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SOME REFLECTIONS ON CURRENT CONSTITUTIONAL CONTROVERSY *

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These remarks are headed: Some Reflections on Current Constitutional Controversy. As T. Reed Powell, I believe, said about a similar title, one should find it possible to stay within its framework. If the title is roomy, at least it bears a promise of reflection.

The constitutional controversies on which one might reflect include different controversies between different controversialists. There has, of course, been controversy between Justices of the Supreme Court. There have been strong words in constitutional clothing by state legislators and governors and some Southern congressmen against the Supreme Court, and, unusually, even some words back by the Court, in *Cooper v. Aaron*.¹ And there have been differences rising perhaps to the level of not-always-polite controversy, among us, the professors.

Note an omission. At one time, one might have reflected also on sharp constitutional disagreements between members of Congress. Such controversy hardly exists today. One reason is that legislators have apparently discontinued reflecting on the constitutionality of their

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¹ 358 U.S. 1 (1958).

own actions. It is a rare occasion when even an isolated member of Congress manifests that his oath to support the Constitution of the United States requires that he consider whether or not the Constitution permits particular legislation, or incidental legislative activity. It is a rare committee of Congress that deems it part of its function in considering a bill or conducting a hearing to reach a judgment as to how its actions square with the limitations and obligations of the Constitution. Even state legislators, some of whom have no hesitation to challenge constitutional interpretations of the Supreme Court, do not appear to indulge the more fruitful practice of attending dispassionately, in advance of legislative action, to how this action would conform to the Constitution as it has become, even—if you will—as the Supreme Court is likely to make it. One may well reflect a little sadly on such legislative omissions, and upon their relevance to so-called presumptions of constitutionality and to the institution of judicial review.

But this is digression, even if perhaps relevant digression. We turn to the controversies which are current. We will reflect in particular about controversy within the Supreme Court of the United States and about controversies of professors about the controversies of the Justices. We will suggest that there has been a change in the subject matter of constitutional controversy; that there has been a corresponding, if not a consequent, change in the issues that divide the Justices of the Supreme Court; that there has been a change also in the criticism of the Court, leading to controversies among the critics.

THE CHANGING ISSUE OF THE CONSTITUTION

We begin by examining the constitutional stuff of which today's controversies are made; and we approach that examination by noting yesterday's battlefields which are today quiet. It has long been apparent that the constitutional provisions in controversy today are not those of a generation ago, specifically the judicial generation which passed in 1936. Principally, the extent of the power of Congress is hardly in question. The once-big issue, the scope of permissible action by Congress in matters affecting interstate commerce, is no longer an issue. "To regulate commerce with foreign nations and among the several states" has gone as far as words will go, and relation or relevance to commerce has been stretched—or recognized—where it never had been before. If the commerce power were not enough, other powers have magnified to render it highly unlikely that any foreseeable congressional act would be declared to fall outside the Constitution's

authorizations to Congress. Congress long ago learned that it can tax anything, and can prohibit or regulate by taxing—apparently even if regulation is the principal motive.² Permissible congressional action under the fourteenth amendment has grown, as the concept of “state action” and state responsibility has grown, maybe even to include forms of state inaction. The so-called war powers and their ramifications during war, and in the aftermath of war, and in anticipation of war, or in the fear of war, or in defense against possible war, have led some to wonder whether there is anything beyond the scope of *that* power of Congress. And the newly labeled “foreign affairs power” of Congress has led at least me to wonder whether Congress might not be able to legislate on anything which affects the relations of the United States with other nations, in a world in which everything seems to affect in some way the relations of the United States with other nations.³

There has, then, been no controversy worthy of that characterization about the scope of the powers of Congress—not even at the height of the Bricker episode, when “states-righters” found themselves building up the powers of Congress in order to show that cutting down the treaty power to the size of the powers of Congress could not have any serious consequence, while lawyers of a generally “nationalist” hue found themselves denigrating the powers of Congress in order to show the danger of the proposed constitutional amendment. The Bricker controversy, it is true, reflected as well as enhanced states-rights sentiment, which has had important effect on whether, and how, Congress will exercise its powers. But these are political limitations, not constitutional ones; they are self-imposed, not clamped upon an unwilling Congress by a superior Supreme Court.

As to the states, too, the area of controversy has changed. Some of the old battlefields are almost quiet. It is true that in regard to some old issues majorities, over strong dissent, have recently upheld the power of states to tax net income from interstate commerce,⁴ as well as the states’ power to tax some instrumentalities having relation to the federal government.⁵ But in both areas, it seems clear, this power can be nullified by Congress. And in both areas the majority of the Court may have acted on the basis that “it’s only money” and may have assumed that Congress concurs in allowing the states the in-

² See, e.g., *United States v. Kahriger*, 345 U.S. 22 (1953); *Sonzinsky v. United States*, 300 U.S. 506 (1937).

³ *Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 922-30 (1959).

⁴ *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

⁵ *United States v. City of Detroit*, 355 U.S. 466 (1958).

creased revenue, even where the United States Government ultimately pays the bill. There may well remain small questions as to the power of the states to act when Congress is silent, or speaks unclearly. But in matters relevant to the nation—and increasingly few matters are not—the states, in an ultimate sense, act only by the grace of Congress.

The constitutional issues involving the powers of the state, then, revolve not about the tenth amendment, but about the fourteenth; they relate not to the issues of federation, but to the relation of the state to the citizen, of the state's power of government to the individual's liberties. Here too there has been change. The big issue of the last generation was "substantive due process," implementing inherent limitations on government, on the police power. The revolution brought by *Nebbia* and *Parrish* in effect rendered the police power plenary.⁶ Laissez faire is not a constitutional requirement and the welfare state is equally consistent with constitutional principles. There are no inherent limitations on the role of government. There are only prohibitions, prohibitions like those in the Bill of Rights for the protection of individuals and minorities. In regard to the states, only those in the original Constitution are particularized; others can only be spun out of "equal protection" and the oracular ambiguity of "due process of law." In economic matters, there remains a minimum of limitation in substantive due process, a prohibition of confiscation, and—perhaps—of regulation wholly arbitrary and capricious. But no recent case has invalidated economic or social legislation for violation of due process. If the equal protection clause was used—some think misused—in one case to strike down an economic regulation,⁷ it is not likely that there will be many such occasions for the Court to find objectionable "discrimination" or class legislation.

