THE newly reconstituted Supreme Court of the United States has become the center of an earnest controversy with respect to the true role of the Court in constitutional interpretation. The general controversy is, of course, far from new. What makes it of more than ordinary significance is that the Court itself is revealing a tendency substantially to alter the extent, if not the nature, of judicial review. This tendency has not yet become clearly dominant, but it is apparent enough to shake the implicit faith in the Court of many of those to whom, before 1937, any criticism of the tribunal was something akin to heresy.

In a speech to the annual convention of the American Bar Association in 1939, the president of that body, Mr. Frank J. Hogan, asserted that the Supreme Court of the United States is failing the people of this country. The burden of his grievance seemed to be the decisions rendered since the spring of 1937, which have in effect reversed earlier restrictive doctrines and have resulted in a greater breadth of activity for legislatures, both state and federal. He deplored the expansion of the power of the general government and pointed out that “the plain result of all this is that no lawyer can safely advise his client what the law is.” The guards against the abuse of legislative power are being let down, he said, and the limitations imposed upon it are being obl-
erated. "What was a constitutional principle yesterday may be a discarded doctrine tomorrow, and this, all this, is what has been so often proudly proclaimed to be a government of laws and not of men."

The reference to a "government of laws," and the implication that it is being destroyed by Supreme Court decisions giving greater latitude to legislatures in the solution of pressing social and economic problems, is representative of one of the warring points of view concerning the activity of the Court in interpreting the Constitution. The other view holds that the tribunal in the past has gone beyond its rightful sphere in the review of legislation and has been engaged in reading its own social and economic predilections into the Constitution. To those who hold this latter opinion, the new majority of the Supreme Court is doing no more than to redress a balance which until recently had been too heavily weighted in the other direction. Mr. Hogan's discomfiture and despair, as a lawyer, at the activity of the Court are perhaps understandable. But to equate the modification of old constitutional doctrines with the obliteration of a "government of laws" is to reveal a certain confusion with regard to the nature of the process of interpreting written constitutions. Mr. Hogan is not alone in his bewilderment. Views of Supreme Court justices themselves demonstrate a striking divergence in attitude on this very question.

During the course of recent years, and particularly in relation to the constitutional decisions in 1936 and 1937 constituting what has been termed "the Supreme Court Revolution," the opinions of the judges on the supreme bench evince wide differences as regards the conception of the nature and scope of judicial interpretation of the Constitution. Justice Stone, dissenting in the A. A. A. case, emphasized that courts are concerned with the power to enact statutes, not with the wisdom of those statutes, and went on to point out that "while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." He noted that for removal of unwise laws from the statute books appeal should lie not to the courts, but to the ballot and the processes of democratic government. By implication he accused the majority of a lack of self-restraint in voiding the statute as unwise rather than restricting themselves to the exercise of what he conceived to be proper judicial functions. The suggestion that the spending power

4 Id., 297 U. S. at 78-79.
must be "curtailed by judicial fiat" because it may be abused, he held, "hardly rises to the dignity of argument. So may judicial power be abused." He concluded his remarks by asserting that "Courts are not the only agency of government that must be assumed to have the capacity to govern," and by pointing out the dangers in the "assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government."

A year later, dissenting for himself and his three conservative brethren in West Coast Hotel Co. v. Parrish, Justice Sutherland undertook to answer his fellow justice and to point out the errors in such an attitude. In language which leaves little doubt that he is responding directly to Justice Stone's remarks, Sutherland said,

"The suggestion that the only check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of will and not of judgment."

He then brought forth the familiar contention that "the meaning of the Constitution does not change with the ebb and flow of economic events." Speaking directly in relation to the majority opinion in the instant case, which expressly reversed an interpretation accepted since 1923 and followed as precedent one scant year earlier, he said meaningfully, "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation."

These two opinions are characteristic of the divergent views, to be found oft-repeated in recent years, as to the nature of the function of constitutional construction. The reality of this difference may be emphasized by noting a few other examples taken more or less at random.

5 Id., 297 U. S. at 87, quoting Holmes that "it must be remembered that legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Missouri, Kansas & Texas Ry. v. May, 194 U. S. 267 at 270, 24 S. Ct. 638 (1904).
7 300 U. S. 379, 57 S. Ct. 578 (1937).
8 Id., 300 U. S. at 402.
9 Ibid.
10 Id., 300 U. S. at 404. In support he quoted Cooley's well-known statement that "What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." 1 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 124 (1927).
from the opinions in 1936 and 1937. Dissenting in *Morehead v. New York ex rel. Tipaldo,* Justice Stone implied that the majority was allowing its economic prejudices to influence its reading of the Constitution. "It is difficult to imagine any grounds," he said, "other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others. . . ." Continuing, he added that "The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs than it has adopted, in the name of liberty, the system of theology which we may happen to approve."

Chief Justice Hughes, in the majority opinion in *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* declined to shut his eyes to "the plainest facts of our national life" and to deal with the legislation under consideration in an "intellectual vacuum," which is in general what the Court had been accused of doing the preceding year. This departure from "well-established principles" was attacked in a minority opinion by Justice McReynolds, with whom concurred Justices VanDevanter, Sutherland and Butler. One is inclined to agree with his assertion that "Every consideration brought forward to uphold the Act before us was applicable to support the Acts held unconstitutional in causes decided within two years." Since the personnel of the Court had not at that time been changed, this suggests the importance of the attitude with which the justices—even the same justices—approach their task.

