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THE BROODING OMNIPRESENCE OF CONSTITUTIONAL LAW†

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I. THE PROVINCE OF COURT ADJUDICATION IN AMERICAN CONSTITUTIONALISM

A. *Introduction*

I have called these lectures *The Brooding Omnipresence of Constitutional Law.* For, in truth, it seems at times that all American law is becoming *constitutional* law. Within recent years, every state has had to revise its criminal justice procedures to bring them into line with Supreme Court decisions that have given new force to the Bill of Rights and the fourteenth amendment. The law of libel, once an exclusive preserve for torts experts, has borne a new look since *New York Times Co. v. Sullivan.*[1] The reverberations of

† This article is based on the third annual Sterry R. Waterman Lectures given by Professor Jones at Vermont Law School (April 25-26, 1978). In his lecture of April 25, Professor Jones made the following tribute to Judge Waterman:

> There are people, never very many of them, who enhance life by the integrity of their work and the quality of their character. Sometimes they are cast in humble roles, and their light does not shine far. Sometimes they rise to the eminence of a high appellate court. Either way, people like this enrich the lives of everyone with whom they come in touch. They are, in the old words, "the salt of the earth."
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> Sterry Waterman means this to me and, I know, to all of you who are his neighbors in Vermont. We know him as a wise and learned judge, a citizen of profound social concern, and a wonderfully generous and unpretentious human being. I had an old uncle who used to say that cheddar cheese and Calvin Coolidge were the best things that ever came out of Vermont. But Uncle Frank never knew Judge Waterman. I am deeply honored to be here to give these third annual Sterry R. Waterman Lectures.

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1. 376 U.S. 254 (1964), holding that constitutional protections for speech and press limit state power to award damages in actions for defamation. This decision "threw the First Amendment overalls into the chowder, and the splashes have not yet all come down." W.

constitutional adjudication have spread so far that they now affect the work of school principals, appliance dealers, social security administrators, librarians, operators of movie houses, Madison Avenue advertising people, and village zoning boards. Old law school standbys like family law, civil procedure, property—even legal ethics—can no longer be thought of as autonomous subjects; each has acquired a constitutional dimension. In days gone by, Huey Long used to tour the country proclaiming "Every man a king! " We have attained something better: today almost everybody is a constitutional lawyer.

This "brooding omnipresence"—I borrow the phrase from Holmes[2]—makes it even more important than before that we clarify our ideas about constitutional law and particularly about the nature and reach of the judicial process in constitutional adjudication. It is my purpose in these Waterman Lectures to make some contribution to that clarification.

B. *The Courts and the Efficacy of Federal Law*

The constitution of any organized society is the aggregate of the norms that govern the distribution of political powers in that society and of the ways in which—and purposes for which—these powers are to be exercised. A constitution may be seen from many perspectives, but it is, in its first aspect, a creation and delegation of powers, and a constitution will not endure unless the powers it confers are sufficient to give its delegates effective capacity to govern. We in our day are rights-conscious, fearful of political power, and so tend to think of the Constitution of the United States as essentially a catalogue of *shalt nots,* a body of procedural and substantive limitations which safeguard individual interests against government intrusion. This is a wholesome libertarian point of view, but it sees only the negative aspect of American constitutionalism. If our

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PROSSER & J. WADE, CASES AND MATERIALS ON TORTS 951 (5th ed. 1971). *New York Times Co. v. Sullivan* involved published criticism of a public official; subsequent cases have centered on the applicability of the constitutional privilege when the comment concerns a so-called "public figure." The cases are collected and the varying views of the Justices analyzed in W. PROSSER, J. WADE & B. SCHWARTZ, CASES AND MATERIALS ON TORTS 1010-27 (6th ed. 1976).

2. "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . ." Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

constitutional government were all brakes and no engine, it could never have taken the Nation across a continent and on the eventful and difficult journey of our first 200 years.

History reminds us that it was touch and go, at first, whether the engine of constitutional government could be made to run at all. English political experience, although well known to the American patriots, was out of point and unhelpful, because the crucial constitutional issue there had been King versus Parliament, a contest waged intermittently for centuries until the Bill of Rights of 1689 and the Act of Settlement 1700 established Parliamentary supremacy as the central principle of the British Constitution. In the United States, the dominating issue from and after 1776 was not executive versus legislature or even, as we think of it today, government versus the individual but national power versus historic state authority. The "radicals," as historians[3] call the men who from 1776 to 1788 opposed the delegation of substantial powers to a central American government, gave relatively little thought to judicial protection of their cherished liberties. Their faith was in democratic political processes—but only if government was local, and the more local the better. The village was ideal, the state acceptable, but nation-wide government was, they thought, incompatible with democracy and corrosive of individual rights.

The nation-minded men who prevailed at the Constitutional Convention had convictions of their own against undivided sovereignty and all forms of govermental absolutism and were acutely aware of the touchy state sensibilities that had to be taken into account in the structuring of a new national government. They differed on many theoretical matters but not on what the first priority was: that the Convention's great purpose was the creation of an effective national government. Ways and means had to be found whereby thirteen aggressively independent states—fourteen if we count Vermont knocking impatiently at the door—could be joined in an efficacious union but without losing their fiercely defended separate identities and political significance.

Somehow or other, an impression has been created that the Constitutional Convention proceeded much like a graduate seminar

3. *E.g.*, M. JENSEN, THE ARTICLES OF CONFEDERATION 11 (1940).

in political theory and that the Constitution was in large part a distillation of the writings of Bolingbroke, John Locke and other political philosophers, notably Montesquieu. Actually, as the records of the Convention clearly show, the delegates drew most often on political experience in which they themselves had participated. If American constitutional history is to be understood, it must be kept in mind that the Constitution of 1787 was not drafted a priori but on the basis of the known and thoughtfully analyzed experience of the troubled years of the Articles of Confederation, particularly the post-war years from 1781 to 1787.[4]

I hope that present-day students are not taught the oversimplifications that were taught to me about the Articles of Confederation, the *Act* of Confederation as it is more properly called.[5] Students of my generation heard only about the "weaknesses" of the Act of Confederation, not at all that the Act, considering its time and political context, was an admirably drafted constitutional document and a remarkable step towards durable national union. I can think of no other exercise in constitutional history quite as instructive as a sentence-by-sentence comparison of the text of the Articles—I use the conventional term—with the text of the Constitution as finally adopted. Try the exercise for yourselves, and see if you do not agree with the appraisal of the Constitutional Convention's great archivist, Max Farrand. "[T]he surprising thing, especially to one accustomed to condemn the articles of confederation, is to see how large a part of the powers vested in congress were taken from the articles of confederation."[6] The power to regulate interstate and foreign commerce was not delegated to the Confederation government, and could not have been in the political climate of 1776 and 1777 when the Act of Confederation was drafted and submitted to the states for approval, but in many other of its federalism-related sections the text of the Constitution borrows from the Act of Confederation, sometimes word for word. These similarities between the two documents make us take particular note of the points at which the Constitution of 1787 embodies governmental devices sharply

4. Jones, *The Articles of Confederation and the Creation of a Federal System*, in ASPECTS OF AMERICAN LIBERTY 126, 143 (G. Corner ed. 1977).

5. Boyd, *The Articles of Confederation and Perpetual Union*, in OLD SOUTH LEAFLETS 5-6, 238-39 (1960).

6. M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 140 (1913).

different from those in the Act of Confederation. When we encounter such a change in basic design, as we shortly shall, is it not the most likely inference that the framers of the Constitution made the change to prevent the occurrence of problems of federal-state relations—or state-to-state relations—that had caused recurring crises during the Confederation period?