The constitutional issues today, then, are no longer primarily about the scope of governmental power, federal or state, but about the meaning and scope of prohibitions on that power. For the federal government the issues are about the meaning and application of prohibitions on ex post facto laws and bills of attainder; of "Congress shall make no law abridging the freedom of speech"; of "unreasonable searches and seizures"; of being "twice put in jeopardy," and being "compelled to be a witness against himself"; of "due process of law," and whether private property was "taken for public use"; of "cruel and unusual punishments." There are differences about whether to infer further prohibitions—for example, whether Congress is forbidden

⁶ *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁷ *Morey v. Doud*, 354 U.S. 457 (1957).

to take away a man's citizenship against his will. Even when Justices seem to be disagreeing about the scope of the power of Congress to make rules for the government and regulation of the land and naval forces, it is only in a context where the disagreement is really as to whether civilians associated with the armed services abroad can be tried without the protections which the Bill of Rights grants to those accused of crime by the United States.⁸

Similar controversy is engendered by challenges to actions of the states. There are the same disputes as to the meaning of specific prohibitions on the states—bills of attainder, ex post facto laws. And still alive is an old controversy—in its contemporary manifestation exemplified by *Adamson v. California*⁹—whether the Bill of Rights was made applicable to the states by the fourteenth amendment. *Adamson* in 1947 represented the high water mark for the dissident view, when four Justices expressed themselves for total “incorporation,” although they differed among themselves as to whether the due process clause should have some additional independent content. Today only Mr. Justice Black and Mr. Justice Douglas frankly adhere to this view.¹⁰ For the majority, following a series of cases culminating in *Palko v. Connecticut*,¹¹ the due process clause forbids to the states action which

⁸ *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957).

⁹ 332 U.S. 46 (1947).

¹⁰ Because it is recent, and perhaps insufficiently noted, a new footnote to this controversy is worthy of mention. Mr. Justice Brennan, at the end of the last term of Court, apparently decided to seize a case in which Mr. Justice Stewart was not sitting, *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960), to set forth what Justice Stewart meant in a majority opinion handed down the same day, *Elkins v. United States*, 364 U.S. 206 (1960). The view he announced was that where due process is deemed to afford a protection which is also contained in the Bill of Rights, the protection against the state has the same scope as the protection against Congress. For this position one may cite language in earlier cases which seemed to put the question as whether a particular provision in the Bill of Rights was incorporated in the due process clause. If so, says Justice Brennan, those provisions which are found to be incorporated must mean the same thing in their incorporated form against the states as they do in the Bill of Rights against the federal government. Justice Brennan admits that there are cases which would not be consistent with his interpretation, but he considers them erroneous. Mr. Justice Frankfurter, chief spokesman today for the traditional view of due process, would not agree. In addition to a number of holdings, he would say, the logic of the doctrine and its derivation in the language of the fourteenth amendment do not support Justice Brennan's view. If the due process clause accords some of the protections also accorded by the Bill of Rights, surely it is not because the framers of that amendment had made a selection among the Bill of Rights for application to the states, but because the amendment contains a concept, applicable to the states, some of the content of which coincides with some of the protection in the Bill of Rights. It is difficult to see why in regard to any particular “right” the concept of ordered liberty must be found to afford exactly the same protection as has been found in the explicit language of the earlier amendments. It is yet to be seen whether Justice Stewart will adopt what four of his brethren say he means; if he does, there will be new constitutional jurisprudence, another heap of rejected cases, including the renowned *Betts v. Brady*, 316 U.S. 455 (1942), and a sharp reduction of the differences between the prohibitions on the federal government in the Bill of Rights, and those on the states in the fourteenth amendment.

¹¹ 302 U.S. 319 (1937).

"shocks the conscience of Mankind," which violates "the concept of ordered liberty."¹²

So the controversy has raged about this "ordered liberty." Is ordered liberty violated by involuntary blood tests for alcohol; by putting Willie Francis into the electric chair a second time after an abortive first attempt to electrocute him; by failure to provide counsel to indigents in noncapital cases; by admitting evidence obtained by unreasonable search and seizure; by trying Hoag for the robbery of one victim after he had been acquitted of robbery upon other alleged victims in the same incident?¹³

We do not consider any of the disputes in detail. But patterns are discernible and some generalizations have some warrant. Several Justices, in most instances a minority, seek to broaden the various prohibitions against the federal government; and the same Justices, for the most part, seek to extend the requirements of ordered liberty to approximate the expanding specifics of the Bill of Rights. They would find bills of attainder and ex post facto laws in situations where historically, others insist, the prohibitions would not apply.¹⁴ They would extend the concept of "punishments" to consequences other than those meted out by judicial sentence after criminal trial and find some of these to be cruel or unusual.¹⁵ They would extend the right of the people to be secure against unreasonable search and seizure to a right to be secure against inspections by officials who are not police officials

¹² One might note that "substantive" rights guaranteed by the Bill of Rights are, in the view of all the Justices, also protected by the fourteenth amendment, while the "procedural" safeguards are, for the majority, guaranteed only if they are implied in the concept of "ordered liberty." If one accepts these categories, there may still be doubt whether this nice division is coincidence, or an understandable consequence of the spirit and the language of the fourteenth amendment. It has never been quite clear how the Court was reading and applying the language of the due process clause. When the Court says that this clause requires of the states that they respect "ordered liberty," is that requirement found in the word "liberty," in the phrase "due process of law," or, somehow, in the clause as a whole? When the Court holds that the clause protects, against state infringement, the freedoms of the first amendment, is it saying that freedom of speech is an aspect of "ordered liberty," just as is the right not to be convicted of a crime on the basis of a coerced confession? One might have suggested that the "substantive" provisions of the Bill of Rights, e.g., the freedoms of the first amendment, or the right to be secure from unreasonable search and seizure, are included in the "liberty" which, together with life and property, are the subjects of protection. As to the procedural safeguards in the later amendments of the Bill of Rights, or other procedures not mentioned in the Bill of Rights, the question for the Court is whether a particular procedure is implied in "due process," in accepted notions of fairness, in "ordered liberty." It has sometimes seemed that such careful "parsing" of the clause in the fourteenth amendment might lead to greater consistency, or at least greater clarity. The opinions of the Court, however, do not fit comfortably into this linguistic analysis.

¹³ *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Betts v. Brady*, 316 U.S. 455 (1942); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Hoag v. New Jersey*, 356 U.S. 464 (1958).

¹⁴ See *Flemming v. Nestor*, 363 U.S. 603 (1960); *Garner v. Board of Pub. Works*, 341 U.S. 716 (1951); cf. *United States v. Lovett*, 328 U.S. 303 (1946).

¹⁵ See *Trop v. Dulles*, 356 U.S. 86 (1958).

searching for contraband or evidence of crime.¹⁶ They would extend the right to counsel to investigations which are not strictly criminal in nature.¹⁷ They would extend to new situations the prohibition against double jeopardy.¹⁸ Most significant perhaps they would push the protections of the first amendment—freedom of communication, association, religion, which are also protected by the fourteenth—to a preferred position, sometimes tantamount to erecting a presumption of unconstitutionality for legislation on these subjects.¹⁹ Mr. Justice Black, and perhaps Mr. Justice Douglas, would seem ready to go yet further—to the position that communication and association are absolutely immune to regulation, leaving at least libel and the well-worn “shouting fire in a theatre” somehow to fend for themselves.²⁰

Those who seek to increase the limitations on both federal and state governments also seek, to that end, to discard some distinctions based on the separate sovereignty of the states. They seem prepared, for instance, to find double jeopardy when one is tried by both a state and the federal government, where the same act violates both state and federal law.²¹ They are not satisfied that the federal privilege against self-incrimination does not exempt one from testifying in federal proceedings to matters which may incriminate under state law, nor from testifying in state proceedings to matters which may incriminate under federal law.²² They have barred the admission in federal courts of evidence unlawfully obtained by state officials.²³

Institutional Concomitants of Constitutional Change

The accent on controversy may perhaps divert attention from the fact that these differences, while sharp and sometimes deep, are in an agreed and limited area of conflict; outside this area is a large domain of constitutional development which is settled beyond present dispute.

