Foreword—The Supreme Court, October 1977 Term

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> A country's constitutional law is but a reflection of its political, economic, and social life. Not unnaturally, the external conditions of any particular period are bound to have their effects in the legal sphere as well—especially in the field of public law. This is as true of the United States as it is of other countries. From this point of view, the constitutional jurisprudence of the American Supreme Court is only the juristic mirror of the different stages through which American history has passed. "Our jurisprudence is distinctive," said Justice Jackson on the 150th anniversary of the Supreme Court, "in that every great movement in American history has produced a leading case in this Court."[1]

With these words, the present writer once began an essay explaining recent developments in our constitutional law to a British audience. To one familiar with the work of the nation's highest court, the quoted statement is almost a truism. Any commentary on a Supreme Court term is also a commentary on the life of the nation in that period.

The constitutional decisions of the 1977 Term, like those of preceding terms, mirrored the events of the period during which the term took place. A widely emulated attempt to undo the effects of past racial inequality gave rise to the most controversial equal protection decision[2] since *Brown v. Board of Education*[3] itself. Strains in our system of federalism were reflected in holdings on state power to regulate and tax interstate commerce.[4] Basic concepts of fairness that have come to per-

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1. Schwartz, *Recent Developments in American Constitutional Law*, in PRESENT TRENDS IN AMERICAN NATIONAL GOVERNMENT 155 (Junz ed. 1960).

2. Regents of Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978). For a discussion of *Bakke* and its implications, see notes 9-27 and accompanying text *infra*.

3. 347 U.S. 483 (1954).

4. *See* Department of Revenue v. Association of Wash. Stevedoring Cos., 98 S. Ct. 1388 (1978) (Washington business and occupation tax on the interstate commerce activity of

meate society brought forth decisions on different aspects of due process and equal protection.[5] Recognition of the crucial role of free expression and a free press had a continuing impact on the year's series of First Amendment cases.[6]

During the past Term, the high bench remained a storm center in our governmental structure. An observer of the Court cannot, however, but note with satisfaction that the controversy about the Court has greatly diminished in intensity. In part, this has been due to the Court itself, which has been remolding its jurisprudence to meet much of the criticism directed against it. But even more importantly, this quieting of controversy has reflected the acceptance among the vast majority of our people of the need for the performance by the Court of its constitutional role. With Justice Story over a century ago, most Americans would still say, "The universal sense of America has decided, that in the last resort the judiciary must decide upon the constitutionality of the acts and laws of the general and state governments, so far as they

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stevedoring conducted within the state does not violate the commerce clause); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (Wisconsin regulations limiting the length of trucks operated on state highways violate the commerce clause by placing a substantial burden on interstate commerce where the regulations provide only a speculative contribution to highway safety). For a discussion of these cases, see notes 33-45 and accompanying text *infra*. *See also* Moorman Mfg. Co. v. Bair, 98 S. Ct. 2340 (1978) (Iowa single-factor sales tax formula does not violate the commerce clause even though it may result in duplicative taxation of the income of corporations engaged in interstate commerce); Exxon Corp. v. Governor of Md., 98 S. Ct. 2207 (1978) (Maryland statute prohibiting producers or refiners of petroleum products from operating retail service stations within the state neither discriminates against nor unduly burdens interstate commerce and thus does not violate the commerce clause).

5. *See* Flagg Bros. v. Brooks, 98 S. Ct. 1729 (1978) (warehouseman's sale of stored goods pursuant to a U.C.C. provision held not state action and therefore not a sufficient basis for a claim for relief under 42 U.S.C. § 1983); Foley v. Connelie, 435 U.S. 291 (1978) (New York statute limiting appointment of members of state police force to United States citizens does not violate equal protection clause). For a discussion of these cases, see notes 46-63 and accompanying text *infra*.

6. *See* Zurcher v. Stanford Daily, 98 S. Ct. 1970 (1978) (when a newspaper's First Amendment interests would be endangered by a third-party search of its offices pursuant to a warrant, the preconditions for the issuance of such a warrant, including probable cause, specificity, and overall reasonableness, must be applied with particular exactitude); *In re* Primus, 98 S. Ct. 1893 (1978) (collective activity undertaken to obtain meaningful access to the courts, which includes solicitation of prospective litigants by nonprofit organizations that engage in litigation as a form of political expression and association, is entitled to First Amendment protection and may be regulated only with narrow specificity); Landmark Commun., Inc. v. Virginia, 98 S. Ct. 1535 (1978) (First Amendment bars the criminal punishment of a newspaper for publishing truthful information regarding the confidential proceedings of a state judicial review commission); First Nat'l Bank v. Bellotti, 98 S. Ct. 1407 (1978) (the expression of views on an issue of public importance is entitled to First Amendment protection even when the speaker is a corporation).

are capable of being made the subject of judicial controversy."[7] The most significant thing about the Supreme Court is, after all, its continued performance of its constitutional function and the continued acceptance by the mass of Americans of such performance. This remains a basic aspect of our system—as significant in an analysis of recent developments as it would be in an overall historical account.