The Achilles' heel of the Confederation was that "the united states in congress assembled"—the cumbersome name assigned to the central government by the Articles—was not empowered to act on individual citizens directly but only on and through the thirteen state governments. To explain what I mean by this, let me take as our illustration the eternal problem of how the costs of government are to be financed. The Articles, like the present Constitution, empowered the Confederation Congress to appropriate money for the "common defense or general welfare" of the United States. But how was the money to be raised? Under the Confederation plan, the burden of national expenses was to be shared by the states in proportion to the value of the real property within each state, as ultimately assessed by Congress, but the taxes for paying each state's share had to be "laid and levied" by the local state legislature. In short, Congress could not tax individuals or collect taxes from them. Replenishment of the Confederation treasury could be accomplished only through the agency of the state governments.

By the Act of Confederation, the states were under clear constitutional duty to honor the requisitions Congress made on them for funds. Articles VIII and XII were explicit and unambiguous on the point. But throughout the Confederation years, the central government was continuously harassed by shortages of money and stumbled from one financial crisis to another. Congressional requisitions for funds were regularly and earnestly made, but met with uneven and grudging, often even contemptuous, responses in the states. Nor were financial requisitions the only area in which the states disregarded their constitutional obligations as members of the Confederation. In other matters, too, directions and entreaties from "the united states in congress assembled" were ignored by state power-holders or, at best, only partially and tardily complied with.

What could be done to make the central government effective? People concerned about the survival of the precarious new union

thought at first in terms of forcible sanctions by which a defaulting state might be coerced into honoring its fiscal and other obligations as a member of the Confederation.[7] But it was evident, then as now, that the use of national force against a state and its office-holders is a disruptive and risky business, far too drastic for employment except as a last resort. The problem was never solved in the Confederation years, but a workable solution finally emerged in the course of the deliberations of the Constitutional Convention. The answer, which seems simple and almost obvious to us in the brilliant glow of hindsight, was to enable the national government to exercise its delegated powers by the enactment of laws addressed not to states but to individual citizens directly and enforceable against them by federal officers and in regular judicial proceedings.[8] This step could never have been taken in 1776 or 1781. The decision to take it has been characterized, and properly so, as "the great and crucial decision" of the Constitutional Convention.[9]

I suggest that we have a more balanced understanding of the role of the courts in the American constitutional order when we remember at least this much of our history: that the courts were brought into the picture initially as part of what I have been calling the *engine* of constitutional federalism. It was in the courts and by regular judicial proceedings that the enactments and orders of the new national government were to be enforced—and so given practical efficacy. And as it was in the beginning, it is now. In the working dynamics of American constitutionalism, the Judges of the United States Courts of Appeals, their nine more secluded hierarchical superiors in Washington, D.C., and their judicial brothers on the firing line in the District Courts are not just brake-appliers, crucial as the brakes are in our constitutional design. They are also, and equally, the constitutional agents through whom federal laws are made effective, in show-down situations, when voluntary compliance is unattainable. We miss much of the point if we think of judges as always playing on constitutional government's defensive platoon. A judge or a court can fail in either of two ways: by withholding constitu-

7. Jones, *supra* note 4, at 141.

8. Gunther, *Toward "A More Perfect Union": Framing and Implementing the Distinctive Nation-Building Elements of the Constitution,* in ASPECTS OF AMERICAN LIBERTY 146, 154 (G. Corner ed. 1977).

9. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1 (1973).

tional protections from persons in cases to which they apply or, on the other side of it, by arriving at decisions which undermine the practical efficacy of valid law. Both types of failure are, I suggest, *constitutional* transgressions.

My reference a moment ago was to the members of the federal judiciary as agents, active participants in the enterprise of national government. But in 1787 when the Constitutional Convention was in session, there was no assurance that there would ever be a separate system of federal courts. The Convention merely authorized the future creation of "such inferior Courts as the Congress may from time to time ordain and establish."[10] It was thus a distinct possibility that all or virtually all proceedings to enforce federal laws against individuals would have to be instituted in state courts. Manifestly, state court judges, like other state officers, might be less than warm in their support of enactments emanating from the central authority, particularly if the federal enactment contradicted or differed in substance from existing state law. State court nullification of national legislation, a very real danger in the political climate of the time, would have frustrated the "great and crucial decision" of the Constitutional Convention.

It was this perceived danger to which the supremacy clause of article VI of the Constitution seems chiefly addressed: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[11] The clause is tightly drafted and leaves no room for legitimate argument that a statute passed by Congress pursuant to its delegated powers is not binding law in Virginia, Massachusetts or any other state.

After ratification of the Constitution, it was soon seen, however, that the supremacy clause was in need of further and procedural support. The possibility yet remained that state court judges, although under moral obligation to follow "the supreme Law of the Land," might for parochial reasons violate their constitutional duty

10. U.S. CONST. art. III, § 1.
11. U.S. CONST. art. VI, cl. 2.

to give force to valid federal law. The efficacy of federal law would thus be secure only if the state courts in the federal question part of their work were made subject to the appellate jurisdiction of the Supreme Court of the United States. This clinching step was taken in 1789 when the first Congress enacted section 25 of the Judiciary Act.[12] Section 25 was bitterly assailed by state judges and states' rights political theorists, but the Supreme Court's unanimous decision in *Martin v. Hunter's Lessee*[13] accepted the supervisory jurisdiction and sustained the validity of section 25.

The procedural apparatus was now in place for making it as certain as such things can be that federal laws made in pursuance of the Constitution would be given controlling effect in judicial proceedings in state as well as in federal courts. The Supreme Court of the United States, in its exercise of the supervisory powers entrusted to it by article III of the Constitution and section 25 of the Judiciary Act, was to play a great role in the unfolding drama of American political history. But other processes than the judicial have been and are at work in the shaping of our constitutional polity. There are bounds to the province of court adjudication in American constitutionalism. Let us take a look, then, at the constitutional world that lies outside the appellate courtroom.

C. *Constitution-Making—In and Out of Court*

We lawyers learn and teach constitutional law as we learn and teach other law courses, from *case*books, massive and carefully arranged collections of appellate judicial decisions. When we think about the fundamental norms of our government, our thought is inevitably focused on the role of the courts and the process of constitutional adjudication. It is only being realistic, we think, when we quote Charles Evans Hughes' familiar observation that "We are under a Constitution, but the Constitution is what the judges say it is."[14] Consciously or unconsciously we equate constitutionality with adjudicability. An issue has no constitutional dimension, we seem to think, if there is no way to have it determined in court. Or, on the other side of it, if an issue has a serious constitutional aspect,

12. 1 Stat. 85 (1789). Gunther, *supra* note 8, at 157-60.
13. 14 U.S. (1 Wheat.) 304 (1816).
14. *Quoted in* A. MASON, THE SUPREME COURT FROM TAFT TO WARREN 116 (1958).

then it must follow that a court will—or certainly should—take jurisdiction to decide it. This single-minded concentration on the province of court adjudication as if it were the whole of American constitutionalism has always troubled me, most of all in these days when high-minded people seem to have lost confidence in ordinary political processes and are appealing to the courts to set everything right. It is my purpose now to examine this commonly held assumption that the edifice of American constitutional law has been entirely or virtually a judicial construction.