One final excerpt may be allowed as indicating a striking formulation in the course of these decisions of the familiar mechanical view of the judicial function. "There should be no misunderstanding," said Justice Roberts in the A. A. A. opinion, "as to the function of this court

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12 Id., 298 U. S. at 633.
13 Id., 298 U. S. at 636. This passage shows strikingly the similarity of Stone's views to those of Holmes. Cf. the latter's dissent in *Lochner v. New York,* 198 U. S. 45 at 75, 25 S. Ct. 539 (1905), that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."
14 301 U. S. 1, 57 S. Ct. 615 (1937).
15 Id., 301 U. S. at 41.
16 Id., 301 U. S. at 77.
in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception." He then continued his description of the process whereby the constitutionality of a statute is tested, saying that

"the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. ... Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

Such an explanation, it has been frequently pointed out, begs the real question. All would agree that when a statute conflicts with the Constitution, the former must yield. The vital issue is how the Court decides whether such a conflict does in fact exist. The nature of this process is the point at which divergent opinions arise. Is it merely, as the pure mechanical theory must assume, the exposition and application of a document of self-evident meaning? This can hardly suffice to explain legitimate differences of opinion among honest and able men—among the judges themselves. Obviously, it is something more than this and less than the exercise of untrammeled will.

Of course it is not for a moment to be contended that these differences in view are recent or novel developments. The insistence that the judge is not influenced by will or opinions as to the wisdom of legislation is to be found in Hamilton's papers in The Federalist, in Marshall's constitutional decisions, and in recurring judicial dissertations throughout the Court's history. Likewise the unchangeable nature of the Constitution has been emphasized again and again, to receive perhaps its classic formulation in Ex parte Milligan and to be stressed notably in later years in dissents in the Nebbia case and the Minnesota Mortgage Moratorium case. Certainly the tendency to take a substantially different view, namely one which refuses to regard the judge as an inhuman or superhuman automaton, is to be found clearly expressed in many of Justice Holmes' best-known opinions.

18 Id., 297 U. S. at 62-63.
19 See especially Number 78.
20 4 Wall. (71 U. S.) 2 (1866).
The controversy over the proper exercise of the judicial power of interpretation is by no means a new one. Emphasis has been laid, for illustrative purposes, on its more recent phase because it seems apparent that the fate of much experimental social legislation before the Court has depended and continues to depend to a large degree upon the attitude of the judges and their conception of the role they are to play in interpreting and applying the Constitution. The events of the last few years, and the importance of the question of the judges' general approach to legislation, seem to make it desirable to examine anew some of the important factors involved in the judicial interpretation of fundamental law.

I

The Mechanical Theory of the Judicial Function

Much has been written about the so-called "mechanical theory" of the judicial function. Limitations of space and the general familiarity of the subject-matter suggest that a brief summary of the theory and some of the criticisms advanced against it will suffice for the purposes of the present discussion. According to this view the judge has merely the function of finding and applying a rule of pre-existing and all-sufficient law. This concept of the role of the judge leads to the theory of a closed system of rules mechanically developed by inflexible logic and automatically administered. The judicial function is thought of as consisting only in the application of a rigid legal formula to a particular set of facts. The rule to be applied is definitely prescribed as such in the existing body of the law, or it is logically deducible from authoritatively given premises. The application of law is held to proceed entirely upon rule and logic, and to afford no occasion for shaping or direction in the hands of the judge. Interpretation is thought to consist of an absolute method allowing no scope for anything but discovery of the actual, or logical deduction of the potential legal rule and its application mechanically to the case at hand. The idea is given scientific form by the theory of the separation of powers, according to which the legislature makes the law, the executive administers it, and the judiciary applies it to the decision of particular causes. It is admitted that the courts must interpret to apply, but this interpretation is taken to be in no sense a lawmaking activity. The law is conceived

Judicial power is thus held to be legitimately exercised only when the judge gives effect to the discoverable will of the lawmaker. The function of the judge is thus considered to be purely passive. He is the oracle of the law, but he does not make or change the law. In the words of Montesquieu, "the judges are but the mouth which pronounces the words of law; they are merely inanimate beings." Judicial opinions may be evidence of what the law is, but they do not make law. Thus the judicial function is thought of as beginning and ending with the application to a particular case of a rigid and unchanging legal formula specifically prescribed as such or exactly deducible from authoritative premises. It is affirmed that "The man who claims that under our system the courts make law is asserting that the courts habitually act unconstitutionally."

This conception of the judicial application of written law obviously proceeds upon several assumptions. There is presumed to be a complete body of pre-existing law which is capable of offering solutions for all subsequent controversies. One, and only one, correct application of the law is possible, and this application is apparent and obvious to all reasonable men. The judge himself is assumed to function in a purely impersonal manner, with the result being attributed wholly to the will of the lawmaker and not at all to the individual capacities or outlook of the judge. It is taken for granted that there is a will of the lawmaker for every possible situation within the area covered by the written provision and that this will is discoverable and must govern all succeeding cases. Interpretation is conceived of as the finding and application of that discoverable will, and nothing more. Where logical analogy is resorted to in order to fill out gaps in the law, it is considered to be a purely automatic process leading to the will of the lawmaker where it is not express and involving no element of choice or direction by the judge. Finally, no distinction is presumed to exist, for the purposes of interpretation, between detailed legislative rules and broad legal standards embodied in the written law. All written provisions, in-

25 This makes of the court, according to Professor Pound, a "sort of judicial slot machine," "... the facts do not always fit the machinery, and hence we may have to thump and joggle the machinery a bit in order to get anything out. But even in extreme cases of this departure from the purely automatic, the decision is attributed, not at all to the thumping and joggling process, but solely to the machine." POUND, THE SPIRIT OF THE COMMON LAW 171 (1921).
26 DE L'ESPRIT DES LOIS, Bk. XI, c. VI.
27 Zane, "German Legal Philosophy," 16 MICH. L. REV. 287 at 338 (1918).
28 For an elaboration of this point, see Dodd, "The Judicial Function in Construing a Written Constitution," 4 ILL. L. Q. 219 (1922).
cluding broad constitutional clauses, are considered subject to the same process with the same result, namely, the discovery of the will of the lawmaker.