Bakke: Opportunity Manqué?

One who analyzes the work of the nation's highest tribunal well realizes the truth in Cardozo's famous statement that the law has its periods of ebb and flow.[8] Certainly, it will hardly be contended that the 1977 Term constituted one of the flood tides of Supreme Court jurisprudence. Indeed, compared to other recent terms, the one under review may seem relatively inconsequential.

Yet, even "ordinary" terms of the high bench are not without significance to students of the Court as an institution. If anything, in fact, such terms may be of even greater value from the point of view of day-to-day institutional functioning. Great cases, like hard cases, are prone to make bad law. Cases decided in the glare of the *cause cèlèbre* are far more apt to distort the functioning of the deciding tribunal than those dealt with under calmer circumstances.

During the past Term, the Court did decide one case that gave every prospect of being a great case: *Regents of University of California v. Bakke*.[9] Few cases in recent years have received the public attention which the media and the country focussed on *Bakke* from its inception. Yet, if *Bakke* "at the borning" seemed to have all the potential for an historic landmark, *Bakke* delivered appeared to all too many to be a judicial anti-climax. The Court, it was widely felt, had missed an opportunity definitively to resolve the most important equal protection issue since that presented a quarter century ago in *Brown v. Board of Education*.[10]

At issue in *Bakke* was the special admissions program of a state medical school, under which sixteen out of 100 places in the entering class were reserved for blacks and members of other minority groups.

7. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1570 (1833), *reprinted in* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1576 (5th ed. 1891).

8. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 126 (1921).

9. 98 S. Ct. 2733 (1978).

10. 347 U.S. 483 (1954).

Such persons were considered separately from general applicants.[11] A white male denied admission brought an action attacking the program. He alleged that the special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the equal protection clause.[12] The Court affirmed an order directing that he be admitted, but it reversed that portion of the lower court's judgment enjoining the school from according any consideration to race in its admissions process.[13]

The Justices were sharply divided in *Bakke*.[14] Four held that the special admissions program violated the prohibition against racial discrimination in the Civil Rights Act of 1964.[15] Four others held that the program for affirmative admission of blacks and other minorities violated neither the 1964 statute nor the Constitution.[16] The swing vote was cast by Justice Powell, who agreed with the first four that the admissions program, with its inflexible provision for sixteen minority admissions, was invalid, and with the second four that race may be taken into account as an admissions criterion.[17]

Bakke appears to bar rigid preferences based solely on race. But the same prohibition does not apply to taking race into account in determining eligibility for educational or other public programs. The state has a substantial interest that legitimately may be served by an admissions program that involves the competitive consideration of race.[18] To that extent, racial classifications would be valid to ensure racial diversity in governmental programs, even when there has been

11. 98 S. Ct. at 2739-41.

12. *Id.* at 2742.

13. *Id.* at 2764.

14. Justice Powell announced the two-part judgment of the Court. Four Justices concurred with one half, another four in the second half. *See* notes 15 & 16 *infra*.

15. 98 S. Ct. at 2809 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C.J., and Stewart & Rehnquist, JJ.). They found that Title VI of the Civil Rights Act of 1964 applied and that Bakke was excluded from the medical school in violation of its prohibition against the exclusion of any person from participating in any program receiving federal financial assistance on the ground of race. They concurred in the judgment insofar as it affirmed the California Supreme Court judgment ordering that Bakke be admitted to the school. *Id.* at 2815.

16. Justices Brennan, White, Marshall and Blackmun filed an opinion wherein they concluded that Title VI proscribes only those racial classifications that would violate the equal protection clause if employed by a state, and that race may be used to remedy past societal discrimination. *Id.* at 2766. They concurred in the judgment reversing the California Supreme Court insofar as its judgment prohibited the use of race as a factor in university admissions. *Id.* at 2767.

17. *Id.* at 2739.

18. *Id.* at 2764 (opinion of Powell, J.). Justices Brennan, White, Marshall and Blackmun joined in this part of the judgment. *See* note 16 *supra*.

no finding of past racial discrimination. And when such a finding has been made, the implication is that specifically race-conscious corrective measures may be used.[19] In such a case, in order to eliminate the effects of racism, the law must first take race into account; as Justice Blackmun puts it, in order to treat the victims of racial discrimination equally, it must treat them differently.[20] Under *Bakke*, the famous assertion of the first Justice Harlan that "[o]ur Constitution is color-blind"[21]must be seen as an aspiration rather than a reflection of reality.[22] Until the effects of discrimination are eliminated, race may be taken into account for remedial purposes.