The aphorism that "the Constitution is what the judges say it is"—which, by the way, is only part of what Mr. Hughes said on that occasion in 1907[15]—is undeniably true in the great area of civil liberties. In constitutional adjudication, the guarantees spelled out in the Constitution's first eight amendments and in the three Civil War amendments mean no more and no less than what the courts, and particularly the Supreme Court, say they mean. A statement of the law of equal protection, for example, is a statement of essentially judge-made law or, to put the matter more usefully in words borrowed again from Holmes, a prophecy "of what the courts will do in fact"[16] in future cases in which an equal protection argument is urged. I would not for a moment discount the significance of constitutional adjudication in the civil liberties and civil rights area; the work of the courts, particularly as their decisions keep the channels of free discussion open and otherwise contribute to the fairness and vigor of our basic political processes, exerts profound influence across the board of American political and social life. It is in this great area, where claims of government power come into

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15. Then-Governor Hughes' statement, read in context, is an affirmation of responsible legal realism:

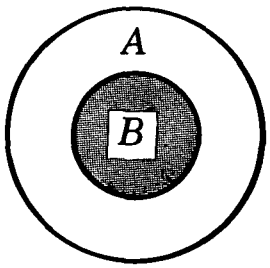
> My whole life has been spent in work conditioned upon respect for the courts. I reckon him one of the first enemies of the community who will talk lightly of the dignity of the bench. We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.

MASON, *supra* note 13, at 116. It is evident that the focus of the Hughes statement is on the relatively few provisions of the Constitution that explicitly protect individual liberty and property from unwarranted government interference.

16. "The prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897), *reprinted in* O. W. HOLMES, COLLECTED LEGAL PAPERS 167, 173 (1920).

confrontation with assertions of constitutional privilege by specific individuals, that the courts have their most nearly exclusive province—one is almost tempted to say their Happy Hunting Ground. But as we move into other areas of public decision-making, we find—and it should not be entirely to our dismay—that constitutionalism does not live by courts alone.

Visual aids are much in vogue in contemporary social science, so let me try a graphic representation, although a lawyerish and hence very simple one. I suggest that we think of American constitutional law as a body of norms that can be expressed graphically in the form of two concentric circles, which increase in areas as follows:



On this graph, *A*, the inclusive circle, represents and includes the total normative structure of American constitutionalism, that is, the whole aggregate of rules and principles which in our legal order govern the distribution of political powers, the selection of the persons who are to exercise these powers, and the ways in which and purposes for which these powers are to be exercised. *B*, the inner and less inclusive circle, represents those of our constitutional norms that are subject to effective supervision by the courts under the institution of judicial review.

My first and painfully obvious point is that Circle *B*, the province of effective judicial supervision, is smaller in area than Circle *A*, the whole universe of Constitution-related decisionmaking. You will readily concede this much, I am sure, because you will think at once of the many constitutional provisions that involve only the internal organization of government and of other constitutional provisions in which the issues are committed for final decision to one of the non-judicial branches of government. You may quarrel with my proportions, however, and think that I have drawn Circle *B* far

too small in relation to Circle *A*. As to this, I ask you to reserve final judgment until you have heard me out.

My second point is that Circle *B* is not set off from the rest of Circle *A* by a permanent and watertight bulkhead. The content of Circle *B* can and does change from time to time and from court to court, and such changes are of more than ordinary significance for our constitutional balance. This, for example, is what happened in *Baker v. Carr*[17] and the other electoral apportionment cases: a constitutional norm that had been considered for years as a "political question" outside Circle *B*[18] was taken hold of by the Supreme Court and pulled into the province of judicial supervision. This was not merely a change in the rules but the arrival of an umpire who had never taken charge before, and the ball game will never be the same again. It is interesting, I think, and highly relevant to our immediate thesis, that Chief Justice Warren, who had a kind of instinct for the jugular in constitutional matters, always ranked *Baker v. Carr* above even *Brown v. Board of Education*[19] as the most significant decision of the Supreme Court during his tenure there.

If I had unlimited time, I could provide other instances in which the Supreme Court by its decisions has from time to time expanded the area of our Circle *B*. If the 1968 decision in the church-state case of *Flast v. Cohen*[20] is a straw in the wind, the Court may be proceeding, although in a most cautious and gingerly way, towards bringing federal expenditures within the province of judicial review,[21] an ex-

17. 369 U.S. 186 (1962).

18. *See* Colegrove v. Green, 328 U.S. 549 (1946), in which a bare majority of the Supreme Court (only seven Justices participating) affirmed the dismissal of a complaint challenging, on equal protection grounds, the constitutionality of congressional districting in Illinois. *See also* South v. Peters, 339 U.S. 276 (1950), affirming the dismissal of a complaint challenging the county unit system in Georgia state elections.

19. 347 U.S. 483 (1954).

20. 392 U.S. 83 (1968), holding that individual taxpayers had standing to sue to challenge the constitutionality of federal expenditures in aid of church-related schools. The "standing" issue decided in *Flast v. Cohen* seems, on first impression, a highly technical point. But *Flast v. Cohen*, in its practical effect, is by far the most important church-state decision of recent years. The applicability to federal expenditures of the establishment of religion clause of the first amendment had theretofore been an issue outside the province of constitutional adjudication; by *Flast v. Cohen* the issue is made a Circle *B* item on which the Supreme Court rather than Congress is to have the last word.

21. The leading case for the long-standing proposition that a taxpayer lacks standing to challenge the constitutionality of a federal expenditure is Frothingham v. Mellon, 262 U.S.

pansion of Circle *B* that would have incalculable consequences in these days when government spending is fully as important as government regulation as an instrument of national policy. But one must not exaggerate the reach of recent and imaginable future judicial expansions of Circle *B*. The circumference of judicial supervision can be moved outward, but, by the nature of our constitutional structure, Circle *B* cannot be made coextensive with Circle *A*.

Nor is it to be assumed that the constitutional norms that lie within the province of judicial review are necessarily the most important ones as ground rules of American constitutional government. In preparation for these Waterman Lectures, I conducted a kind of informal and library-based Gallup Poll of the published views of scholars of American history as to the constitutional issues that have been—or are—of top priority importance for the development of the nation's political institutions. My poll, although woefully unscientific, discloses a substantial scholarly consensus on at least the following eight issues as of central and enduring importance; if any one of them had been differently decided, American constitutional federalism might have taken a quite different course. As we consider these fundamental problems one by one, I suggest that you try this simple exercise: ask yourself, as to each issue stated, whether it was or is a decisional item within Circle *B*, the province of constitutional adjudication, or an item beyond the bounds of judicial supervision and so ultimately for decision by the less orderly processes of politics and history. Our eight central issues, stated in approximately the order of their appearance on the American constitutional scene, are these:

> 1. Is it constitutionally permissible for the United States to acquire territory beyond that comprised of the thirteen original states and their western claims?[22]

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447 (1923). And in a companion case, *Massachusetts v. Mellon*, disposed of by the same unanimous opinion, the Supreme Court held that a state had no such standing "either in its own behalf or as the representative of its citizens." 262 U.S. at 480. Does *Flast v. Cohen* merely carve out a special exception to the general rule of nonreviewability of congressional exercise of the spending power? Or does it presage closer juducial scrutiny in the future of federal expenditures generally? *See* United States v. Richardson, 418 U.S. 166 (1974); *see also*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 84, 91 (1978).

22. "President Jefferson and others seemed to have doubts about the constitutionality of the Louisiana Purchase but their concern was not where in the federal government the

2. Must newly acquired territory be prepared for ultimate admission to statehood; and, if so, must the admission be on a basis of full parity with the original states?[23]

3. Are the decisions of state supreme courts on federal questions reviewable by the Supreme Court of the United States?

4. What is the reach of the powers of Congress under the interstate commerce clause, and to what extent does the delegation of this power to Congress foreclose regulatory action by the individual states?