¹⁶ See *Frank v. Maryland*, 359 U.S. 360 (1959).

¹⁷ See *In re Groban*, 352 U.S. 330 (1957).

¹⁸ See *Gore v. United States*, 357 U.S. 386 (1958); *Green v. United States*, 355 U.S. 184 (1957); cf. *Hoag v. New Jersey*, 356 U.S. 464 (1958).

¹⁹ The cases are many, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

²⁰ See, e.g., their opinion in the obscenity cases, *Roth v. United States*, 354 U.S. 476, 508 (1957), and in *Beauharnais v. Illinois*, 343 U.S. 250, 267 (1952). Compare their respective opinions in *Dennis v. United States*, 341 U.S. 494, 579, 581 (1951).

²¹ See *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

²² See *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *Feldman v. United States*, 322 U.S. 487 (1944); *United States v. Murdock*, 284 U.S. 141 (1931).

²³ See *Elkins v. United States*, 364 U.S. 206 (1960); cf. *Rea v. United States*, 350 U.S. 214 (1956).

Although the Bill of Rights is 170 years old, it was little invoked and infrequently given effect in constitutional litigation before the last three or four decades. It is interesting to speculate whether this was because a Congress fighting for its still-limited powers was careful not to trench on the rights of individuals whom the still-powerful states would have championed; because in the context of the times the limited powers of Congress did not in fact produce legislation in the forbidden areas of the early amendments, or proliferate criminal prosecutions with which so much of the Bill of Rights is concerned; or because, quite differently, the Bill of Rights as then interpreted represented a standard commonly recognized, and one which the Congress was not disposed to violate. In regard to the first amendment, in particular, it took foreign war and fear of foreign sympathies to move Congress to impinge on political rights, and after the alien and sedition laws in John Adams' administration there were none of that kind until the First World War.

The Bill of Rights, it will be recalled, was an attempt to preserve for the citizen protections only recently won in England, and some not then yet won there but achieved in the Colonies. In addition, the due process clause, innocent in its simplicity, was to assure that there would be rule of law, the law of the land, the common law and procedure of England. The Bill of Rights offered these assurances against the central government; similar guarantees against the states were put into state constitutions.

The fourteenth amendment is eighty years younger than the Bill of Rights. It has its independent history and its different origins in a victory for the nation over the states. There is significance in the fact that, like the Bill of Rights, the fourteenth amendment was not important for the protection of civil rights or liberties until a few decades ago—substantive due process to protect liberty born as substantive due process to protect property was dying. New doctrines and changing world forces led to the increased exercise of repressive governmental power by the nation and by the states, raising issues of individual liberty against both governments. And inevitably—if not necessarily in accord with constitutional language, or history, or logic—how the Bill of Rights governed the federal government has affected how the fourteenth amendment governed the states. In regard to both the federal government and the states, the protections for the individual have grown steadily. The Bill of Rights being long established and in comparatively explicit terms, there was of course a considerable headstart against the federal government, and there was no states-rights' sentiment to hinder the Court in developing and ex-

tending protections. Prohibitions on the states, virtually nonexistent before the Civil War, had to await the slow pouring of content into ambiguous phrases, in the face of resistance by local interests to a federal Supreme Court applying a not-popular constitutional amendment. But the long evolution of our common-law constitution continues and the controversies noted are part of the process. The protections of the Bill of Rights grow; those of the fourteenth amendment grow too; they remain less, although the differences are narrowing. The developing concept of ordered liberty reduces the consequences of the failure of the Constitution to make all of the provisions of the Bill of Rights applicable to the states. Due process, the phrase once designed to assure mere lawfulness by government, has become the headstone of the corner of individual protection.

The changing issues of constitutional controversy, then, are yet another reflection of the fact that the Constitution under which we live today has changed from that of our fathers. They reflect also, I would suggest, significant change in the role of the institutions of our federal government. I offer for your consideration some generalizations, valid, I think, as indicating trends, tendencies, emphases.

Constitutionally, our federal government continues to become a national government.

In regard to the central government, one may say, with only a modicum of exaggeration and simplification, that the United States has become a national society with a national economy, its interests thoroughly intertwined with those of other nations, particularly in time of international crisis; that legislatively, at least, the federal government has become a national government; that the power of Congress has moved from a limited power derived from enumerated clauses measured out by the Supreme Court, towards a plenary power based on national need as seen in the light of political judgment. It is the Congress, no longer the Supreme Court, that ultimately can make the important decisions of federalism. Once the Court, although itself a branch of the federal government, stood between the Congress and the states as an impartial arbiter, meting out to each its proper share of governmental power. Congress no longer needs the Court to protect the nation against encroachment by the states; the states can no longer invoke the Court to protect them against encroachment by Congress. State and local interests must look for their protection to the Congress itself, as, indeed, the Constitution originally contemplated—particularly to that body of “ambassadors” of the states, the United States Senate.

The Supreme Court is no longer defining and adjusting the frontiers between the powers of governments; it is defining and redefining prohibitions on government on behalf of the individual.

The issues for the Court are no longer which government, state or federal, can act, or whether a particular act is within the power of government. The issue is whether a particular act is prohibited to government by the Bill of Rights or the fourteenth amendment, or those other provisions of the Constitution which afford protection to the individual against the action of his governments. With the exception of the infrequent case reflecting the constitutional separateness of one state from another, the Court hardly acts any longer to adjust and maintain the mechanism of federation under the Constitution; it acts, in constitutional matters, to mediate between the requirements of government asserted by the Legislature, the Executive, and sometimes the Judiciary, and the protection for the individual and the minority promised by a written constitution. The Court does not mediate between two powerful competing interests. It stands in the path of powerful representative government in the name of an ideal—the liberties of the individual.

The constitutional issues before the Court, then, begin to resemble those of a unitary state with a written constitution. Indeed, one may suggest that the Court's constitutional role grows less dissimilar to that of the courts of Great Britain. For when we frequently say, lightly, that Great Britain has no written constitution, we forget some very precise constitutional documents like Magna Charta, the Bill of Rights, the Act of Settlement, the Habeas Corpus Act, the Act of Toleration, and the Parliament and Representation Acts. Parliament lives by these. The courts enforce them upon the Executive. If in principle the courts cannot apply them as limitations on Parliament, we have seen that in the United States, too, the Court now only rarely applies our Constitution to limit or prohibit acts of Congress.