This is, however, only the present writer's interpretation of *Bakke*. One would have to be rash indeed to assert categorically that his interpretation of the case is the correct one. The manner in which the *Bakke* Court divided and the various conflicting opinions blur the force of the decision.[23] "What is the law of the case?" is the natural query of the lawyer after an important Supreme Court decision is handed down. It must be admitted that it cannot be answered with full certainty after *Bakke*. It may be, as John Winthrop expressed it in 1644, that "[j]udges are Gods upon earth,"[24] but a pantheon that speaks with such inconsistent voices hardly inspires the listener with the feeling of divine certainty.[25]

One may, however, express a modest doubt as to whether a ringing *Brown*-type unanimous decision would have really served the law better. On so complex and divisive an issue, such a decision might have turned out to be a latter-day *Dred Scott Case*[26]—tearing the country apart rather than resolving the issue. The Supreme Court has been well compared to the Delphic Oracle. Like that ancient institution, it has owed part of its success to the often obscure quality of its pronouncements, which can be taken to mean all things to all men. Sir Maurice Bowra, speaking of the Oracle at Delphi, tells us that, "[w]hoever controlled it was well informed on public affairs and knew

19. Justice Powell's opinion carefully distinguishes *Bakke*, where there was no finding of past racial discrimination in the medical school admissions program, from those cases where past discrimination had been established. 98 S. Ct. at 2757-58.

20. *Id.* at 2808 (Blackmun, J., concurring in part and dissenting in part).

21. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

22. 98 S. Ct. at 2766. (Brennan, J., concurring in part and dissenting in part).

23. *See* notes 14-17 and accompanying text *supra*. In all, six opinions were filed by the Justices in *Bakke*.

24. Winthrop, *Arbitrary Government Described*, 43 HARV. CLASSICS 94, 100 (1910).

25. *See* notes 14-17 & 23 *supra*.

26. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

that most . . . troubles are easily settled by common sense."[27] At its best, the *Bakke* decision represents a common-sense approach to the most difficult constitutional issue of recent years. At the least, it has gained for the country and its Constitution a significant breathing space, in which political institutions and public opinion can try further to cope with the problem.

Good for This Day and Train Only?

Critics of the Supreme Court have directed continuing animadversions against the Court's failure to follow precedent. They repeat the famous charge of Justice Roberts, made in a 1944 dissent, that it is "the present policy of the court freely to disregard and to overrule considered decisions and the rules of law announced in them."[28] The result, said the learned judge, in one of the few *bon mots* he ever permitted himself while on the bench, is that adjudications of the Supreme Court are brought "into the same class as a restricted railroad ticket, good for this day and train only."[29]

Certainly one of the essential attributes of any successfully functioning institution is that of internal consistency and adherence to established precedent. The principle of stare decisis is thus one which tends to guide all reasonable human action. Yet, important though consistency of conduct may be in other spheres, it is in the law that it attains its peak of perfection. The very basis of law in a civilized society is that it enables men in like circumstances to be dealt with in a similar manner. But this can be true only if the law itself is settled and applied consistently in specific cases. One can, perhaps, picture a satisfactory dispensation of justice by Saint Louis under the oak at Vincennes; yet who would be willing to submit his case to the uncontrolled discretion of one other than a saint? In a developed system of law, the individual will of the magistrate must be fettered by the doctrine of adherence to settled principles and precedent. In a judicial tribunal, stare decisis is not so much a virtue as a necessity.

In the nation's highest bench, however, adherence to precedent cannot be the "be all and end all" of judicial virtues. If the Supreme Court were inexorably to follow prior precedent in every case, stare decisis would become the doctrine of the dead hand. As early as 1851, the high Court itself saw the need for flexibility in its application of the

27. C. BOWRA, THE GREEK EXPERIENCE 61 (1957).
28. Smith v. Allwright, 321 U.S. 649, 666 (1944) (Roberts, J., dissenting).
29. *Id.* at 669.

rule of adherence to precedent.[30] Stare decisis in our system is, in Justice Brandeis' words, not "a universal, inexorable command."[31] In truth, the worst thing that could happen in a legal system like ours, where the judge plays such a primordial part, would be to bind him rigidly to all the rules fashioned by his predecessors. Certainty and change—these are the essential needs of a legal system. Obviously, they both cannot be given full scope; in their pure forms they are at antagonistic poles. Neither can be made the exclusive concern of the legal system. Without certainty, the law becomes not a chart to govern conduct, but a game of chance; with only certainty, the law is as the still waters in which there is only stagnation and death. Inherent in every system of law is the antinomy between certainty and change. The law must be stable and yet it cannot stand still;[32] that is the great juristic paradox which no legal system has as yet been able to resolve in a wholly satisfactory manner.

The Supreme Court is thus scarcely subject to valid criticism simply because it has not adhered slavishly to precedent. The crucial question is the quality of the decisions which have been overruled. Where they have become mere deadwood on the constitutional tree, the Court is hardly to be blamed if it seizes the opportunity for pruning.

The decisions handed down during the 1977 Term which do not follow precedent appear to involve just such attempts to remove derelicts on the stream of the law. The decisions dealing with state power over commerce are good examples; two of them declined to follow precedents which appeared to be controlling. *Department of Revenue v. Association of Washington Stevedoring Cos.*[33] expressly overruled *Puget Sound Stevedoring Co. v. State Tax Commission*[34] and held that a state could constitutionally apply its business and occupation tax to the gross receipts of a stevedoring company doing business in the state. *Ray-*

30. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 456, 458-59 (1851). In this case, a precedent of twenty-six years was overruled to extend admiralty jurisdiction from its tide-water definition to encompass all areas of navigable water, including those inland.