5. Are the courts empowered and directed by the supremacy clause and other provisions of the Constitution to inquire into and determine the constitutional validity not only

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power to acquire territory lay but whether the United States could acquire additional territory at all." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 329 n.50 (1972). The Constitution itself says nothing about the acquisition of new territory. The only provision of the Constitution that seems at all relevant is art. IV, § 3, cl. 2, wherein Congress is given power "to dispose of and make all needful rules and Regulations respecting the Territory or other Property belonging to the United States." There is surely no basis here for an inference that *additional* territory may be acquired by purchase, conquest or treaty, because the United States, as successor to the Confederation government, was from the outset possessed of the very substantial, unorganized territory that had been conveyed to the Confederation when Virginia, Connecticut and certain other states relinquished their western claims to what became the Northwest Territory. *See* Jones, *supra* note 4, at 131 and 143-44.

23. It was by no means clear in 1789 that American federalism was to be continent-wide. The Ordinance of 1787, enacted in the final days of the Confederation Congress, had provided that the Northwest Territory was to be divided into five regions (later Ohio, Illinois, Indiana, Michigan and Wisconsin) each of which would in time be eligible for admission "into the Congress of the United States, on an equal footing with the other states." But the Constitution is far less explicit with respect to the political equality of new states and merely provides that "new States may be admitted by the Congress into this Union." U.S. CONST. art. IV, § 3, cl. 1. It was the hope of the Gouverneur Morris, and perhaps of other delegates fearful of a possible future shift of political power from the thirteen original states to the more numerous new states, that the equivocal language of art. IV, § 3, cl. 1 would leave Congress with power to govern later-acquired territories "as provinces" with "no voice in our affairs." FARRAND, *supra* note 6, at 144-45. But the political precedent of the Ordinance of 1787 carried over after adoption of the Constitution, and there was never again a question of keeping a region in permanent colonial status until the nation acquired territories outside the "continental United States." In our own day, the precedent of the Ordinance of 1787 has been reaffirmed and extended by the admission to statehood of Alaska and Hawaii.

24. The ARTICLES OF CONFEDERATION of 1781, art. XIII, had declared explicitly that "the union shall be perpetual." No such commitment to the future is stated in the Constitution. The "perpetual union" provision of the ARTICLES OF CONFEDERATION was certainly known to most of the framers of the Constitution. How is the omission to be explained? If a "perpetual union" clause had been included in the Constitution, might it have affected at least the rhetoric of the southern secessionists in the years preceding the Civil War?

of state legislation but also of acts of Congress?

6. Does a disaffected state have the constitutional privilege to secede from the Union?[24]

7. What are the constitutional limits on the powers of the President as diplomatic representative of the nation and as "Commander in Chief of the Army and Navy of the United States"?[25]

8. What categories of wrongdoing are proper grounds for removal from office under article II, section 4 of the Constitution, particularly in impeachment proceedings brought against the President of the United States?

There is my list of eight issues of great historical consequence for American constitutionalism. Another student of our institutions might come up with a different top eight, but his list would have to include many of the items on mine, and it is difficult to see how many of my eight could reasonably be displaced. Note, then, that of our eight crucial issues only two—the problem of giving meaning to the commerce clause and the issue of the constitutional authority for judicial review itself—are distinctly Circle *B* items, issues that were or predictably will be authoritatively disposed of by the process of constitutional adjudication.

On three of the remaining six great issues—those related to territorial acquisitions, to the organization of territories for statehood, and to the reviewability of state court rulings on federal law—the practical and enduring decisions were reached by political processes: respectively, the ratification of the treaty for the Louisiana Purchase, the consistent practice of Congress in the organization of territories and admission of new states, and the enactment by the first Congress of section 25 of the Judiciary Act.[26] The constitutional issue of secession was settled with enormous suffering by the Civil War. The two issues that have continued into our day—the limits on presidential powers and the constitutionally proper grounds for impeachment—are, it seems clear, problems on which judicial intervention is unlikely to be more than marginal, so that lasting settlements will have to be arrived at not by adjudication but by political means.

25. U.S. CONST. art. II, § 2.

26. 1 Stat. 85 (1789).

Am I suggesting by this analysis (eight great issues and only two of them authoritatively disposed of by constitutional adjudication) that the circumference of Circle *B* should be plotted as something like one-fourth of Circle *A*? I am not so dogmatic as all that. My library-based Gallup Poll was not a truly scientific endeavor, and my selection of issues for analysis may have included too many long settled old ones and been otherwise arbitrary or unrepresentative. I will not argue too much with someone who insists that Circle *B* should be estimated for present-day purposes as covering not just a fourth but a third or even a half of the all-inclusive Circle *A*. But whatever your or my estimate may be on that, the point remains: court adjudication is but one of the processes of American constitutional law. It may be the process that we lawyers find most congenial to work in, the one whose workings touch most often on our most intimate concerns. But it is by no means the whole show.

We have, then, put at least rough bounds on the province of court adjudication in American constitutionalism. What are the implications of all this for our understanding of the judicial function in constitutional cases? Although there is material enough for a book here, there are two points I feel bound to make. My first is this: full awareness that the province of court adjudication does not extend all the way across the board, that other departments of government also have great influence and responsibility in matters of constitutional development, gives us a better perspective on the familiar and domatic charge that judicial review is an "undemocratic" procedure and therefore dangerous to the political vitality of the nation. Those who worry on theoretical grounds that a group of unelected judges—"Platonic Guardians" in Learned Hand's phrase[27]—may come to exert too heavy a hand in public affairs should find considerable assurance in the demonstrable fact that the Platonic Guardians do not, and by the nature of our institutions cannot, patrol as much of the turf as is commonly supposed. What-

27. [I]t certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve. . . . For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.

L. HAND, THE BILL OF RIGHTS 73 (1958).

ever other uses my concentric circles may have, they are good for one's sense of proportion.

My second point is that an examination of our constitutional history in terms of the respective contributions of courts and elected officials effectively refutes the too commonly held assumption that constitutional issues, if not settled by court adjudication, will be decided irrationally and arbitrarily in the political process. This pessimistic assumption surfaced now and then when the Nixon impeachment proceedings were under way. Thus, for example, there were criticisms of the House Judiciary Committee for making President Nixon's refusal to give the Committee and the House access to necessary information a count in the bill of impeachment, instead of filing suit in court against Mr. Nixon to compel production of the needed documents. And there were others who went so far in their court-mindedness as to contend that even the removal of a President on impeachment by the House and conviction by the Senate would be reviewable in court proceedings designed to determine whether the offenses of which the President had been found guilty were constitutionally proper grounds for his removal under article II, section 4. This fantastic suggestion, or so it seems to me, reflects at best a grotesque over-estimate of the province of constitutional adjudication and, at worst, a despairing conviction that American political processes cannot operate except in an irrational and irresponsible way.

The measured and dignified way in which the Nixon impeachment proceedings were managed until terminated by Mr. Nixon's resignation, and the careful attention given by Congress to the profound constitutional issues involved in enactment of the War Powers resolution of 1973,[28] are sufficient evidence, and contemporary evidence, that our political processes are not as insensitive to consti-

28. 50 U.S.C. §§ 1541-1548 (Supp. V 1975) (H.J. Res. 542, adopted over a presidential veto on Nov. 7, 1973). Section 1541(a) sets the tone of the Resolution:

> [I]t is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

tutional considerations as the court-or-nothing people would have us believe. This, I think, is a good place to let Justice Holmes have the next to last word: "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[29] That is a good and sturdy admonition, even if it sounds a bit old-fashioned in these days when "Sue the bastards" seem to be displacing "Turn the rascals out" as the rallying cry for social reform.