Certain obstacles appear in accepting the strict view of interpretation as outlined under the mechanical theory. It is apparent upon very little reflection that in many instances the will of the actual lawmaker cannot be determined. "The lawmaker" himself is of course the merest abstraction. And when the lawmaker is in fact a large body of men, one has very often to deal not with legislative will but legislative wills. Moreover, most of the problems of interpretation arise in circumstances about which the legislator had no intent at all. Where the lawmaker had no real intent, and where gaps are to be filled in, it is impossible for the judge to adhere in fact to the theory that it is his sole function to effect the legislative will. In this sphere, according to C. K. Allen, "there is a very wide margin in almost every statute where the Courts cannot be said to be following any will except their own."

Even if the lawmaker were an actual entity, and even if he did have an intent with regard to all subsequent cases arising under the law, the words used in conveying that intent would be necessarily subject to different views as to meaning. It would be possible to accept the proposition that there is a legislative will and to deny at the same time that the courts ordinarily can and do find it. Words are inadequate vehicles of meaning. They are, in themselves, merely symbols which require complicated processes of thought before significance can be attached to them. As symbols, they are imperfect and changing, and altogether incapable of acting as the carriers of fixed and definite meaning. Many have pointed out that the legislature in enacting a law merely puts a number of words on the statute books, that these words have meaning only when interpreted and applied by the courts, and

30 Josef Kohler has emphasized that "whenever a law is adopted, all that is really agreed upon is the words. For among those who have anything to do with the passage of the act frequently something different is understood by each." Kohler, "Judicial Interpretation of Enacted Law," in SCIENCE OF LEGAL METHOD 187 at 196 (1917). In the same volume, see Karl Wurzel, "Methods of Juridical Thinking," 286 at 356.
31 ALLEN, LAW IN THE MAKING, 2d ed., 286 at 301 (1930). "The fact is," according to John Chipman Gray, "that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; ... when what the judges have to do is ... to guess what it would have intended on a point not present to its mind, if the point had been present." GRAY, THE NATURE AND SOURCES OF THE LAW 165 (1909).
32 "Words," says Professor Wigmore, "are the most fluent and indefinite of things." Editorial preface to THE SCIENCE OF LEGAL METHOD xxxv (1917).
33 Says Dean Leon Green, "There is no such thing as words so plain that they are
that it is for the courts alone to say what they mean.\textsuperscript{84} This meaning may often be very different from the original one attached to the words by the person or persons by whom the provision was framed and adopted. As pointed out by Gray

"A judge puts before himself the printed page of the statute book; it is mirrored on the retina of his eye, and from this impression he has to reproduce the thought of the law-giving body. The process is far from being merely mechanical; it is obvious how the character of the judge and the cast of his mind must affect the operation, and what a different shape the thought when reproduced in the mind of the judge may have from that which it bore in the mind of the lawgiver."\textsuperscript{85}

Due, however, to the general acceptance of the idea that legal rules have an immutable meaning, much of the shaping of the law to meet actual conditions must be carried on as a pretended interpretation of the law. This is a real extension and creation of law, going beyond the mere exposition of a written provision. "Anglo-American history," says Wigmore, "illustrates copiously how the judiciary have in fact occupied themselves at all times with declarations of law independent of statute, i.e., with genuine legislation."\textsuperscript{86} The retention of the pretext of effectuating a legislative intent is necessitated by the widespread belief that the function of the judge is merely to discover and apply the meaning of the law existing prior to the decision.\textsuperscript{87}

Whether filling gaps in the written law, or deciding the scope of application of vague and ambiguous words and phrases, the judge has a more or less wide latitude in the choice of his starting point for legal reasoning. It is not logic itself, then, that assumes the principal importance in this process, but rather the premises to which the logic is to be applied. The accepted method of judicial decision often seems tacitly

\textsuperscript{84} In a famous passage Gray declares, "statutes do not interpret themselves; their meaning is declared by the courts, and it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law." Gray, \textit{The Nature and Sources of the Law} 162 (1909).

\textsuperscript{85} Id., 163-164.

\textsuperscript{86} Preface, \textit{Science of Legal Method} xxx (1917).

to assume the starting point, and then proceeds impressively to demonstrate that impeccable logic leads necessarily to a single result. In truth, however, the very choice of starting point is often by far the most important part of the entire process. For it appears that precedents may be invoked and logic called upon to justify widely differing interpretations of the same text applied to the same set of circumstances. This can hardly be explained on the theory that all but one of the solutions is wholly wrong—that somehow individuals, including dissenting judges, who disagree have erred in their logical development of the case. It is far more reasonable to hazard the guess that each has a comparatively sound logical argument, and that divergent conclusions are reached largely because of divergent starting points.