31. Washington v. W.C. Dawson & Co., 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting).

32. R. POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1967).

33. 98 S. Ct. 1388 (1978).

34. 302 U.S. 90 (1937). *Washington Stevedoring* also overruled Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1949), a decision that had reaffirmed the rule of *Puget Sound. Washington Stevedoring* concerned a tax levied by the state of Washington upon the business of loading and unloading within Washington of vessels engaged in international and interstate commerce. The prior stevedoring cases had held that stevedoring itself constituted interstate commerce and as such was not taxable by the states.

mond Motor Transportation, Inc. v. Rice[35] declined to follow *South Carolina Highway Department v. Barnwell Brothers*[36] and struck down a state law prohibiting trucks longer than fifty-five feet on its highways, as applied to an interstate carrier operating sixty-five foot double trailer units.

The precedents not followed in the *Washington Stevedoring* and *Raymond Motor* cases had become incongruities in commerce clause jurisprudence. *Puget Sound* created an unjustified exception to state power to tax gross receipts.[37] A stevedoring company conducts its operations entirely within the state; it is taxed solely on the revenues from loading and unloading performed in the state in the same manner as all other businesses earning revenues there are taxed. The tax applied to it is as fairly related to the services and protection supplied by the state as it is in the case of all other businesses taxed.[38] Immunity for stevedoring companies from a general business tax on all receipts earned in the state had no constitutional warrant;[39] *Puget Sound* was an anomaly which had long ago earned its deserved repose.[40]

The same is true, though to a lesser extent, of *Barnwell*.[41] The

35. 434 U.S. 429 (1978).

36. 303 U.S. 177 (1938).

37. States generally may tax business activities carried on within their borders. The occupation of stevedoring, because of its close relation to shipping consisting of loading and unloading vessels, was characterized as interstate commerce itself, and thus immune from state taxation. *See* Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. at 94.

38. Department of Revenue v. Association of Wash. Stevedoring Cos., 98 S. Ct. at 1398-99. The *Washington Stevedoring* decision emphasizes that "interstate commerce must bear its fair share of the state tax burden." *Id.* at 1399.

39. *Id.* at 1399. The Court noted that in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), the earlier distinction made between direct and indirect taxation of interstate commerce was discarded, and that the constitutionality of applying a business and occupation tax to stevedoring under the commerce clause depends upon its practical effect. The test is set forth as follows: "The Court repeatedly has sustained taxes that are applied to activity with substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State." 98 S. Ct. at 1399.

40. Not only was the classification of stevedoring as interstate commerce per se economically unrealistic in light of the activities carried on wholly within the state, but Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947), the decision reaffirming *Puget Sound*, had also reasoned that multiple tax burdens on interstate commerce could result from permitting taxation. *Washington Stevedoring* makes a definitive response to the abstraction: "When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens logically cannot occur." 98 S. Ct. 1397. *See also id.* n.17.

41. 303 U.S. 177 (1938). In *Barnwell*, truckers engaged in interstate transport challenged a South Carolina law which prohibited the use within the state of trucks whose width exceeded ninety inches and whose weight when loaded exceeded 20,000 pounds. Although neighboring states allowed trucks of ninety-six inches and a load of more than ten tons, and

decision there has permitted the states to impose a veritable code of regulations and licensing requirements in areas not covered by the Interstate Commerce Act and ICC regulations.[42] *Raymond Motor* does not expressly overrule *Barnwell*, but it appears inconsistent with the *Barnwell* deference to state motor regulation and, as such, opens the door to its repudiation.[43] Despite the *Barnwell* attempt to distinguish these motor regulation cases, one cannot help but feel that separate reg-

despite the fact that up to 90% of all trucks used in interstate commerce were of these dimensions and weights, the South Carolina law was upheld. In the absence of federal regulation in the field, the *Barnwell* Court found that the states were free to legislate in the area of state highways, a matter of traditional local concern. *Id.* at 187. Particularly where state regulations promote safety upon the highways, they are presumed constitutional. *Id.* at 189, 195. The test, therefore, under both the Fourteenth Amendment and the commerce clause, was whether the state acted within its powers, *i.e.*, was not preempted by federal legislation, and "whether the means of regulation chosen are reasonably adapted to the end sought." *Id.* at 190. The Court refused to apply a balancing of interests test and reviewed the record to ascertain only "whether it is possible to say that the legislative choice is without rational basis." *Id.* at 192.

42. Where Interstate Commerce Commission regulations or the provisions of the Interstate Commerce Act (codified in scattered sections of 49 U.S.C.) apply, the federal laws supersede any state regulations in the same areas.

43. The state asserted in *Raymond Motor* that safety considerations dictated the prohibitions of the statute; therefore, a "rational relation" test should be applied. The regulations were rational, the state argued, because it takes longer to pass longer trucks than shorter trucks. Overwhelming evidence presented by the interstate shippers demonstrated, however, that no safety factors dictated the fifty-five foot limit in the statute and that, in fact, the prohibited trucks were actually safer. The Court therefore held that "the challenged regulations violate the Commerce Clause because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contributions to highway safety." 434 U.S. at 447.