II. Jurisprudential Perspectives on the Institution of Judicial Review

Years ago, when things were simpler and law schools were few, an *ad hoc* committee of practicing lawyers met in El Paso to test the qualifications of a young blacksmith who had prepared himself by home study for admission to the Texas bar. To the examiners' first question: "What do you know about *habeas corpus*?" the applicant replied that he didn't think there were many of those critters in Texas. Asked then to define the doctrine of consideration, he allowed as how he just had not come across that in his readings, and his answer was much the same when the examiners asked him to state the holding in *Marbury v. Madison.* "What in blazes have you read?" demanded the presiding examiner; and the blacksmith answered proudly, "I have read—and I have memorized—all three volumes of the Revised Statutes of the State of Texas." "Sorry, son," said the questioner sadly, "the trouble with you is that some day those jackasses in the state legislature are going to meet in Austin and repeal every goddam thing you know."

Life would be far easier for law students, and certainly for their professors, if law or any branch of it were a body of unchanging doctrine that could be mastered once and then filed away in the mind for future use as needed. But yesterday's law has a way of being unreliable as a source of guidance for today, and today's precedents may provide the wrong diagnosis for a problem of tomorrow. The central difficulty in legal education, the one that makes us put our emphasis on legal reasoning rather than on the rote learning of

29. Missouri, Kan. and Tex. Ry. v. May, 194 U.S. 267, 270 (1904).

doctrine, is that law students have to be trained in the present for professional service in the future, perhaps thirty or forty years in the future, when issues, rules and procedures may be quite different, not just in detail but in fundamental ways. "Law must be stable," wrote Roscoe Pound, "and yet it cannot stand still."[30] And nowhere in the legal order is this more true than in constitutional law.

A. *The Shifting Sands of Constitutional Doctrine*

Among my souvenirs are two battered notebooks, one recording what I learned when I took constitutional law from a great teacher at Washington University in 1933; the other I used when I first taught the course myself at the University of California, Berkeley in the spring of 1947. Fourteen years is no great time in the life of the Constitution, but what a world of difference appears when my 1933 and 1947 notebooks are put side by side for comparison. Consider this example. In 1933 the regulatory power of Congress under the commerce clause had seemed well on the rise.[31] Within three years, the channel of congressional power was narrowed drastically by Supreme Court decisions in cases like the *Schechter* "sick chicken" case[32] and *Carter v. Carter Coal Co.*[33] But there was nothing at all final about that: the new containing dikes were hardly in place before they were weakened in 1937 by *NLRB v. Jones & Laughlin Steel Corp.*[34] and virtually swept away in 1942 by *Wickard v. Filburn.*[35] In the interpretation of the commerce clause, the old approach—"Thus far thou shalt go but no further"—was replaced by a new one amounting to "Anything goes." This had all happened, mind you, in far less than my fourteen years, and I have used only one issue of several that might have been chosen to illustrate the reality and pace of doctrinal change in that now largely forgotten era of constitutional adjudication.

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30. R. POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

31. The cases so interpreted in my law student days included Stafford v. Wallace, 258 U.S. 495 (1922) and Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342 (1914) (The Shreveport Rate Cases).

32. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

33. 298 U.S. 238 (1936).

34. 301 U.S. 1 (1937).

35. 317 U.S. 111 (1942).

How vastly greater are the changes when I compare my Berkeley coursebook of 1947 with the constitutional law of 1978, just thirty-one years later. To be sure, the interstate commerce issue stands about as it was, although the 1976 decision of the Supreme Court in *National League of Cities v. Usery*[36] suggests that there may be life in the old issue yet. But what of everything I thought I knew and my students thought they learned in 1947 on such problems as the procedural rights assured by the fourteenth amendment to defendants in state criminal prosecutions, the substantive content of the "liberty" guaranteed against government interference by the fifth and fourteenth amendments, or the requirements of the equal protection clause in employment relations, in public education and even in the allocation of government benefits? It is not simply that the answers are different; the movement in theory has been so momentous that the issues are different, too.

Let me make a sad confession, one which would have to be made by any honest person who taught constitutional law way back in the nineteen-forties or thereabouts. If a student in my 1947 constitutional law class at Berkeley had persisted in arguing that the equal protection clause forbids county-based representation in one house of a bicameral state legislature,[37] or that the "liberty" guaranteed by the fourteenth amendment forbids any state regulation whatever of first trimester abortions,[38] or that the death penalty for rape is invalid as constitutionally prohibited "cruel and unusual punishment,"[39] I would unhesitatingly have told him not only that he was wrong but that he was wasting the time of the class on frivolous speculations. And I would have been quite right as the law stood then. My argumentative student, on the decisional law as it could reasonably have been read in 1947, would have been either a nut or a seer gifted with prophetic vision. And seers, in my teaching experience, are few and far between in law school classes.

The American Law Institute published its first *Restatement of Contracts* in 1932, and the *Restatement, Second* of that subject did

36. 426 U.S. 833 (1976).

37. Reynolds v. Sims, 377 U.S. 533 (1964); Lucas v. 44th Gen. Assembly of Colo., 377 U.S. 713 (1964).

38. Roe v. Wade, 410 U.S. 113, 163 (1973).

39. Coker v. Georgia, 433 U.S. 584 (1977).

not get under way until 1964. Constitutional law, it appears, is largely restated by the Supreme Court at far briefer intervals. It is right that we give close study and searching analysis to the doctrines announced and adhered to by the courts in present-day constitutional decisions, for these doctrines are today's constitutional law; but we need an occasional reminder that the principles arrived at by constitutional adjudication are not immutable certainties. The only thing the law student or the law teacher can be 100% sure of is that his constitutional law notebook will be as out of date in the year 2009 as my Berkeley coursebook is today. The stabilizing and enduring element in constitutional law, as in any other field of law, is not a continuity of doctrine but a continuity of authority, tradition and process. That is why I have decided, in this lecture series honoring a great and admired judge, to discuss not the merits or demerits of particular judicial decisions but what seem to me some of the fundamental things, jurisprudential and historical, that relate more generally to the institution of judicial review.

B. *Judicial Review in the Light of History and Legal Theory*

Earlier in these lectures, I followed the common practice of referring to the Supreme Court as a constitutional umpire, empowered to settle disputes as they arise in the course of public affairs between nation and state, or between branches of government, or between government officials and individual citizens. This figure of speech, the Court as umpire, is an acceptable way to describe one aspect of the judicial function in constitutional cases, but it can be misleading if we fail to note that the Court, unlike other umpires, can and on occasion does change the rules while the game is going on. In constitutional adjudication, the administrative task of rule application is inextricably interwoven with the creative task of law amendment and correction. This inevitable blending of law application and law creation is present, of course, everywhere in the judicial process—most manifestly so, perhaps, in the common law countries—but it has very special importance for the jurisprudence of judicial review. Constitutional decisions provide authoritative standards that control what other divisions and agencies of government can and cannot do. When a court abandons or reshapes an older constitutional principle, the effect of its action is to promulgate a new standard of validity which cannot be altered by ordinary legis-

lative action. An umpire entrusted, as is the Supreme Court, with continuing and virtually final authority to determine for itself the rules it will apply in the course of the game carries vast responsibilities when the game is constitutional government.