When the written law itself, therefore, does not supply a definite starting point, when what is meant to be a starting point must itself be defined, there is what might be called an inevitability of choice. And, for the most part, this choice must ultimately rest upon considerations derived more or less consciously from ideas and ideals outside the legal order itself. The choice, once made, can be supported by precedent and logic and the conclusion can be made to appear as inexorably dictated by the written provision. But other choices can likewise be defended by precedents and logic in many instances quite as impressively as the one actually adopted. As a president of the American Bar Association once said, "A judge may decide almost any question any way, and still be supported by an array of cases." The mechanical theory cannot countenance the assertion that the judge first decides how he will solve a particular issue and then proceeds to find the means of establishing that view in legal terms. And it may be that the judge in most instances does start from legal generalities or principles that he considers basic and deduces from them the particular application of the written law. But it is perhaps quite often true that judges reason like other humans, that is, that they in some manner reach a conclusion that seems desirable and then seek to justify that particular choice.

38 1 Wigmore, Evidence, 2d ed., xv (1923). Judge Baldwin quoted with approval the remark of an English judge that "nine-tenths of the cases which had ever gone to judgment in the highest courts of England might have been decided the other way without any violence to the principles of the common law." Baldwin, The American Judiciary 54 (1920), cited by Cohen, Law and the Social Order 124, note 32 (1933).

39 Referring to the "professed method" of interpretation, Max Radin remarks, "That this is not always the true order of events is evident even to those courts which announce their decisions somewhat in this form, or which imply a sequence of this sort. They scarcely conceal from themselves or their readers that the order is in fact almost the
Thus, although the judges may clothe the chosen alternative in language of logic which makes it seem the only one possible, it remains true that in a great number of cases there is an actual choice, and that other conclusions could also be justified logically and legally. In a great many instances, therefore, the real question is not how far a particular rule or principle goes in determining a given case, but rather which one of several competing rules or principles shall be held to apply. This choice cannot be based on the written text, but must be indicated by resort to general legal or other concepts. "The major premise of every judicial decision," says Rudolf Stammler, "is then always a positive legal standard, which the judge must choose for the case presented to him." This choice has been hedged around and restricted by canons of interpretation and construction and rules of "legal discretion" in order to reduce to a minimum the appearance of real choice. The fact is, however, whether it is distasteful or not, that the judges must exercise choice, that such choice must often be influenced by factors outside the formal law, and that society must in the long run be governed by the judgment of men themselves and not by words of laws. "It has required a long process of painful experimenting," says Dean Leon Green, "to drive home the dreaded fact—if it be even now driven home—that men must rely upon the judgment of men and make the best of it."

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40 Justice Holmes' phrasing of this idea is well-known. "The language of judicial decision is mainly the language of logic. . . . Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding." Essay on "The Path of the Law," in Holmes, Collected Legal Papers 167 at 181 (1921).

41 The judiciary "are constantly confronted with the necessity of making a choice between the doctrines of the law which they are to hold applicable to the particular case, and the choice which they make in the particular instance results inevitably in the expansion or restriction of the doctrine applied or rejected." Macmillan, "Law and Ethics," 49 Scot. L. Rev. 61 at 69 (1933), quoted by Shientag, "A Modern Judicial Mind," 36 Col. L. Rev. 615 at 626 (1936).


43 "We must spread the gospel, writes Professor Powell in a private letter from which I quote with his permission, we must spread the gospel that there is no gospel that will save us from the pain of choosing at every step." Cardozo, The Growth of the Law 64-65 (1924).

In short, the mechanical theory demands the impossible of the judge. Merely by ascending the bench he cannot shed the essential characteristics of human thought processes.

"The judicial mind," remarks Lord Macmillan, "is subject to the laws of psychology like any other mind. When the Judge assumes the ermine he does not divest himself of humanity. . . . the impartiality which is the noble hallmark of our Bench does not imply that the Judge's mind has become a mere machine to turn out decrees. . . ."

The man himself will continue to count, his judgments will continue to be judgments expressing an intimate part of himself, and his conscious or unconscious choices will continue to be guided by what seems to him desirable or necessary. In the famous words of Justice Holmes, "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."

If the judicial function has always contained a legislative element and must always contain such an element, can it not be admitted that a real, though somewhat limited, power of lawmaking forms the very essence of the work of the judge? As Justice Cardozo has put it, "So far as they are the mere mouthpiece of a legislature, speaking thoughts and enforcing commands that have been unmistakably set down, their activity is in its essence administrative and not judicial. Where doubt enters in, there enters the judicial function."

The recognition of judicial lawmaking does not mean the recognition of uncontrolled personal volition on the part of the individual judge. He is limited by the received legal tradition, by his desire to

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46 Holmes, THE COMMON LAW 35 (1881). It was in this connection that Justice Holmes made his well-known observation that, "The felt necessities of the times, the prevalent political and moral theories, intentions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Id.

47 Cardozo, THE PARADOXES OF LEGAL SCIENCE 10 (1928). The idea "that courts only interpret and apply, that all making of law must come from the legislature, that courts must 'take the law as they find it,' as if they could always find it ready-made for every case," Professor Pound calls a "pious fiction." POUND, An INTRODUCTION TO THE PHILOSOPHY OF LAW 107-108 (1922). See also Pound, THE SPIRIT OF THE COMMON LAW 172 (1921).
meet with the approval of bench and bar, by the power of precedent, and by his ideas of justice and the nature of the social and legal order. These latter ideas are not created by him, but are formed in him by the principles prevailing in the community in which he has grown up. The received tradition itself, however, is not a symmetrical and consistent one. It allows for divergent opinions within its limits. Indeed, what goes to make up this traditional element is largely what judges have decided or do decide to be the general principles lying behind formal law. The lawmaking function of the judge may be circumscribed by this element, and yet be a truly creative process, adding to that tradition by its very exercise.

“We do not pick our rules of law full-blossomed from the trees,” says Justice Cardozo. “Every judge consulting his own experience must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act.”