The *Raymond Motor* Court reiterated the qualification of the *Barnwell* language suggesting that no showing of a burden on interstate commerce would be sufficient to invalidate local safety regulations in the absence of discrimination against interstate commerce. In contrast to the *Barnwell* analysis, the body of commerce clause jurisprudence now requires a balancing approach. *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

The *Raymond Motor* Court approved the balancing approach taken in Pike v. Bruce Church, Inc., *supra*, and concluded: "Thus, we cannot accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce." 434 U.S. at 443. Although state regulations designed to promote highway safety are entitled to a strong presumption of validity, the Court found that "this presumption cannot justify a court in closing its eyes to uncontroverted evidence of record." *Id.* at 444 n.19. The court carefully noted, however, that the decision was not dispositive of the fate of all such length limits. The Court characterized the evidence produced on the safety issue as "overwhelmingly one-sided. . . . The State of Wisconsin has failed to make even a colorable showing that its regulations contribute to highway safety." *Id.* at 447-48. Thus, if a state legitimately "asserts the existence of a safety justification for a regulation," it might be upheld, even after *Raymond Motor*. *See id.* at 449 (Blackmun, J., concurring).

ulation in each state may result in the same "crazy quilt" of state laws[44] as that to which the Court pointed with alarm as the inevitable consequence of the Arizona train-limit law stricken down in a leading case.[45] In a country dominated by the free-trade concept of the commerce clause, it is anomalous that interstate commerce by motor, as distinct from other forms of interstate transportation, may be required to obtain permits and pay tolls every time it crosses a new state line.

Two other 1978 decisions, involving due process and equal protection issues, also rest on refusals to follow earlier decisions which had themselves gone too far. The first of them, *Flagg Brothers v. Brooks*,[46] held that the sale under the Uniform Commercial Code of belongings by a warehouseman for nonpayment of a storage account may not be considered state action for due process and equal protection purposes.[47] Reliance had been placed on, *inter alia, Evans v. Newton*,[48] which had held that where the tradition of municipal control in the operation of a park was firmly established, transferring control of the park to private trustees would not prevent the park's operation from being considered state action, since the service rendered even by a private park under the facts of the case was governmental in nature. *Flagg* rejects the *Evans* approach, stating, "We doubt that *Newton* intended to establish any such broad doctrine in the teeth of the experience of several American

44. Morgan v. Virginia, 328 U.S. 373, 388 (1946) (Frankfurter, J., concurring).

45. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). (Arizona statute limiting length of passenger trains to fourteen cars and freight trains to seventy cars found invalid as a safety measure where the necessity of stopping trains at the Arizona border and redistributing their cars constituted an undue burden on interstate commerce). The Court applied this test: "The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts." *Id.* at 775-76.

46. 98 S. Ct. 1729 (1978).

47. *Flagg* held that state action was not present because the U.C.C. provision authorizing the sale did not provide the exclusive means for resolving a purely private dispute and because there was no state involvement in the warehouseman's sale of the respondent's goods. 98 S. Ct. at 1735. The rationale of the cases imposing procedural restrictions on creditors' remedies therefore did not apply. *Id.* at 1734. *Cf.* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

48. 382 U.S. 296 (1966). *Evans* held that the managing of a municipal park by the city council as trustees under the terms of a charitable trust which mandated the exclusion of non-whites did not cease to be a state activity when the park was subsequently transferred to private trustees. The services rendered to the community by the park were found municipal in nature, *id.* at 301, and the private trustees were endowed by the state, by its delegating the park management, with powers governmental in nature and thus became agencies of the state subject to constitutional limitations. *Id.* at 299.

entrepreneurs who amassed great fortunes by operating parks for recreational purposes."[49]

Flagg appears correct in its refusal to accept the broadside *Evans* "public function" approach, since, in an era of ever-expanding notions of the proper scope of governmental action, it appeared to have the potential of sweeping within the reach of the Fourteenth Amendment most private activities. The state is increasingly undertaking functions that, not long ago, were thought beyond the legitimate sphere of government. Under the *Evans* approach, all these functions might be considered governmental. This would all but do away with the "state action" requirement for operation of the Fourteenth Amendment since it "might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity . . . ."[50]

The other decision referred to as involving equal protection is *Foley v. Connelie*.[51] A series of recent decisions had completely changed the old law on state power to distinguish between citizens and aliens in fields in which the state had a "special public interest."[52] The Court had invalidated state laws barring aliens from the state civil service[53] or giving a preference to citizens in public works employment.[54] It had also struck down state laws prohibiting aliens from practicing law[55] or engineering,[56] as well as laws conditioning eligibility for welfare[57] or educational benefits[58] upon citizenship.

49. 98 S. Ct. 1735 n.8.