The judicial review of legislation is, as Holmes characterized it, "a solemn and hitherto unheard-of authority and duty"[40] for judges to have; "hitherto unheard-of" in the sense that the tradition of the English common law, in which all early American judges were schooled, had long lived with the principle of parliamentary supremacy, which foreclosed judges from inquiring into the "constitutional" validity of law duly enacted by Parliament or of official action clearly authorized by act of Parliament.[41]

There is a vast historical and quasi-historical literature on whether judicial practice should have been different over here. The range of views, as most of you know, runs all the way from testy charges that *Marbury v. Madison*[42] was outright judicial usurpation to contentions, at the other end of the spectrum, that judicial review was clearly anticipated and provided for by the framers of the Constitution. The uses of history in legal argumentation can be woefully adversary; I have read much of this literature within the past year or two and have the uncomfortable impression that many of the participants in the great debate over the original legitimacy of judicial review have found in the historical documents only the things they wanted to find there. This is not the occasion to undertake still another assessment of the historical case for or against judicial review, but I do want to invite your attention to a few points that have to be taken into any account.

We look first at the words of the supremacy clause itself:

> 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, any Thing in the

40. O. W. HOLMES, COLLECTED LEGAL PAPERS 270 (1920).

41. Jones, *The Common Law in the United States—English Themes and American Variations*, in POLITICAL SEPARATION AND LEGAL CONTINUITY 91, 129-30 (H. Jones ed. 1976).

42. 5 U.S. (1 Cranch) 137 (1803).

> Constitution or Laws of any State to the contrary notwithstanding.[43]

The immediate purpose of that clause, as we have seen, was to make federal enactments binding and enforceable even in state court proceedings, whatever conflicting statutes and precedents might exist in local state law. This immediate purpose could have been accomplished by a simple declaration that the laws and treaties of the United States shall be the supreme law of the land and so binding on state court judges. But the supremacy clause as finally written into the Constitution says significantly more than that. *"This Constitution"*[44] is one of the items, and the one first named, that are declared to be supreme law.

The idea of a constitution as *law*, and so something that can be asserted by an ordinary litigant and drawn on as a source of judicial decision, is an idea we have come to take for granted, but it was by no means a self-evident concept when incorporated into the text of the supremacy clause. Political theorists and jurisprudential writers of the positivist school have always had great difficulty in accepting the notion that the directions of a political constitution are law in the usual sense. In the imperative-theory jurisprudence of Hobbes, John Austin and their successors, nothing is truly positive law that is not a command of the sovereign to the sovereign's subjects.[45] But the conditions and limitations of a constitution run in quite the opposite direction: they are precepts that bind the sovereign, operating as commands not from but to the sovereign.

An imperative-school theorist will readily concede that constitutional precepts are *morally* binding on those who exercise political power in a state and that a legislature is untrue to the nation's basic "positive morality" if it enacts statutes subversive of constitutional guarantees. But it is quite another thing to say that constitutional norms are *law,* because that means, or would seem to, that a legislature which acts unconstitutionally can be taken to task for its

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43. U.S. CONST. art. VI, cl. 2.

44. *Id.* (emphasis added).

45. For a concise and instructive analysis of the views of Hobbes, Bentham, John Austin and other imperative-school theorists, *see* E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 82-92 (1953).

wrongdoing at the complaint of an ordinary litigant and in regular judicial proceedings in an ordinary court. One can almost hear John Austin saying, "Such a state of affairs could never occur in England." And so it could not under the principle of parliamentary supremacy.

A tutor I had at Oxford many years ago explained to me very patiently that a political constitution, whatever else one might say about it, cannot conceivably be characterized as law. I insisted with what he doubtless considered colonial thick-headedness that in the United States, at least, the Constitution is law. I still remember his anguished reply, "But you cannot *say* that." Yet that is precisely what the supremacy clause does say. It is unlikely that the framers of the Constitution, or many of them, were aware of the full implications of adding the Constitution itself as one of the things that are made "law"—and "supreme law"—by the supremacy clause, but the addition,[46] whether or not entirely understood at the time, has had momentous consequences for American constitutionalism.

The case for the historical legitimacy of judicial review is not of course fully made by a simple quotation of the words of the supremacy clause. Even on the assumption that the constitution is "law" and "supreme law," it can still be argued—and often and heatedly has been—that the interpretations of that supreme law by the coordinate legislative and executive branches of government should be final and authoritative. Was it the understanding of the delegates to the Constitutional Convention and of the much larger number of people who participated in the ratification of the Constitution that judicial interpretations of the Constitution were to be controlling in actual cases and controversies, even over the conflicting interpretations of the two political branches of government? The records of the Constitutional Convention provide astonishingly little evidence one way or the other as to what the prevailing understanding was. Many days of Convention deliberation were directed to

46. In earlier drafts of the proposal that became the supremacy clause, only federal statutes and treaties were explicitly declared to be supreme law. The Constitution itself was added to the list at a late stage in the proceedings of the Constitutional Convention. *See* II THE RECORDS OF THE CONSTITUTIONAL CONVENTION 381, 389 (M. Farrand ed. 2nd ed. 1923). The evolution of the supremacy clause is described in a perceptive essay by Gerald Gunther, *Toward a "More Perfect Union": Framing and Implementing the Distinctive Nation-Building Elements of the Constitution*, in ASPECTS OF AMERICAN LIBERTY 146 (G. Corner ed. 1977).

other questions that now seem to us of far less import, but one looks in vain for anything resembling a full dress debate on the pros and cons of judicial review.

I thought when I was young that the very sparseness of this record made it impossible to assert an historical foundation for the institution of judicial review. I know the history somewhat better now and have changed my mind. Judicial review was, I believe, a natural and almost inevitable development in American constitutionalism. Why is it, then, that the framers of the Constitution were not more explicit in conferring this awesome and "hitherto unheard-of" authority on the courts? The more persuasive inference is, I think, that most of the framers simply *took it for granted* that the courts would have the power to hear and decide constitutional challenges in the cases that came before them. If the great issue was given far less attention at the Philadelphia Convention than its gravity deserved, one explanation is that the minds of the delegates, when they thought of courts and their work, were preoccupied with the urgent problem of their time: how to secure the efficacy of federal law in the states and in state courts. Their principal concern was with what courts and judges could do to make federal government work, not with what courts and judges might some day do to keep government, federal and state, within constitutional bounds.

But there is, I believe, a more important, if somewhat more subtle, explanation of the lack of attention at the Constitutional Convention to the great issue we identify with *Marbury v. Madison.* We must not attribute the legal theory of our own day to these men of the late eighteenth century. In our notions concerning the nature of the judicial process in constitutional cases as in other cases, we are all legal realists to one degree or another and so the heirs of Holmes and Cardozo, of Pound and Karl Llewellyn. But prevailing jurisprudential theory in 1787 and for many years thereafter thought of the judicial process in simplistic and mechanical terms and was rigid in its insistence that a single true answer to every conceivable legal problem can be "found" in pre-existing doctrine. If no great issue was made of judicial review at the Philadelphia Convention, it may well be because even the most astute of the framers could not have been aware a priori of the vast discretion inescapably exercised by the courts in the continuing process of judicial review.

Jurisprudential theory, it seems, can make a difference in the real world, and that encourages me to carry on with our analysis.