In any event, one may fairly suggest that the Supreme Court, which originally and only yesterday was needed primarily to resolve the conflicts of federation, is now available—although, and perhaps in part because, the issues of federalism are evaporating—to assume an increasing role in the conflict between the alleged requirements of government and the claimed liberties of the individual.

The Court is not concerned with governmental experiment; it worries about unfairness to individuals.

When the Supreme Court strikes at governmental action it is frequently striking at an act of administrators, not at an act of the

legislature—as in many of the criminal cases under the Bill of Rights or the fourteenth amendment. If behind such an act of the executive there is an act of the legislature, it is frequently an old act. If it is a new act, it is not an act of social experimentation based on hope, but very likely one of repression rooted in fear—like contemporary internal security legislation. The Court is not now a conservative body standing athwart new legislative experimentation, economic or social. It is more frequently a body challenging established institutions. The Court is engaged in raising state practices, often long established, to new levels of ordered liberty, or, in federal cases, raising to new levels the protection against the federal government found in old words in the Bill of Rights.

When the Court protects the criminally accused, even when it is struggling with security legislation in the name of political freedom, it is protecting individuals or small minorities against majority action deemed unfair; it is not frustrating social and economic programs of direct moment to large numbers of people. This makes the role of the Court seem less intrusive. On the other hand, there is less general sympathy for the Court's work, since insufficient numbers of the public identify with the rights vindicated. In regard to the states, it is, of course, not without significance that the enforcement of prohibitions for the protection of individuals and minorities is administered by a federal supreme court under a federal constitution. Even there few constitutional actions of the Supreme Court are calculated to arouse legislatures thwarted in programs of importance to meet new problems.

The constitutional issues before the Court relate largely to the states.

The federal government has learned, generally, to meet the explicit standards of the Bill of Rights. It has been more amenable to reform than some of the now-fifty states. And the Court has been able to raise federal standards in other ways—through its influence on the promulgation of rules of procedure, as well as under its supervisory powers in decisions like *McNabb v. United States*²⁴ and *Rea v. United States*;²⁵ and Congress has generally acquiesced. There has therefore been far less need for invoking the Constitution against the federal government. For years after May 18, 1936,²⁶ not a single act or provision of Congress was invalidated. In 1943 there was *Tot v. United States*,²⁷ a minor and isolated instance. Since then, I count five other

²⁴ 318 U.S. 332 (1943).

²⁵ 350 U.S. 214 (1956).

²⁶ See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

²⁷ 319 U.S. 463 (1943).

occasions on which the Supreme Court invalidated provisions of general acts of Congress, four of them in the last six years dealing with or related to the armed forces.²⁸ The civilian-soldier as a permanent aspect of our society is new; inevitably his constitutional status, and that of associated civilians, has required clarification, adjustment, and development.

Because the Court's active constitutional role today is largely directed to curbing the states, and because the Court no longer protects the states from congressional inroads, the Court is more obviously and exclusively a branch of the federal government. Because it is less frequently at odds with Congress—even in the security cases, the Court has so far avoided declaring any action of Congress invalid, and one sometimes suspects many in Congress are pleased to have the Court save them from follies which they deem politically necessary—the Court may feel more confident to act firmly vis-à-vis the states on behalf of the federal government, as in bringing up to today's date the meaning of the Constitution in regard to the Negro. The Court shares with Congress the role of keeping the states in line, even if there has not been between Court and Congress any clear division and assumption of responsibility. In those few constitutional decisions which have broad impact on the states, the states do not have in the Court a means for political resistance or self-defense such as they have within Congress against congressional legislation; nor can the states frequently move Congress to undo what the Court has done, even where Congress could constitutionally do so.

The Court increasingly reviews findings of fact.

Increasingly, differences of fact determine whether a constitutional right was violated. While all constitutional issues may involve matters of degree, the Court's business under "due process," "equal protection," "cruel and unusual" punishments, "unreasonable" searches and seizures, and other constitutional phrases of more or less ambiguity, requires it to determine anew in every case whether the inevitably different facts of this case exceed the forbidden degree. Occasionally, some Justices, at least, appear to be on the verge of testing, under due

²⁸ See *United States ex rel. Singleton*, 361 U.S. 234 (1960); *Trop v. Dulles*, 356 U.S. 86 (1958); *Reid v. Covert*, 354 U.S. 1 (1957); *Toth v. Quarles*, 350 U.S. 11 (1955). I am counting also *United States v. Cardiff*, 344 U.S. 174 (1952), although it is not clear whether the Court invalidated the provision, or merely construed it as not applicable to the defendant. In *United States v. Lovett*, 328 U.S. 303 (1946), the Court threw out special legislation providing that no part of an appropriation should be used to pay the salaries of three named individuals. *Bolling v. Sharpe*, 347 U.S. 497 (1954), invalidated an act of Congress interpreted as requiring school segregation in the District of Columbia.

process of law, the adequacy of evidence to support a verdict or other conclusion.²⁹ If the Court should yield to this temptation, it could, of course, render every case a constitutional case for the Court's review.

Is the Court's jurisprudence changing?

One may also ask whether the changing issues of constitutional adjudication and the changing role of the Court may not be effecting modifications in the Court's jurisprudence: in its application of the requirements of case or controversy, and of standing, even of "substantial federal question" properly preserved and presented, and of the absence of adequate nonfederal ground; in the doctrine of "political questions"; in the Court's exercise of judicial review, as exemplified in the so-called "presumption of constitutionality" and the policy of "judicial self-restraint"; as well as in related practices like the interpretation of statutes to avoid constitutional doubt. One cannot make many bricks from the few straws available, but one may hazard a guess that students of a later generation will be taught a jurisprudence different in these respects from the one we learned.

There are other consequences also for the institution that is the Supreme Court. It is again the subject of controversy, but for the most part this is directed at its role in other than constitutional cases (even when the attacks are motivated by passion aroused by *Brown v. Board of Educ.*).³⁰ The periodic efforts to curb its jurisdiction have been vindictive, and directed at its so-called misinterpretations of statutes or abuse of its supervisory powers, rather than at any alleged perversion of the Constitution. Problems of racial segregation apart, the Court's calendar and docket contain few major constitutional cases having wide community repercussions. There have been legislation and legislative attempt to undo judicial interpretations of statute; there has been no occasion to seek constitutional amendment to undo the Court's constitutional interpretations.

²⁹ Cf. *Thompson v. Louisville*, 362 U.S. 199 (1960); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

³⁰ 347 U.S. 483 (1954), 349 U.S. 294 (1955). It may seem incredible that one can speak for half an hour on current constitutional matters and say almost nothing about *Brown v. Board of Educ.* My justification is that too much has already been said; and that our theme is constitutional controversy. The segregation cases have achieved remarkable unanimity on the Court, and even the critics—those who deal with the issues rationally—have not engendered much controversy. It is nevertheless appropriate to note for our purposes that those cases also involve prohibitions on the states in the name of individual and minority rights; that the cases have important impact on the states, not on the federal government, and on only some states, not all; that the Court rather than Congress is acting for the federal government; that the Court is striking at established patterns in an attempt to raise standards of equal protection and ordered liberty. And the Negro cases, as much as any other group, suggest the possibility of changing Supreme Court jurisprudence, particularly in regard to standing, presumptions of constitutionality, respect for state findings of fact, and "adequate" nonfederal grounds.