Legal tradition does not exist wholly over and above the activity of the judge as an external force imposing ascertainable limits upon him, but rather is created by the activity of many judges, of whom he is one, making choices within a more or less vaguely defined periphery.

II

CONSTITUTIONAL INTERPRETATION AND THE MECHANICAL THEORY

The limitations of the mechanical theory of the judicial function in the general process of interpretation have been indicated. They are, as has been noted, largely traceable to incorrect assumptions. These assumptions, not warranted by the facts of statutory interpretation, are

49 Cardozo, The Nature of the Judicial Process 103-104 (1921). “We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations. But within the limits thus set, within the range over which choice moves, the final principle of selection for judges, as for legislators, is one of fitness to an end.” Id., 103.
50 See Cohen, Law and the Social Order 113, 116 (1933).
51 Professor Pound lists what he conceives to be the assumptions of the mechanical theory, and concludes that they are “quite at variance with the facts.” Pound, “The Theory of Judicial Decision,” 36 HARV. L. REV. 641, 802 at 824-825, 940 (1923).
even more untrue when made specifically in connection with the interpretation of written constitutions. All the objections which have been raised to the mechanical view of the interpretation of statutes apply a fortiori to the construction and application of constitutional provisions. It is true of constitutions as of statutes that “it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law.” Since a constitution is a much more general document than a statute, the role of the court in shaping the former by interpretation and application is correspondingly more important. Vague words and general phrases abound in a constitution, and must be given meaning by resort to considerations outside the precise terms of the instrument itself. “In constitutional construction,” says Walter F. Dodd, “we have probably the greatest degree of judicial freedom in the interpretation of legal documents.” There are few constitutional provisions whose violation can be determined merely from a perusal of the texts involved. The meaning of the constitutional text itself is by no means always clear. The search for that meaning can but take color from those who are empowered to decide finally what it is to be. In going beyond the written text to find some measure by which to determine the meaning of the provision, the court often has a conception of the ideal social order and the end of law before it as an important factor in its conclusions. In this way the judges read their ideas as to the nature of the social and legal order into the meaning of vague words and phrases in necessarily indefinite constitutional provisions. These ideal pictures of the social and legal order must be reckoned with as a very considerable influence upon the judge in construing doubtful provisions, and no doubt form in many instances the basis of decision for a particularly difficult legal question.

52 Gray, The Nature and Sources of the Law 162 (1909). Gray was fond of quoting from a sermon of Bishop Hoadley, to the effect that “Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them.” Id., 102, 120, 164.


54 Id. at 219-220. Freund has pointed out that the power of interpretation makes the courts that exercise it “a rival organ with the legislature in the development of the written law.” Freund, “Interpretation of Statutes,” 65 Univ. Pa. L. Rev. 207 at 208 (1917).


Some who admit the necessity of judicial lawmaking in the interpretation of statutes would deny its existence in the application of written constitutions, and assume that constitutional construction involves very little more than a mechanical matching of phrases. Curiously enough, Professor Pound seems to be one of these. He draws the distinction as follows: "In dealing with statutes, since from the nature of the case all causes could not be foreseen, this finding the law or judicial lawmaking or spurious interpretation is necessary unless we would have the courts decide by throwing dice or casting lots. But in constitutional law, where the issue is simply whether the legislative act must yield to the supreme law of the land embodied in a constitutional provision, the question can only be one of genuine interpretation." Pound, "Courts and Legislation," SCIENCE OF LEGAL METHOD 202 at 221 (1917), reprinted from 7 AM. POL. SCI. REV. 361 (1915).

When the lower law conflicts with the higher law, the former must yield. The higher law is presumed to establish definite limits beyond which ordinary legislation may not go. In order to determine the existence of a conflict, one need only apply the stencil-pattern of the constitution to the law in question. This conception overlooks the fact that in constitutions as well as, indeed even more than, in statutes the will of the framers as revealed by the text may be partially or wholly unascertainable.

From the very earliest days of constitutional construction, the inadequacies of constitutions as providing a purely mechanical basis for decision are apparent. Constitutions perhaps even more than statutes are the very embodiment of compromise, and hence vague. In much constitutional construction, the search for original intent is forever impossible, due to disagreement among the framers themselves as to the meaning of particular provisions. Ambiguity and vagueness inher in the very nature of a constitution. It must speak in generalities and leave the filling in of the gaps to the organs engaged in the actual administration of its provisions. It is necessarily plastic and capable of adaptation to the exigencies of the times, in so far as the judges can be convinced of the wisdom of and necessity for such adaptation. They, as ultimate arbiters, define the limits and contents of those general provisions more or less in accord with their views of social, economic and legal policy. From the beginning, the direction which the interpretation of the United States Constitution took was determined less by the

57 Curiously enough, Professor Pound seems to be one of these. He draws the distinction as follows: "In dealing with statutes, since from the nature of the case all causes could not be foreseen, this finding the law or judicial lawmaking or spurious interpretation is necessary unless we would have the courts decide by throwing dice or casting lots. But in constitutional law, where the issue is simply whether the legislative act must yield to the supreme law of the land embodied in a constitutional provision, the question can only be one of genuine interpretation." Pound, "Courts and Legislation," SCIENCE OF LEGAL METHOD 202 at 221 (1917), reprinted from 7 AM. POL. SCI. REV. 361 (1915).

58 See tenBroek, "Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction," 27 CAL. L. REV. 399 (1939), for a discussion of the "intent theory" of constitutional interpretation.

instrument itself than by the economic, political and social struggle between two opposing camps in early American party politics.