C. *Legal Method in Constitutional Decision-Making: Authoritative Materials and Received Techniques*

The literature of what is called jurisprudence is a grab bag of many themes, three of which recur in jurisprudential discussions of the judicial process: the themes of authority, method and efficacy in relation to decisional law. There are certain questions that have to be asked if we are to understand a legal system, our own or any other, and high among these crucial questions are these: (1) What is the origin and what is the scope of the powers entrusted to the courts? (2) What materials and methods are made use of by the courts in the exercise of their powers? and (3) What institutional or other factors must be kept in mind if we are to appraise the social impact of decisional law in the world outside the courtroom? So far in our discussion of the jurisprudence of judicial review, we have addressed ourselves only to the first question, the question of authority. We move now to the other two questions, those which relate to the method and to the social impact of constitutional adjudication. These are vast subjects and impose a principle of selection on anyone who would touch on them in a lecture. Lest I spread our discussion too thin, I shall confine myself to a very few points, those which seem to me most important for the understanding of our constitutional processes and most neglected in scholarly writings on constitutional law.

All my life I have been more interested in processes than in products. When I see a great picture in the Louvre or the Metropolitan Museum, the first thing that occurs to me is not how beautiful the picture is but how the artist did it, what his pigments were, the style of his craftsmanship, the techniques he employed in the use of his drawing-charcoal and brushes. And so in law I am a confirmed Legal Methodist, one who finds far greater interest in exploring the materials and methods of judicial decisionmaking than in formal analysis of the logical content and possible doctrinal implications of specific judicial opinions, however important. This being so, the most striking thing to me about article III of the Constitution is that it does not deal at all with the modes of analysis and reasoning that

the courts are to follow in doing their work. To be sure, the headings of the judicial power are carefully enumerated in article III, and there are a few explicit limitations that must have been of particular interest to the framers: the guarantee of jury trial in the state where the offense was committed, the restrictive definition of "treason," and the like. But article III, and this is true of the Constitution as a whole, does not undertake to answer the questions of practical legal method that are at the heart of any court's functioning.

Roscoe Pound wrote many years ago that the essential elements of a legal system are its "*authoritative materials,*" that is, the hierarchy of sources "wherein judges are to find the grounds of decision," and its *"received techniques,"* that is, the methods to be employed by the judges in drawing on the authoritative materials for guidance in the settlement of cases.[47] John Chipman Gray says much the same thing in his great book *The Nature and Sources of the Law,* where he attributes law's experienced certainty and reasonable predictability to the circumstance that judges "seek the rules which they follow not in their own whims, but . . . derive them from sources . . . to which they are directed, by the organized body to which they belong, to apply themselves."[48]

Suppose that John Marshall, when he ascended the Supreme Court bench in 1801 and constitutional law was largely a clean slate, had asked himself the simple-seeming question: "What are or are to be the authoritative materials and the received techniques of constitutional adjudication?" He and his colleagues were explicitly directed to the Constitution itself: "This Constitution . . . shall be the supreme Law of the land."[49] But what are to be the authority and weight of other possible sources like constitutional history, the opinions of learned writers, or the practices and political conventions of the first two Presidents and first six Congresses? And what are the techniques to be employed by the Court in interpretation of the constitutional text? Is the Constitution to be construed literally according to something like the plain meaning rule? Is the Court to apply the words of the Constitution as these words were understood

47. Pound, *Hierarchy of Sources and Forms in Different Systems of Law,* 7 TULANE L. REV. 475, 481 (1933).

48. J.C. GRAY, THE NATURE AND SOURCES OF THE LAW 84-85 (1962).

49. U.S. CONST. art. VI, cl. 2.

by the framers or, which might not be the same thing at all, as they were understood by those who participated in the ratifying conventions? Or are the provisions of the Constitution to be given a kind of purpose interpretation, the one that, in the Court's judgment, best serves to attain the objectives sought by the framers? Or is it perhaps best, since the Constitution is to endure for a long time, to forget about the framers altogether and give the provisions of the Constitution the interpretation that best accords with present-day needs and present-day values?

There is not a word about any of these basic questions of legal method in the text of the Constitution. Even now they elude that single true answer. The student of constitutional law can readily point to cases in which the Supreme Court, from time to time and case to case, has used each of the interpretative approaches just suggested: plain meaning, framers' understanding, purpose interpretation, and present-day needs and values. No single interpretative method has emerged as the one right and always followed way. How can this be after almost two hundred years of adjudicative experience? Since the Constitution is a written document, of higher dignity than an ordinary statute but in at least equal need of textual interpretation, why is it that the hermeneutic question—the question of the technique to be brought to bear in the explication of a writing—has not held center stage in constitutional adjudication? The explanation, almost totally neglected in legal literature, is that American judges from very early on brought the method of the common law to bear on constitutional questions. Constitutional adjudication in the United States is only indirectly and occasionally hermeneutic; in its prevailing and characteristic methodology it is a precedent system.[50] To see this clearly, let us step back for a moment and consider the ways of dealing with legislation that have long characterized the Anglo-American judicial process.

D. *Common Law Ways in Constitutional Adjudication: The Centrality of Precedent*

During the first years in the life of a statute, judges and lawyers center their attention on the text of the statute and on its legislative

50. *See* Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 461-63 (1975).

history and underlying purposes. But the common law principle of stare decisis applies as fully in statutory litigation as in cases involving only case-law sources. So as a statute gets older and interpretative precedents accumulate, the focus of professional and judicial attention tends to shift from the statutory text and history to the judicial precedents. Argument in a case then centers not on the text of the statute but on the norm to be derived by analysis and synthesis of the judicial precedents.

It is the same story but to an even greater degree in constitutional adjudication. During the almost two hundred years since the Constitution became the supreme law of the land, a massive and intricately constructed judicial exegesis has been built up on the spare text of the Constitution. Who would have the temerity to argue a constitutional case without first having mastered the material facts and the doctrinal subtleties of every past Supreme Court case that might be regarded as in point? For judicial precedents—and the matching, analysis and distinguishing away of precedents—are as central in the universe of constitutional law as anywhere else in our legal order. If explicit overrulings of past decisions are more common in constitutional cases than in other cases, that is a matter of degree and not of kind. For precedents are only *generally* binding, under the principle of stare decisis as understood in the United States, even in private law matters; and the reservation of a largely undefined power to overrule is one of the cluster of elements that constitute our institution of precedent. What counts is that it is to the judicial precedents, far more often than to the constitutional text itself, that lawyers and judges turn to guide and structure their constitutional arguments and decisions. And these precedents are analyzed, handled and given effect according to the ways of the common law.

I cannot think of anything more important that might be said about the institutional realities of judicial review. No one can be a good constitutional lawyer or constitutional judge unless he is first a good common lawyer, someone who works comfortably in the intellectual atmosphere of the institution of precedent. The same common law insights are indispensable if one is to be a useful critic of the work of the courts in constitutional adjudication. Judicial opinions in constitutional cases cannot be read as if they were ab-

stract essays in political theory, and it is unrealistic and unreasonable to expect that the constitutional law of any time, including our own, can ever attain the systematic doctrinal consistency of mathematics or the natural sciences. I wish that critics could learn to keep their shirts on when a court—whether it be the Warren Court or the Burger Court or any other—overrules or distinguishes some past case or fails to extend something it has said in the past to the outer limits of the statement's possible implications. One who understands the realities of stare decisis, the cluster of ideas that make up the institution of precedent, knows that courts in our legal tradition have always acted this way. For in a very real sense they are authorized by our legal tradition to move one step at a time, correcting and forever revising, according to their own best judgment, as they go.