The consequences which I have suggested—acceptable, I hope, as tentative generalizations—may be multiplied, and these consequences have further consequences. Perhaps we are only stressing the obvious results of changes in the life of the nation: the Court's constitutional activity must reflect the change in political relationships between the federal and state governments, and the consequent changes in their respective spheres of activity. Where the Court is obviously adopting revised meanings for the Constitution, as in *Brown v. Board of Educ.* or *Shelley v. Kraemer*,³¹ it is also reflecting deep change in today's United States and in the world of which it is a part. It is obvious that the Supreme Court is not out of this world.

THE CONTROVERSY OF THE PROFESSORS

We will return to the constitutional divisions on the Court today. I should like to get back to them through some reflections about the criticism of the Court by its best critics.

Professorial criticism of the Court is hardly new. Professor Frankfurter, for example, and even more the late Professor T. Reed Powell, frequently held a mirror to the Justices, although it is not always apparent that all the Justices looked into it. It has been remarked, again recently by Dean Griswold, that no one has appeared to pick up Powell's mirror.

Perhaps that was inevitable. Perhaps the professor-critic's role had to change with the change in the constitutional issues before the Court, and in the times of the Justices. Professor Powell was the ideal critic for the comparatively unsophisticated jurisprudence of a comparatively unsophisticated Court majority. He was not demanding that the Court replace their values with his. He could show the Justices what assumptions they were finding in the Constitution, often without being aware that they were making any assumptions. He could identify the texts of economic interest which lay behind their pretexts of doctrine. With dispassionate surgical deftness, he could trace the circles in their reasoning, spear their tautologies, make blatant their inconsistencies, scorn their distinctions where there were no differences and their failures to distinguish where there were. He could mock their juggling of concepts and categories when they should have been looking hard at hard facts.

If Justices of a former day deserved their chastisement, they were perhaps also deserving of classic forgiveness, for it is not beyond doubt that they knew what they did. The Court is more sophisticated today. Justices are subject less to charges of naïveté than of cynicism. And so the critics they deserve are different—and the criticism. In

³¹ 334 U.S. 1 (1948).

any event, after a lull while the Court and its jurisprudence were changing, the professors are again giving attention to the Court. The professors have been virtually unanimous in defense of the Court against the passionate outbursts of those goaded by *Brown v. Board of Educ.* They were only less than unanimous when others, perhaps also motivated by anger over school integration, made other irresponsible attacks, especially when these took the form of attempts to limit the jurisdiction of the Court by congressional legislation. Then the professors criticized in turn. Perhaps because the professors felt obliged to show that their defense of the Court was not uncritical; perhaps because they felt that their defense of the Court gave them the right to criticism of a more responsible character; perhaps because the Court again cried for criticism—the law schools have begun to play again the role of loyal critic.

There has been criticism—and defense—of the handling of particular cases—for example, the FELA and Jones Act cases. There has been criticism of sloppy judicial procedures, of inadequate consideration and unacceptable analysis, of opinions that are enigmatic, unmeaningful, misleading. From some quarters there has been criticism that the Court, or some members of it, have shamelessly become too-much a political body, too-little a judicial one; that they have abused the opportunity of their position to remold this country nearer to their hearts' desires; that they have legislated more than interstitially, have distorted interpretation into legislation, have given statutes and legislative materials readings that were not fair readings—in order to achieve a result in the case before them that conformed to their political desires, not to those of the legislature. From other sources has come criticism of another kind—that the Court, or Justices on it, were dragging long chains of the dogmas of the quiet past; were indifferent or hostile to the demands of individual liberty and minority rights; were abdicating their constitutional role of checking oppressive majorities; were retarding the realization of the American ideal.

These and other criticisms have had their rebuttals. Particularly when the criticism was against one "wing" of the Court, there were counterattacks against the other, especially by those who see every Supreme Court Justice alive as either a liberal or a little conservative. For today's purpose, however, we would eschew most of these controversies and deal only with some that revolve around the Court's role in constitutional decision.

Perhaps Judge Hand began the current round in his rare incursion into the academic universe. Speaking of judicial review he

agreed, one might say, that the Court may properly determine the frontiers of power of Congress or of the states.³² It should not, however, intrude when the Legislature is acting within the general orbit of its powers, merely to substitute the Court's choice between values for the choice of the Legislature. If the generalizations we suggested earlier about the changing constitutional issues are correct, on Judge Hand's position, the issues coming before the Court today require judicial restraint—at least where acts of the Legislature rather than those of the Executive are concerned.

Then Professor Wechsler demanded of the Court "neutral principles" of adjudication, and looked for them—and had difficulty finding them—in several leading cases where he sympathized with the result: *Brown v. Board of Educ.*, *Shelley v. Kraemer*, the Negro voting cases.³³ Professor Pollak sought to help Professor Wechsler find neutral principles for reaching the results in those cases.³⁴ Recently, two articles, one by Professors Mueller and Murray Schwartz, one by Professors Miller and Howell, questioned the very demand for neutral principles.³⁵ Most recent were Dean Griswold's strictures against "result-oriented" decisions.³⁶

The Call for Principle

Perhaps a word in the controversy must be said as foundation for the reflections to follow. It seems to me inevitable that we start where Professor Wechsler starts. His term "neutral principles" has been variously interpreted, and at least part of the disagreement with him is due, perhaps, to misunderstanding. But if I interpret him correctly, it would seem that Professor Wechsler demands what my colleague Paul Mishkin and I have called, in the title to an article we have never written, "The Return to Doctrine": Professor Wechsler calls for principle, generally applied, except where the Constitution is admittedly, or can be interpreted as being, partisan. Surely, to begin with

³² HAND, *THE BILL OF RIGHTS* (1958).