"...the success of Marshall," says Professor Wigmore, "in vesting the federal judiciary with the revision of legislative statutes on constitutional grounds, and thus preserving a legislative veto for the judiciary, was an expression of the deeper struggle between two political parties holding antagonistic convictions in the broader field of general politics." 60

In the continued development of the Constitution, the role of the Supreme Court has been to a great extent a truly legislative one, involving application of general phrases the meaning of which cannot be found in the instrument itself. Constitutional law, as Dicey has said, is to a very large degree judge-made law. 61 The mechanical theory cannot explain the divergence in the nature of the decisions rendered by the Supreme Court on similar issues in the different periods of its history. As one writer has put it, the different tenor of these decisions is "explainable only by the political proclivities of the justices of each period." 62 This need not be considered an indictment of the judges. Lord Bryce pointed out that

"In none of these ... periods can the judges be charged with any prostitution of their functions to party purposes. Their action flowed naturally from the habits of thought they had formed before their accession to the bench, and from the sympathy they could not but feel with the doctrines on whose behalf they had contended." 63

The judge's shaping of the constitution will depend to a great extent on his ideas of public policy and the needs of the community. His interpretation of its vague words and phrases will take color from

60 Wigmore, editorial preface to The Science of Legal Method xxvii (1917).
62 Costigan, "The Supreme Court of the United States," 16 Yale L. J. 259 at 266 (1907). "Marshall's own career," said Justice Cardozo, "is a conspicuous illustration of the fact that the ideal is beyond the reach of human faculties to attain. He gave to the Constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions." Cardozo, Nature of the Judicial Process 169-170 (1921).
his entire personal conception as to the political and social ends it is supposed to further. This will be done more or less consciously and wisely according to the nature of the particular judge or judges into whose hands the ultimate power of interpretation is given. But done it will be, consciously or unconsciously, wisely or unwisely; and the resulting interpretation of the instrument becomes its ultimate and binding meaning, whether for good reasons or bad.⁶⁴

That the mechanical theory does not fit the facts is then apparent in any realistic approach to the problem. Moreover, as Professor Pound has pointed out, as a political theory of the nature of the judicial function it can no longer stand the critical scrutiny to which all legal and political institutions are now subjected.⁶⁵ There would seem to be few reasons for not recognizing the actual place of the courts in the formation of public policy and the exercise of true lawmaking authority under the broad powers designated by the term interpretation. So long as we entrust to the courts the absolute and final authority to declare the meaning of our laws and constitutions, so long as the courts must necessarily exercise this function under the more or less direct influence of the social, political and economic ideas and ideals of the justices, and so long as the solutions of many problems of public policy must stand or fall in accordance with their conformity to standards drawn from outside the legal order itself, the demand that this process be subject to critical analysis as genuinely creative activity is a compelling one.

III

Judicial Self-Restraint

Judicial self-restraint in the interpretation and application of the Constitution, particularly with regard to the invalidating of legislation, has been evidenced in the history of the Supreme Court in two different ways. The first has to do with the doctrine of “political” questions, or, as they are sometimes called, non-justiciable controversies, in which cases the Court has refused to take jurisdiction. The other concerns the application of the oft-repeated dictum that a law will not

⁶⁴ “We have chosen,” says Thomas Reed Powell, “to subject state and national legislation to the judgment of the Justices of the Supreme Court with no further advice than that they must exercise their judgment. . . . They are the arbiters. The judgments they give are their judgments; the reasons they give are their reasons.” Powell, “The Judiciality of Minimum-Wage Legislation,” 37 Harv. L. Rev. 545 at 572 (1924).

be voided unless it is clearly and unmistakably contrary to an express provision of the Constitution. While the former is not often included under the caption of judicial self-restraint, the present discussion would be incomplete without some attention to this phase of the subject.

The statement is often heard that the Constitution is law in the same sense as any other kind of law, that all parts of the Constitution are equally law, and that courts cannot avoid the duty of enforcing every part of the Constitution as the supreme law of the land. In fact, however, not all parts of the Constitution are equally enforceable. The Supreme Court has on more than one occasion refused to enforce, or even to consider cases involving the enforcement of, certain specific constitutional provisions. This has taken the form of the doctrine that the Court will consider what it deems "political" questions to be non-justiciable, and will decline jurisdiction. *Luther v. Borden* 66 was the first important case in which this position was taken explicitly with regard to domestic affairs. This litigation, arising out of Dorr's Rebellion in Rhode Island, involved an attempt to secure judicial pronouncement as to the legitimate government of the state. Recourse was had to the clauses of the Constitution guaranteeing to each state a republican form of government and guaranteeing to protect them "against domestic violence." 67 The Supreme Court refused to take jurisdiction, characterizing the provisions in question as relating to non-justiciable interests. The opinion reveals that the Court was chiefly impressed by the far-reaching consequences which might follow any attempt to settle the question judicially. Beginning with this decision there developed the idea that there are some cases of which the courts are not authorized to take jurisdiction, even though such refusal means judicial non-enforcement of express constitutional provisions. 68 But the problem of what are or are not "political" questions has never been adequately worked out. It has been said that the term is applied to "all those mat-

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67 These clauses are found in Art. IV, § 4.

ters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction." 69 Regard for possible consequences, it is pointed out, seemed to be the determining factor in the decisions holding that certain constitutional issues are non-justiciable. 70