I happen to prefer common law method to any other, even and particularly in constitutional adjudication, but my present point is simply that common law method is a fact of life, perhaps the most important fact of life, in the operation of judicial review. One who would understand how constitutional law works and grows must have an understanding of how the common law works and grows. And that understanding is best achieved, I suggest, not by reading formal critiques of current Supreme Court doctrine but by turning to Holmes and his emphasis on the "legislative" judgments that lie behind the logical form of judicial opinions;[51] to Cardozo's four ways of exerting the force of a judicial precedent,[52] and to Karl Llewellyn's ideas of "situation sense" in appellate litigation and of the "steadying factors" that make judicial decisions "reckonable" in the tradition of the common law.[53]

E. *The Shared Constitutional Powers of Courts and Legislatures*

We have now reached the last station on what has been a long, and I hope not too wearying, journey. What can be said in the time that remains about the matter of efficacy, the way that constitu-

51. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897); *reprinted in* O.W. HOLMES, COLLECTED LEGAL PAPERS 167, 181 (1920).

52. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 30-31 (1921).

53. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 268-85 ("situation sense"); 19-61 ("steadying factors") (1960).

tional decisions operate in the larger society? Again I must be rigidly selective. To set the tone for the point I think most important to make to round out these Waterman Lectures, I take our text, a brief one, from the book *Presidential Power,* by the highly esteemed political scientist Richard Neustadt: "The constitutional convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather it created a government of separated institutions *sharing* powers."[54] In Neustadt's sense, the powers entrusted to the judiciary by the Constitution are shared with the political departments of government and particularly with the Congress of the United States. The common task is to give meaning and social reality to the authorizations and prohibitions that are but sketched out in the constitutional text.

It is narrowing and misleading to see judicial review as an institution in which an adversary situation always exists between judges, on one side of the barrier, and elected representatives on the other. For there are occasions, more frequent I think than the occasions of out-and-out conflict, when the Constitution-related work of courts and legislatures is not adversary but mutually supplementary, when the practical effect a constitutional provision is to have in our society is determined by a kind of concordance of judicial decisions and legislative decisions. We have already seen a classic example of this legislative-judicial coordination in the matter of the review of state court decisions by the Supreme Court of the United States. Both Congress and the Supreme Court contributed to the result, Congress by its enactment of section 25 of the Judiciary Act of 1789,[55] the Supreme Court by accepting the jurisdiction in *Martin v. Hunter's Lessee*[56] and *Cohens v. Virginia.*[57] This you may say is an old and unduly technical illustration, involving not much more than simple offer and acceptance. But there are many recent examples, and I think I have time for two.

National regulation of commerce and industry provides a clear case in point, an area of governmental action in which the practical significance of a constitutional provision for contemporary life is, in

54. B. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 33 (1959).
55. 1 Stat. 85 (1789).
56. 14 U.S. (1 Wheat.) 304 (1816).
57. 19 U.S. (6 Wheat.) 264 (1821).

effect, a composite result to which both judicial decisions and legislative decisions have contributed. After the Supreme Court's highly permissive interpretations of the commerce clause in cases like *United States v. Darby*[58] and *Heart of Atlanta Motel, Inc. v. United States*,[59] there appear to be few if any judicially enforced limits on the power of Congress to adopt nation-wide regulatory measures. One who looked only at the *United States Reports* might infer from the judicial decisions alone that virtually every aspect of local business is now regulated by federal law and that state regulations are of only marginal importance. But the fact of the matter is that Congresses have not chosen to exercise the commerce power to anything like the full extent authorized by the Supreme Court's permissive decisions, and, as my distinguished colleague Herbert Wechsler has written, "it is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism."[60] In the interpretation of the commerce clause and other constitutional provisions delegating power to Congress, the courts do no more than stake out the outer bounds of permissible national action; what happens within these bounds is for congressional determination. Those who espouse social reforms that can be accomplished only by federal legislation may find their burden of persuasion heavier in Congress than in the courts. No writ of mandamus lies to compel a legislature to push its powers to their full allowable limits.

My other and concluding example of the shared responsibility of courts and legislatures in the practical achievement of constitutional ends concerns the fourteenth amendment and particularly its guarantee of equal protection of the laws. No other provision of the Constitution seems at first impression so exclusively within the province of court adjudication. Equal protection was a rare argument,[61] almost an afterthought,[62] in the constitutional litigation of

58. 312 U.S. 100 (1941).

59. 379 U.S. 241 (1964).

60. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 560 (1954).

61. The "old" equal protection in the pre-Warren years . . . supported only minimal judicial intervention in most contexts. . . . The historical background of the 14th Amendment persuaded judges at an early point to apply a stricter scrutiny and to adopt a less deferential stance when racial classifications were challenged. But in most contexts, the impact of equal protection

only a few years ago. Today it has come into central prominence and seems to be displacing the due process clause as the most far-reaching theory of constitutional challenge and the one most often employed.[63] With equal protection so constantly in court, how can legislative intervention in the area be of any importance?

The answer is, in part, that the equal protection clause is self-executing, and so enforceable in constitutional adjudication, only against state, that is, governmental action. Racial discrimination and other categories of unjustly discriminatory conduct are not within the ban of the fourteenth amendment, as constitutional law now stands, unless sponsored or in some way supported by state or local public authority. But discriminatory practices by private individuals or organizations can be made unlawful by act of Congress, and that is what Congress did by enacting the Civil Rights Act of 1964.[64] It is to the eternal credit of the courts that the first great breakthrough in the tough campaign to make racial equality a reality in American life came in *Brown v. Board of Education,*[65] but Congress, too, made its contribution through the Civil Rights Act and, what may count even more in the long run, by enacting the Voting Rights Act of 1965,[66] which enabled great numbers of theretofore disenfranchised citizens to seek relief for their grievances not only as litigants in court but also as effective participants in the political process.

Who can be sure that a historian twenty or thirty years from now may not say that the Voting Rights Act was an even more

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was very limited, both in frequency of invocation and in scope of intervention. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 657 (9th ed. 1975).

62. "It is the usual last resort of constitutional arguments to point out shortcomings of this [equal protection] sort." Buck v. Bell, 274 U.S. 200, 207 (1927) (Holmes, J.).

63. Since the mid-1950s "there has been an explosion of cases applying the equal protection limitation." E. BARRETT, CONSTITUTIONAL LAW: CASES AND MATERIALS 763 (5th ed. 1977). The equal protection decisions of the Warren Court and Burger Court are subjected to detailed and intensive analysis in L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1136 (1978).

64. 42 U.S.C. § 2000a (1970), sustained as a valid exercise of the commerce power in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); and Daniel v. Paul, 395 U.S. 298 (1969).

65. 347 U.S. 483 (1954).

66. 42 U.S.C. § 1913 (1970). The principal decisions upholding the validity of the Act were South Carolina v. Katzenbach, 383 U.S. 301 (1966) and Katzenbach v. Morgan, 384 U.S. 641 (1966).

efficacious breakthrough for the disadvantaged than the Supreme Court's decision eleven years earlier in *Brown v. Board of Education*? And is it not undeniable that the decisions of the courts in the school desegregation cases and the supporting legislative decisions to enact the Civil Rights and Voting Rights Acts are best understood as contributions to a shared goal, as a package, if you will, of effective *constitutional* action?

I spoke before of the *engine* and the *brakes* of constitutional government. There are times, plenty of times, when the courts must put on the brakes, even over the outraged protest of elected legislators and what the pollsters in their wisdom call public opinion. But judges, although the most visible guardians of our constitutional tradition, are not the only officers of government who take an oath to support the Constitution of the United States.[67] Judges, however resourceful, are limited in the remedies at their command; and we may be asking the courts to do too many things for us that we ought to be doing for ourselves in the more rough-and-tumble arena of electoral politics. For we have learned by experience, both ancient and modern, that resolute adjudication and responsible political action both have their parts to play in the building—and in the keeping—of a just constitutional order.

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67. U.S. CONST. art. II, § 1, cl. 8; art. VI, cl. 3.