50. Evans v. Newton, 382 U.S. at 322 (Harlan, J., dissenting).

51. 435 U.S. 291 (1978).

52. Graham v. Richardson, 403 U.S. 365, 372 (1971). In cases such as People v. Crane, 214 N.Y. 154, 108 N.E. 427, *aff'd sub nom.* Crane v. New York, 239 U.S. 195 (1915), and Truax v. Raich, 239 U.S. 33 (1915), the Court fashioned the doctrine that the state's "special public interest" in favoring its own citizens over aliens in the distribution of limited resources such as public benefits justified the discriminatory treatment of aliens. Beginning with Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), however, doubt was cast on the continuing validity in all contexts of the special public interest doctrine. *See* Graham v. Richardson, 403 U.S. at 374. In *Graham*, the Court rejected the concept that "constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' " *Id.* The special public interest doctrine was based on the right/privilege dichotomy, and the prior cases had reasoned that the receipt of privileges could be made dependent upon citizenship.

53. Sugarman v. Dougall, 413 U.S. 634 (1973).

54. Lefkowitz v. C.D.R. Enterprises, Ltd., 429 U.S. 1031 (1977).

55. *In re* Griffiths, 413 U.S. 717 (1973).

56. Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572 (1976).

57. Graham v. Richardson, 403 U.S. 365 (1971).

58. Nyquist v. Mauclet, 432 U.S. 1 (1977).

Foley v. Connelie creates a major exception to this line of jurisprudence which had seemed so overwhelmingly established. It holds that a state may limit appointment of members on the state police force to citizens. Police officers participate directly in the execution of broad public policy and so are not to be equated with persons engaged in routine public employment who exercise no broad power over people generally.[59] Although the decisions now extend to aliens the right to education and welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern may be reserved to citizens.[60] Therefore, while the decisions of the Court with respect to aliens will continue to reflect fine questions of values, not all limitations on the rights of aliens will be viewed as inherently suspect and subject to close scrutiny.

It is to be hoped that *Foley* will abort the trend toward prohibiting all state classifications based on citizenship.[61] The decisions which *Foley* declined to follow had all but rendered irrelevant the circumstance that there are factual differences between the alien and the U.S. citizen that result from the perpetuation by the former of a dual status as an American inhabitant but a foreign citizen.[62] Alienage is essentially a voluntary status under our liberal naturalization laws. In this respect there is a fundamental difference between citizenship and other so-called suspect classifications. As a federal judge once stated, "The governmental body charged with discrimination by the alien can give Molière's classic answer: 'Tu l'as voulu, Georges Dandin.' "[63]

By way of summary, the discussion in this section indicates that even the decisions during the 1978 Term that declined to follow precedent did not treat constitutional law as carte blanche upon which the Court is free to scribble as it pleases. This does not, to be sure, mean that the high bench no longer overrules precedent. Even the most conservative tribunal will find occasion to discard prior decisions. Yet it does indicate that the often unwarranted repudiation of established law, which not too long ago caused such distress to lawyers and laymen alike, is now a thing of the past. Whatever may have been the case some years ago, decisions of the Court may no longer be classed with Justice Roberts' restricted railroad ticket—good for this day and train only.

59. 435 U.S. at 297.
60. *Id.*
61. *See* cases cited in notes 52-58 *supra*.
62. Harisiades v. Shaughnessy, 342 U.S. 580, 585 (1952).
63. Rok v. Legg, 27 F. Supp. 243, 246 (S.D. Cal. 1939).

Strands and Patterns

In writing of the high Court, the present writer has compared it to a tapestry made up of many strands which, interwoven, make a pattern; to separate a single one and look at it alone not only destroys the whole but gives the strand itself a false value.[64] In the main, the commentaries which follow this foreword examine the single strands of individual decisions. But their real significance lies in their contribution to the weaving of the institutional pattern. It is to this pattern that this section is devoted. Here we are dealing not so much with individual decisions as with the Court itself as an institution during the 1977 Term.

It does not require the acumen of one for whom the *United States Reports* constitute his staple reading to realize that there is something amiss in our highest judicial institution. What is particularly distressing to one who studies the Court in operation is the apparent failure of its members to act with a full realization of the fact that the strength of the high tribunal arises from its operation as a collegiate institution. A court vested with the awesome powers entrusted to our highest bench can function effectively only if it speaks as an organic entity. If it voices merely the individual views of its members, the authority of its pronouncements can never be quite the same. In recent years, as is well known, the institutional ethos of the Court has been weak. "The fact is," wrote Justice Jackson just before his death, "that the Court functions less as one deliberative body than as nine."[65] Since this was written, there has, if anything, been an intensification in the internal atomization of the Court.