³³ Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

³⁴ Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

³⁵ Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A.L. REV. 571 (1960); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

³⁶ Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81 (1960). The controversy between Professor Hart and once-Professor Thurman Arnold, while not irrelevant, does not turn on different views as to the Court's role in constitutional adjudication. Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959); Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

the absurd; the Court ought not to decide for appellant against respondent, in constitutional cases as in others, because appellant has bribed the Court, or is a political leader, or is a nice fellow—unless judgment for the payer of bribes, or the political leader, or the nice fellow, were to be accepted as a general principle of adjudication. Surely decision should not go in a specific case, nor should special constitutional preference be given, to the rich man, or the white man, or the protestant man, or the poor man, or the insurance company, or the labor union, or the black man, or the Quaker, or the Witness—unless one can fairly say that the Constitution granted such a preference. Neutral principle, then, means, I take it, “principle,” “doctrine,” a rule of general application. Neutral principle also means that the principles which the Court announces must be logically and consistently applied. It means, for example, that if the due process clause no longer precludes economic regulation and does not prevent a state from barring “yellow-dog contracts,” it does not prevent a state from adopting a “right to work” law, unless relevant differences can afford a distinguishing principle.³⁷ It means that if a state can require the Ku Klux Klan to disclose its membership, a state can be barred from requiring membership lists from the NAACP only if the Court can set forth relevant distinctions between the two cases.³⁸ It means, on the other hand, Professor Wechsler might rightly say, that one cannot continue to nod respect to language and history and admit that the fourteenth amendment applies only to state action, but go on to treat private action as state action when it is a Negro complaining. Or, again, one cannot find judicial enforcement of racial discrimination to be forbidden state action in one circumstance, and not in another, unless one can build a rational distinction between the two kinds and contexts of judicial action that is relevant to the concept of state action.

It happens that I, like Professor Pollak, believe that the particular cases which bother Professor Wechsler can be justified on “neutral principles,” although the Court perhaps did not do so effectively. But Professor Wechsler’s basic thesis seems to me unchallengeable. It is a thesis which should perhaps go without saying, but one cannot assert confidently that it does not need to be said. One cannot be sure that the object of his attack is a man of straw, as long as courts continue to give basis for his fears, and writers even seek to rationalize a principle of “anti-principle.” Professor Wechsler’s seems to me to be the

³⁷ See *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

³⁸ See *Bryant v. Zimmerman*, 278 U.S. 63 (1928); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

inevitable reaction, long overdue. Long ago critics of the Court began "to remove the fig leaf," to stress that judges were fallible mortals with prejudices, who talked "principle" that was really a rationalization for achieving prejudged results; or, at least, that judges tended to find in the general language of the Constitution the notions they brought to it about the proper role of government and the rights of the individual. It was perhaps inevitable that some should carelessly press this necessary cautionary reminder to the judgment that there is, can be, and ought to be no doctrine, that all adjudication is empirical, *ad hoc*, and that the appellate judge, at least in constitutional cases, has no rule other than his own predilections. But is it not time to insist that this is not so, and that not even the most extremist proponent of the empirical view really intended any such absurdity? Is it not clear that even strictly political actions of political bodies cannot be entirely *ad hoc*, and that the judge's role under a written constitution differs from the politician's at least in substantial degree? Can it be denied, for instance, that every Justice has at some time decided a constitutional case contrary to his political sympathies, although judges may differ radically in how hard they will struggle to achieve a disinterested result?

Sometimes, it appears that those who deny doctrine believe that they are supporting an "activist" view in constitutional adjudication. But the cases which bother Professor Wechsler in particular were unanimous decisions, or at least decisions which did not reflect any basic "activist" division in the Court, and which quickly became accepted by all. The current divisions of the Court, to which we have referred, are not differences as to whether principles exist, or whether they should be neutral or general. All members of the Court assume that there is doctrine and act on that assumption. All participate in the writing of opinions, the citation of cases, even the distinguishing of other cases; do these not presuppose a rational application of principle by a continuing judicial institution? If there is any among today's Justices who rejects doctrine, he pays to the rest the homage of hypocrisy by joining in the rational process of adjudication on the assumption that principles exist. In large areas of the Constitution today judges do not even differ as to what the principles are—as in those once-issues in which the Court has long denied review and litigants no longer seek it. Where the judges now divide they are differing not as to whether principles exist, but as to what are the applicable and controlling principles.

The denial of principle is, I sometimes think, the snicker of the cynic. To him the entire process of decision is a sham. The judicial

opinion is ritual, not reason, and principles are incantations to be invoked. To those who believe, on the other hand, that the game has rules and the rules have purpose, that the process has reason, principle is the essential reason. The judicial opinion is a vital aspect of the process. One might do worse for the beginning of a definition than to suggest that judicial doctrine and principle are those reasons for reaching a result which can be stated in a judicial opinion.

The Ingredients of Constitutional Decision

We assume that there is and must be doctrine, that in the current divisions of the Court there are, in largest part, doctrinal differences. Criticism of the work of the Court, then, must deal with these differences, must consider whether competing doctrines are equally acceptable, and how the proper or preferable doctrine is to be selected.

Sometimes, when discussing one of the Court's constitutional divisions, I amuse myself by asking a student, "Who is right?" Sometimes a wise student rejoins by asking what the question means. Some would suggest that "Who is right?" is a silly question. They might say that different judges are applying different values—and there is no basis, except one's own values, for choosing between the differing values of different judges.

I might grant them their proposition, within narrow limits. But even if I were not trying to decide who is right, even if I were only trying to equip myself to choose between their values, I, as a litigant, citizen, critic, or legislator seeking constitutional amendment or legislative curbs on the Supreme Court, might wish to know what these values are. In fact, however, it should be clear that values, and choices between values, are not fungible, and that not all values are equally available to the judge. Judges are not entirely at large in choosing among values. If in some constitutional cases, indeed, either answer may have something to be said for it, surely we cannot accept that all constitutional cases can with equal propriety be decided either way.

Like others who have spoken on this subject,³⁹ I believe that the Court owes an obligation to the integrity of the judicial process in constitutional cases to articulate the bases for its decisions—what ingredients have gone into the judgment, in what weights, absolute and comparative. The writing of an opinion will help assure that the decision is based on principle, and will help make clear what the principle is. Whether or not the Court meets this obligation, the

³⁹ Early criticism of inadequate per curiam and other opinions was Professor Brown's in *Foreword: Process of Law, The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77 (1958).

critic of the Court, too, must seek to identify the ingredients of decision, to expose those which are choices between competing values, to examine the extent to which this choice is open to the judge, to evaluate the choice made.

I do not suggest that this is an easy task, that it can be done with any hope of precision, that the process of criticism itself can escape criticism for the critic's assumptions, articulated or unarticulated, and the critic's choices. But the attempt is essential if the critics are to be able to speak to the Court, or to each other. Here I should like to reflect briefly on what seem to be principal ingredients in constitutional adjudication, and on how the Court handles them.

Let us begin by stressing the extent to which the judge, in constitutional adjudication, does not have free choice between values or results. There are some elements in decision, that may also be called principles or values, which, all must agree, limit the judge's choice. Take, for instance, the very fact of a written Constitution, and the kinds of substantive provisions in our Constitution. A judge is inevitably bound by the system of government which is the context in which he sits. We may demand of him commitment to the philosophy of government that he, in his part, also represents. The fact that the Constitution which he invokes is written means that he must pay a substantial respect to the words in it, no matter how much he may feel that the society would be better if they had not been written, or if different words were in the Constitution. If language can be used at all, there must be large areas of agreement on the meaning of words. Words are ambiguous but the area of ambiguity is not without narrow limits; in many provisions, at least, the words of the Constitution have a minimum core of unambiguity which cannot be avoided. Surely, then, the Court does not have unlimited latitude to say what the Constitution is; the Court does not possess an equivalent alternative to the amending process provided in the Constitution. Words limit the choices open to the Court. We can demand that Justices give words their due.

