentered again in September, 1931. He is to be conferred with the degree of Bachelor of Philosophy in Social Science, May the twenty-ninth, this year.