The 1977 Term has seen no diminution in this tendency. Certainly there has been no decrease in the readiness of the Justices to articulate their individual views in concurrences or dissents.[66] Almost every case of importance last Term saw a sharp division in the Court. The present Justices express disagreement with their colleagues with an alacrity that would have shocked earlier Courts. Even with the dissent and the concurrence conceded to have a proper place, one may wonder whether the Justices have not, in recent years, made too great a use of their right to differ publicly. Every right can be abused, and the right of members of the Supreme Court to express disagreement with their colleagues is no exception. Just after his elevation to the Court, Justice Frankfurter

64. B. SCHWARTZ, THE SUPREME COURT 342 (1957).

65. R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 16 (1955).

66. Notable is the diversity of opinions in the *Bakke* case, discussed above. *See* notes 14-17 & 23 *supra*.

stated, in a concurring opinion, "The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions."[67] If carried to its extreme, the right to concur or dissent leads back, in effect, to the practice of the pre–Marshall Court of seriatim opinions. Yet this is, in truth, what seems to have been happening in the Supreme Court of the past few decades.

Notwithstanding Justice Frankfurter's already-quoted statement, one may doubt whether the proliferation of Supreme Court opinions is a "healthy" development. Without a doubt, it has a direct, adverse effect upon the respect in which the Court and the law are held. The supreme bench is identified in the public mind as the authoritative expounder of American law. Anything that detracts from the esteem in which the highest tribunal is held cannot but reflect adversely upon the law throughout the land. In our system, as already indicated, the Supreme Court is clothed with much of the panoply and prestige that the ancients associated with their religious oracles. But even the Oracle at Delphi could not long retain the allegiance of men if it spoke with up to nine inconsistent voices.

Closely related to the profusion of Supreme Court opinions has been the decline in their quality. It is certainly unrealistic to expect a Holmes or a Cardozo, for example, to sit on every Supreme Court. But does that mean that the highest bench must be the characteristic institution of an age that Dean Acheson called just before his death "the apotheosis of mediocrity"?[68] Cardozo once noted that people assert that "a judicial opinion has no business to be literature."[69] Does it, however, follow that it has no business being literate?

The Court, like the country, has become so result-oriented that its devotion to legal craftsmanship has been skewed. Too many recent opinions are deficient even in adequately explaining their bases.[70] Too many tend to be homilies in political science. Their language is turgid and verbose; their reasoning prolix and obscure. Too often, they ignore the distinction between *obiter* and *ratio* and the appropriate weight to

67. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring).

68. N.Y. Times, Nov. 14, 1971, at 45.

69. SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 339 (M. Hall ed. 1947).

70. For a striking example, see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). It was of this type of opinion that Justice Jackson wrote his caustic animadversion: "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it!'" SEC v. Chenery Corp., 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

be given to different types of legal and non-legal authority. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong," reads the oft-quoted Cardozo statement.[71] Observers of the high Court in operation are equally entitled to know just what its decisions mean. Of course, as Alice's king said, "If there's no meaning in it, that saves a world of trouble, you know, as we needn't try to find any."[72] But this hardly seems a proper method for an ultimate judicial tribunal to follow—at least not this side of Wonderland.

Conclusion

Former Solicitor General Bork has recently tilted a lance against the continuing trend toward judicial activism. The role of the judge, he urges, should be to "let elected representatives make the value judgments not rather clearly already made by the Constitution. . . . That means abandoning power judges could exercise and—being human—would like to exercise."[73] Instead, he says of the Supreme Court, "the trend . . . is toward a more dominant, imperialistic institution than the court was forty years ago."[74]

Certainly judicial activism did not end with the Warren Court. Far from it! The Court today exercises powers vis-à-vis the other branches that would have appeared unthinkable only a quarter of a century ago. The doctrine of judicial self-restraint, of which Justice Frankfurter was for many years the foremost advocate, now appears a principle from another world. The judicial referee, whose task it is to keep the ring free from governmental action that passes the bounds of reason, has been replaced by a present-day version of the super-legislature,[75] acting as Supreme Censor "to judge the wisdom or desirability of legislative policy determinations."[76]

Critics of the Court, on and off the bench, have pointed out the similarities between the present Court's free-wheeling use of concepts such as due process and that employed by the Nine Old Men during the first part of this century. What is it that the pre-1937 Court had done which virtually all now condemn? It was the elevation by the Justices of their own personal predilections into constitutional dogmas

71. United States v. Chicago, M., St. P. & P. Ry., 294 U.S. 499, 511 (1935).

72. L. CARROLL, ALICE IN WONDERLAND.

73. YALE L. REP. 10-11 (Spring 1978).

74. *Id.*

75. The famous phrase of Brandeis, J., dissenting in Burns Baking Co. v. Bryan, 264 U.S. 504, 534 (1924).

76. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

that could not be touched by the legislature. True, the old Court's action in that respect was almost entirely limited to the economic field; yet that was so because it was in that field that legislative action was threatening to upset the Justices' preconceptions. Today, all the members of the Court would find the economic philosophy that prevailed on the pre-1937 tribunal anachronistic. None of the present Justices has difficulty in accepting a need for government regulation that would have seemed all but revolutionary to the old Court majority. In the area of economic legislation, then, self-restraint accords with the personal convictions of the present Court. The same is not true in the area of personal regulation. Here, legislative restrictions run counter to the libertarian predilections of a majority of the Court. But are these Justices necessarily more justified in writing their private predilections into the Constitution than were their pre-1937 predecessors? "The great ordinances of the Constitution," declared Justice Holmes in a celebrated passage, "do not establish and divide fields of black and white."[77] Nor does the organic instrument differentiate qualitatively between the different provisions that make up its text. As no constitutional guaranty enjoys preference, the Justices are not justified in selective application of the Constitution, giving full effect only to those parts which for the moment find personal favor with individual Justices.[78]