Courts have never taken full advantage of the possibilities inherent in this doctrine. Many of the laws relating to broad social and economic programs struck down by the Court could have been approached from this point of view. This would, of course, involve the surrender on the part of the Court of a portion of its prerogative to pass upon the substance of an act as enunciated by the legislature. Measures conceived to be of wide political and social import, the significance of which was deemed greater to the nation than to the private litigants involved, could by judicial self-limitation be held non-justiciable and hence not subject to invalidation by the courts. That there are certain such controversies of which the courts will not entertain jurisdiction is not open to question, although the extent of application of the standard is yet to be worked out satisfactorily. A recent case in which the Supreme Court refused jurisdiction of what it termed a "political" question contained a statement by Chief Justice Hughes that "appropriateness under our system of government of attributing finality to the action of the political departments," as well as "lack of satisfactory criteria for a judicial determination," are "dominant considerations" in determining whether a question is "political" and not "justiciable." 71 These same


This extremely interesting case involved an attempt to secure judicial pronouncement upon whether a previous rejection of the Child Labor Amendment by the Kansas legislature precluded subsequent ratification, and whether an unreasonable time had elapsed since submission to the states. The Chief Justice ruled these questions "political" and held that the decision of Congress upon them would not be subject to judicial review. Justice Black's separate concurring opinion is worthy of notice. See also Chandler v. Wise, 307 U. S. 474, 59 S. Ct. 992 (1939), involving similar issues.
considerations might counsel a refusal to take jurisdiction of cases involving the constitutionality of far-reaching social and industrial legislation. Such issues are not really to be determined in terms of legal categories. The doctrine of "political questions" provides one way in which the courts could withdraw from problems with which they are not essentially fitted to deal. There is evidence, highly alarming to some, that the newly reconstituted majority will adopt, though probably not through this means, the essential position that the legislature rather than the judiciary is to be deemed better qualified to deal with questions of significant social and economic policy. Such an attitude, if generally followed, would be an exercise of judicial self-restraint in the clearest sense of the term.

Far more commonly understood by the term judicial self-restraint, however—and, from the context, what Justice Stone undoubtedly meant—is, having taken jurisdiction, to resolve any doubt whatever in favor of the challenged statute. In recent years this doctrine has so often been paid meaningless lip-service in the very opinions striking down legislation, that to many its enunciation has seemed an almost automatic preliminary to the invalidation of a statute. It was not always so. In the early years of constitutional construction, the Supreme Court observed the principle quite closely, particularly with regard to cases involving federal laws. The evolution of a broad judicial review over legislation after the Civil War represented a drawing away from this earlier practice, a fact emphasized in the strong dissents of Justices Harlan and Holmes.

In the period up to the Civil War, particularly with regard to federal statutes, the Supreme Court adhered generally to self-denying standards. Although federal laws were challenged in some twenty-four cases, only two were invalidated. In the cases between *Marbury v. Madison*, in 1803, and the *Dred Scott* case, in 1857, the two glaring exceptions to the general rule, the Court not only refused to declare a federal law unconstitutional, but in several instances went quite far afield in search of an interpretation which would uphold the statute. A few examples merit special attention. In *Loughborough v.*


73 1 Cranch (5 U. S.) 137 (1803).


75 Some of the important cases in this period involving the validity of federal legislation were: Stuart v. Laird, 1 Cranch (5 U. S.) 299 (1803); United States v. Fisher, 2 Cranch (6 U. S.) 358 (1805); Martin v. Hunter's Lessee, 1 Wheat. (14 U. S.) 304 (1816); McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316 (1819);
Blake, the Court actively sought out means of upholding a federal direct tax on the District of Columbia, and found it not only in the taxing power but also in the section giving authority to provide for organizing, arming, and disciplining a militia. In United States v. Coombs, a federal law punishing thefts from wrecked ships was sustained although the admiralty power, under which it was presumably enacted, was found inadequate to support it. Justice Story, writing the opinion, remarked that a law must never be assumed unconstitutional "unless that conclusion is forced upon the Court by language altogether unambiguous." After admitting that the admiralty power was insufficient as a basis for the act, he went on to uphold it as an exercise of the commerce power. Again, in United States v. Marigold, the Court, in order to uphold a federal act punishing counterfeiting, found it necessary to seek out a different part of the Constitution to validate each section of the statute.

In the period immediately following the Civil War, however, the Court began to take a new attitude. Although the old doctrines were repeated, in the years from the War to the 'eighties new concepts were developing which formed the basis for the elaboration of the broad judicial review which emerged after 1890. The Court no longer actively sought for means of sustaining statutes. Although repeating the old platitude that any rational doubt was to be resolved in favor of the law, the Court more and more began to weigh constitutional questions de novo and to uphold or reject legislation as the weight of the argument seemed to indicate. This was a departure from previous practice, although it was accompanied by the reiteration of earlier doctrines. No longer was the Court to uphold federal legislation if any reasonable


Art. I, § 8, par. 16.
12 Pet. (37 U. S.) 72 (1838).
Id. at 75.
9 How. (50 U. S.) 560 (1850).
Hepburn v. Griswold, 8 Wall. (75 U. S.) 603 (1870), a 4-3 decision, is in many ways an important turning point in this development. The opinions in that case will be found of special interest in this connection. See also Collector v. Day, 11 Wall. (78 U. S.) 113 (1871).
argument could be presented for it, but only if that argument, in the opinion of the majority of the Court, was the better argument. Nor did the Court, therefore, unduly exert itself to uphold legislation. In *United States v. Fox*,82 there was involved a law which punished anyone "who, within three months before the commencement of proceedings in bankruptcy, under . . . pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud." Said Justice Field, in condemning the law, "It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy; but it does not say so, and we cannot supply qualifications which the legislature has failed to express."83

In addition, the Court began requiring that the means adopted to a legitimate end must be "appropriate" in the eyes of the Court, thus ironically turning Marshall's old dictum against national power. For example, in *Hepburn v. Griswold*,84 the Court said the statute was not "in any reasonable or satisfactory sense an appropriate or plainly adapted means to the exercise of that power," i.e., the currency power.85 While the issue of the notes was held proper, the provision making them legal tender was not. Justice Miller, dissenting, pointed out the advantages of having them legal tender, and quoted Marshall's statement that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of the power granted by the Constitution."86 Nor did the Court in this period hesitate to use the "spirit of the Constitution" as an ample basis for invalidating federal legislation. To refer again to *Hepburn v. Griswold*, the Court made the following statement with reference to the contract clause, which is, of course, a limitation only upon the state governments.