There are other institutional factors, or principles, or values, which also limit the Court's freedom in choosing among values. The fact that it is established as, and called, a "judicial body," not an "appellate legislature," suggests that its choice between values is not as free as was that of the legislature whose action it reviews. We do not pretend to define the difference in role between judiciary and legislature, or to define even the special differences between these roles in constitutional cases—in distinction from their roles in the development of private law. But surely there must be more to justify a court

in invalidating a statute than that the judge, had he been in the legislature, would have voted for value *B* as more desirable than value *A*.

These factors—the written Constitution, the unambiguous minimum core of meaning in its words, the quality of a court in contradistinction to a legislature—will be generally accepted, I believe, as limitations on the Court's free choice between values, although there may be disagreement as to how stringent the limitations are, in general or in a particular case. There are other ingredients, with greater uncertainty as to their import, and greater disagreement as to how heavily they weigh. There are words between the lines of the Constitution, and the history of these lines and of these words, the story of what was said about them by those who said and heard them. There is "the statute as a whole," the pattern of the Constitution, the division of power between nation and state, the distribution of functions among the branches of the national government, and the limitations on these powers. In addition to the pattern as established, there is the pattern that became, the federalism that grew and the special shape it took as the result of the Civil War, and the Civil War amendments, and the interpretations of these amendments. There are the great admonitions—of Marshall, that it is a constitution we are expounding; of Holmes, that in interpreting the Constitution we must consider what this country has become. That it is a constitution suggests that it is alive and grows; it suggests also that there are principles of growth; it does not, of course, mean that any Justice is free to make it "grow" however and wherever he will.

We have been recently reminded that our ancestors did not expel George III in order to offer an American throne to Clio, the Muse of History.⁴⁰ We may all agree that they did not. But do we, perhaps, owe more and better to history than did our ancestors? Or perhaps, not being revolutionaries, can we as easily escape history? That it is a constitution we are expounding also means that our ancestors wrote the document for us as well as for themselves. We are not new men, without umbilical cord. To be aware of how we got here does not mean to be tied by the dogmas of the past. The rearview mirror is not primarily to warn us that we are being chased. It suggests, it has been said, that you cannot successfully navigate the future unless you keep always framed beside it a small, clear image of the past. Clio deserves no throne; but may she not claim a corner seat at the conference table?

The ingredients we have mentioned are admittedly proper, even if the weights to be given them are hardly agreed by either Justices

⁴⁰ Cahn, Book Review, N.Y. Herald Tribune, Oct. 16, 1960, p. 8, col. 3.

or critics. Even these disagreements, I would urge, are within limits which emphasize that the Justices are not at large in their choices. There are, however, ingredients of another kind, more difficult to appraise and to criticize. Sometimes it is clear that what determines how the agreed ingredients we have noted are used—what determines, ultimately, the decision—are other ingredients whose claim to inclusion is not always articulated and justified. I do not mean anything sinister like bias to a particular litigant, or even a class of litigants. I refer to implicit or assumed philosophies of government which Justices find or put in the Constitution.

What one might call meta-constitutional assumptions are not new to constitutional adjudication, although the need to justify them has not always been equally felt or satisfied. Way back, for example, in *Calder v. Bull*,⁴¹ Mr. Justice Chase suggested that there are inherent limitations on government, apart from the Constitution, deriving from natural justice. Mr. Justice Marshall, too, in *Fletcher v. Peck*,⁴² suggested that even without a constitutional prohibition there are things a legislature cannot do; for example, it could not take private property without compensation. Later Justices were less frank, or perhaps less aware. When Justice Holmes said in dissent in *Lochner v. New York*⁴³ that the fourteenth amendment did not enact Herbert Spencer's Social Statics, it is not beyond possibility that Mr. Justice Peckham and his majority in that case did not know what Holmes was talking about.⁴⁴ They could not, perhaps, conceive that one could read the Constitution without finding there, or assuming, that particular view of the role of government which accorded with their ideas of the natural and inevitable. Important deviations from laissez faire were violations of the natural limitations upon government which, if they did not rise to constitutional stature before, were put or confirmed there by the fourteenth amendment.

Lochner v. New York and its assumed limitations on government are long dead. But there are now prohibitions on governmental action which Justices have found in the Constitution, also subject to the charge that the Justices are putting them there. We are all agreed that the fourteenth amendment did not enact Herbert Spencer or Adam Smith,

⁴¹ 3 U.S. (3 Dall.) 386 (1798).

⁴² 10 U.S. (6 Cranch) 87 (1810).

⁴³ 198 U.S. 45, 74 (1905).

⁴⁴ A friend once asked Mr. Justice Holmes: "What about your colleague, Justice Peckham?" "Oh," answered Holmes, "he is a handsome, charming fellow and a delightful raconteur." "I don't mean that," continued his questioner, "I mean what is he like intellectually speaking?" "Intellectually?" replied Holmes. "I never thought of him in that connection."

"Now that you ask me, however, I would say that his major premise is 'God damn it.'"

the "liberalism" of another day, as limitations on majority government; many of us seem prepared to assume that the Constitution did enact John Stuart Mill's *On Liberty*. The Court has found, or put, ideas of proper relation between individual liberty and governmental order in the first amendment and in the fourteenth. If the language of the first amendment offers more of a "peg" for Mill than, to our trained eye, the words "liberty or property" provide for Herbert Spencer or Adam Smith, one must admit that the language cannot bear the whole weight, even as to the federal government, even less as to the states. And, though we give every weight to the ancestral influence of John Locke and to the later Jefferson, history too does not provide the necessary support.⁴⁵ The views of Mill afford a philosophy of government which you and I may share, but it is likely that this philosophy was not shared by those who wrote either of those amendments, and is not shared by the majority of the citizenry today, surely not by majorities of the legislatures which pass acts which the Court invalidates in the name of these amendments. When the Court gives these protections a preferred position and, assuming a different role for the Supreme Court in relation to legislation, applies a different presumption as to the constitutionality of legislative action, the Court may also be doing something with which you and I sympathize. But it is important that the Justices, and the professors, admit it and justify it. There have of course been attempts at justifications—in Stone's famous footnote;⁴⁶ in Cardozo's "matrix" metaphor;⁴⁷ even Judge Hand's strictures on judicial review admit that here it is less likely that the legislature has balanced values impartially and in good judgment.⁴⁸ But granting some justification for "preferred position," the nature and degree of the preference remain to be agreed. Somewhere, some Justices at least seem to see an ideal image of the nation, of the "democracy" which we are not but are ever becoming; and they see theirs as the principal role in realizing that image. Perhaps the Court cannot even attempt to educate us as to what is the ideal image of ourselves as a nation, what is this "democracy" toward which our Constitution is being headed. The critic may still demand such education; he may also demand that the Court keep in mind that democracy implies respect for majorities as well; he may ask whether the Court is the one to lead the reluctant rest to that promised democracy. The critic is entitled to ask, although he be himself hard put to give

⁴⁵ See LEVY, *LEGACY OF SUPPRESSION* 100-04, 266-67, 299-306 (1960), Cahn, *supra* note 36.