Nor is it enough to say that we can safely allow the Supreme Court to intervene actively only in cases involving personal rights. In the first place, as the Court itself has recognized, "the dichotomy between personal liberties and property rights is a false one. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."[79] It may well be that protection of personal rights is the area that for the moment finds favor. But are we justified in assuming that the preponderance on the Court will always be with those who are of the present Justices' persuasion? As Justice Frankfurter once put it,

> Yesterday the active area in this field was concerned with "property." Today it is "civil liberties." Tomorrow it may again be "property." Who can say that in a society with a mixed economy, like ours, these two areas are sharply separated, and that certain freedoms in relation to property may not again be deemed, as they were in the past, aspects of individual freedom?[80]

77. Springer v. Government of the Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

78. *Accord*, Ullmann v. United States, 350 U.S. 422, 428-29 (1956).

79. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

80. F. FRANKFURTER, OF LAW AND MEN 19 (1956).

Unrestrained judicial activism today, on matters of civil liberty, opens the door to similar activism tomorrow, in areas which may happen then to find favor.

It is not mere caviling to point out that judicial predisposition toward the libertarian result may be a two-edged sword. Properly employed, it can maintain the essential balance between liberty and authority. Carried to an activist extreme, however, it can lead the judges to assume undue authority over the other branches. It should not be forgotten that, no matter how we may gloss over it, judicial review is basically an undemocratic institution. Through exercise of its review power, the Supreme Court may enable the will of even the great majority of the people to be frustrated. That this is no mere theoretical possibility is shown by what actually happened in the pre–1937 period. The Court then consistently set at naught policies which most of the country approved of, and it did so by resort to constitutional theories that we now see had clearly become outmoded. The Supreme Court is essentially a check of the past upon the present. But it is the present that represents the will of the people and it is that will that must ultimately be given effect in a democracy. If the democratic bases of our system are to be respected, the review power of the one non-democratic organ in our government should be exercised with self-restraint.

It is paradoxical that those who profess to be the preachers of present-day liberalism now assert the need for the Court to assume a more active responsibility. If there was one principle that nineteenth-century liberals agreed upon, it was that of the primacy of legislative power. To them, it was the elected representatives of the people, not an irresponsible judicial organ, who were endowed with primacy in the governmental structure. Yet, whatever else we may think of the tenets of nineteenth-century liberalism, is this not the proper distribution of governmental power in a representative democracy? Laws duly enacted by the people's representatives should not be aborted by judicial fiat unless the judges are presented with no other choice in the matter. As Marshall aptly said, "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will."[81] It is the Supreme Court's responsibility to see that their will is faithfully executed in the determination of controversies.

There are those, however, who fear that judicial deference toward the legislature tends to leave us unprotected against violations of constitutional rights. To them, the Court is the only real bulwark of our

81. Marshall, C.J., *quoted in* 309 U.S. at *xv* (1940).

liberties; if it removes itself from the center of the constitutional stage, our only substantial safeguard will be gone. The present writer would be the last to denigrate our highest tribunal and the cardinal task it performs in a democratic system such as ours. But to overmagnify the role of the Court is to perform neither it nor the country a service. It was with profound insight that one of the greatest of modern jurists, Judge Learned Hand, declared in a passage that has become deservedly famous:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes, believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[82]

Though Judge Hand's comment may seem to some too pessimistic a gospel of despair, it contains a fundamental truth about the proper constitutional role of the Supreme Court. Courts are not the only instruments of government that can be relied upon to preserve us against harm. If they were, they would be largely inadequate for the purpose. Civil liberties can at best draw only limited strength from judicial guarantees. Courts can hardly be expected by themselves to preserve us against our own excesses. It is no idle speculation to inquire which comes first, judicial enforcement of constitutional rights or a free and tolerant society. Must we, in Justice Jackson's question, first maintain a system of free government to assure a free and independent judiciary, or can we rely upon an aggressive, activist judiciary to guarantee free government?[83] Americans not infrequently forget the answer to this question. Without a doubt, the Court is of basic importance, particularly in molding public opinion to accept fully the implications of the rule of law; the law enunciated by it may play the role of Plato's "leading-string."[84] As such, it can have a definite educative as well as a normative effect. But it is the attitude of the society and of its organized political forces, rather than of its purely legal machinery alone, that is the controlling force in the character of free institutions.

82. L. HAND, THE SPIRIT OF LIBERTY 189-90 (3d ed. 1960).

83. R. JACKSON, *supra* note 65, at 81.

84. *See* Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws and Delegations of Power*, 72 NW. U. L. REV. 443, 452 (1977).