⁴⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁴⁷ *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937).

⁴⁸ HAND, *THE BILL OF RIGHTS* 69 (1958).

a confident answer, how much this ideal of freedom is to weigh in a balance with language, or history, or the respect due to legislatures, or the respect due to federalism when action of a state is involved.

The Process of Constitutional Adjudication

The choice of values in today's divisions then can be criticized—on the ground of insufficient respect to institutional limitations; too little or too much weight to other factors admittedly relevant; the injection of factors not admitted, the degree of their influence not justified; a preference by some Justices for results which fit an image of the nation not projected by the Constitution and which the Justices cannot prove to be justified by history, need, the philosophy of the people, or anything other than the Justices' faith or inclination. The criticism is not to be directed at any one judge, or even exclusively at one faction. Inevitably, of course, the burden of justification is greater—if indeed justification is inherently possible—when a Justice allows his ideal to outweigh the traditional ingredients of adjudication.

These criticisms, of course, assume adjudication on principle, the kind of general principle which I believe Professor Wechsler demands. There is another respect, however, in which the current divisions may be examined, and some of the Justices found wanting, in respects which do not meet Professor Wechsler's demands. For the demands of doctrine we have suggested also require respect for the qualities of principled adjudication, for the integrity of judicial process. The law, if we may adapt Cardozo, is "not only as the past has shaped it in judgments already rendered, but as the future ought to shape it in cases yet to come."⁴⁹ The judge, as Cardozo said of the lawyer, "must be historian and prophet all in one."⁵⁰ We have suggested that the claims of history—where we started, how we came, what we have become—are not always given their due in the development of constitutional doctrine. If the Court has not always been fair to its role as historian, it is sometimes even less fair to its role as prophet. For that should suggest that a decision is to live for some indefinite while, that a doctrine is to have some durable life and have application to other cases of common character. Neutral principles need not be eternal, but they ought to offer hope for survival. If lines are to be drawn, we may have to accept that there may be two cases, barely on either side of a fine line, with opposite results. We may have to accept also that in the light of experience and hindsight, the Court may later see fit to redraw the line. But still its decisions must draw

⁴⁹ CARDOZO, LAW AND LITERATURE 137 (1931).

⁵⁰ *Id.* at 166.

a line, must establish a principle of decision to which the Court is then prepared to give general application. It is obvious, of course, that the Court only decides the case before it, but in deciding that case it must give reason that promises applicability to the next case. Too often, it is fair to say, the Court, intent on disposing of the case before it, has inadequately considered that the reasons it gives, and the doctrine it announces, will and ought to apply to tomorrow's case in indistinguishable circumstances. No doubt some of the Court's critics read more into judicial opinions than is there, and are later surprised when the Court tells us that its earlier decision was limited. Still, greater awareness by the Justices, greater care in giving reasons for decision, would have spared it criticism when the Court moved from *Dennis* to *Yates*, from *Watkins* back to *Barenblatt*, from *Nelson* and *Sweezy* to *Uphaus*.⁵¹

But the criticism reaches deeper. Can the Court announce, in *Lambert v. California*,⁵² that ignorance of the law is a constitutional excuse, without writing an opinion which would adequately distinguish ignorance which has been held not to be an excuse, and give due account to the generally applied view that scienter is not a constitutional requirement? Or take *Shelley v. Kraemer*, a case that concerned Professor Wechsler and has troubled others. The Court announced, as the basis for decision to reverse enforcement by a state court of a restrictive covenant, that judicial action is state action. That some judicial action is state action was long clear, for example, from state criminal convictions invalidated for lack of procedural due process. But some believe that the Court was invalidating as "state action" discrimination which was not the state's but that of private individuals. They believe also that there is some judicial action that enforces private discrimination which the Court would not be prepared to invalidate. Is the Court prepared, for example, to find forbidden "state action" when a state court imposes a sentence, or grants a recovery, for trespass, to give effect to private racial discrimination? Or when a state court probates and administers a discriminatory will? If, as many assume, the Court is not prepared to invalidate the judgments of state courts in these situations, surely then the reason for the decision in *Shelley v. Kraemer* cannot be merely that judicial action is state action. I, too, suspect that the Court is not prepared to follow where its opinion might seem to lead. I believe that one can perhaps write

⁵¹ *Dennis v. United States*, 341 U.S. 494 (1951); *Yates v. United States*, 354 U.S. 298 (1957); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Sweezy v. New Hampshire*, 354 U.S. 239 (1957); *Uphaus v. Wyman*, 360 U.S. 72 (1959).

⁵² 355 U.S. 225 (1957).

an opinion in *Shelley v. Kraemer* which can draw distinctions that would tolerate the action of a state giving effect to discriminatory bequests but not to restrictive covenants; or distinctions that in special contexts might tolerate the enforcement of religious discrimination, but recognize no comparable and permissible racial discrimination; or distinctions that would recognize the state's right to give effect to social discrimination in one's home, but not in one's business—and show the relevance of these distinctions to the proper role of government and thereby to the concept of “state action.” Perhaps I am wrong, perhaps such an opinion cannot be written—at least not without establishing some new “inherent” concepts about the respective areas of permissible government regulation and of inviolable individual liberty. The Court clearly has not written a satisfying opinion. It leaves the impression that the Court is expanding and contracting words; it does not reflect adequate recognition that the requirement of “state action” contains important principles of relation in the federal system, and important principles of relation between government and individual. Inadequate efforts to write adequate opinions cry for criticism, not least because they lend support to the cynics to purvey the impression that reason is unnecessary, that opinions have to be indulged but do not really matter.

CONCLUSION

The issues in constitutional controversy today do not generally reflect an ordeal of battle between powerful political forces. They represent primarily the degree to which the Court will opt for liberty over “democracy,” will champion an ideal—the rights and liberties of individuals and small groups—against the forces of representative government. The changing issues have reflected and effected changes in institutions and relations between them, changes between state and nation, between Court and legislature, between Court and critic.

The answers to constitutional questions do not lend themselves readily to the judgment of right and wrong. We can only hope and ask for scrupulous adherence to the process due constitutional adjudication—the principled application of principle, man-made principle, the exposition of the ingredients of decision, of the respective weights given them, of the choices they represent. Whether or not he likes the result, the critic must review this process. He too must adhere to neutral principles, to neutral principles of criticism—he cannot merely choose sides and vote for his sympathies, or for his judicial favorites. The critic must demand equally of all judges in all cases respect for the rules of judging. Perhaps then we can demand for our criticism and for our own controversies the attention of the Justices.