"But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation. . . . In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation im-

82 95 U. S. 670 (1878).
83 Id. at 672-673.
84 8 Wall. (75 U. S.) 603 (1870).
85 Id. at 616.
86 Id. at 629, quoting United States v. Fisher, 2 Cranch (6 U. S.) 358 at 396 (1805). See also United States v. De Witt, 9 Wall. (9 U. S.) 41 (1870), and United States v. Reese, 92 U. S. 214 (1876).
pairs the obligation of contract, is inconsistent with the spirit of the Constitution.”

The whole development was so gradual and its results so congenial to the general spirit of the times, that an exaggerated judicial review had fastened itself firmly upon American institutions by the turn of the century. Judicial distrust of legislatures and legislation outlived the economic and political validity of laissez-faire, and resulted in a serious inability of the governmental machine to meet the exigencies of a highly complicated civilization. Just as economic considerations in the latter part of the last century counseled a free hand for private investment and exploitation of the country’s vast resources, so today economic factors, following the breakdown of laissez-faire, require the existence of a well-equipped governmental mechanism competent to its task. The earlier needs led to the development of political laissez-faire embodied in the judicially enforceable concept of “liberty” in the due process clauses of the Fifth and Fourteenth Amendments. The later needs point to the desirability of judicial recognition of an increased sphere for legislative and administrative action. Such recognition necessarily means a break with a number of carefully-developed precedents of the preceding era. This is now taking place. The present conflict of ideas, both on the Court and outside it, is a reflection of this state of flux. The transition might be expected to entail a re-examination of postulates with regard to what the Constitution requires of the judiciary.

There is evidence that such reappraisal of the nature and consequences of judicial interpretation of the Constitution is being undertaken, both by scholars and judges. Those jurists who have most clearly recognized the character and implications of the process in which they were engaged are the ones who have most eloquently urged a judicial tolerance in dealing with legislation. Among these, the name of Holmes is uppermost. He gave impressive formulation in many of his famous opinions to the conviction that judges, consciously or unconsciously, were reading individual prejudices into the phrases of the Constitution, and were in consequence depriving legislatures of their rightful powers. Speaking of Holmes in a recent book, Professor Corwin says, “feeling himself not to be God Almighty, Justice Holmes became the mouthpiece of a new gospel of laissez-faire, namely of laissez-faire for legislative power, because legislative power represents, or under a democratic dispensation ought to represent, what he termed

87 Hepburn v. Griswold, 8 Wall. (75 U. S.) 603 at 623 (1870).
‘the dominant power of society.’”88 It is at least possible that the worldly, tolerant views inevitably associated with the name of Holmes, and carried on by Cardozo, Brandeis, and Stone, are soon destined to find their way into the dominant Supreme Court attitude. Writing as early as 1934, one commentator felt justified in saying that

“The judges’ growing realization of the nature of their role and of the necessity of their being informed if their decisions are to be wise, their growing skepticism as to the finality of their own wisdom and even more as to the finality of the wisdom of their predecessors, their tendency more and more to adopt a policy of laissez-faire for legislatures and especially for Congress—these are the most significant developments in constitutional law today.”89

Certainly that observation, whatever the degree of accuracy it may have had in 1934, is emphatically true today. Perhaps never in the history of the Court has there been such a period as that since 1937 for the modification or reversal of the results of predecessors’ wisdom. And these modifications have been, on the whole, steps in the direction of “laissez-faire for legislatures.”

Of the justices added to the tribunal since the “Supreme Court Revolution of 1937,” Justice Black has perhaps most clearly indicated his position in connection with the general question of judicial review. In his opinions on the Court he has given evidence of a realistic and refreshing awareness of the peculiar province of legislative and administrative bodies and the need for judicial self-restraint in dealing with their activities.90 In an early dissenting opinion he described the inherent advantages of a legislature over a court in making decisions as to matters of policy. He concluded by asking whether laws may be held invalid “because the court is convinced that the legislature might have chosen a wiser, less expensive and less burdensome regulation?” If this be so, “the final determination of the wisdom and choice of legislative policy has passed from the legislatures—elected by and responsible to the people—to the courts.”91 In other opinions he has pointed out the inherent limitations of the judicial procedure with respect to

88 Corwin, Court over Constitution 119 (1938).
90 For a discussion of Justice Black’s constitutional opinions, see Barnett, “Mr. Justice Black and the Supreme Court,” to be published in the December, 1940, issue of the University of Chicago Law Review.
the review of legislative and administrative determinations, and has sought a redefinition of the scope of judicial review with regard to state as well as federal agencies. 92

There is every reason to believe that Justice Frankfurter also may be expected to carry on the Holmes tradition regarding the relationship of legislative to judicial functions. In a book published shortly before his accession to the bench, Justice Frankfurter wrote of Holmes that “He left issues in the arena where they belong. He knew that judges in their way legislate, and therefore did not propose that they should undermine the legislature’s power to legislate.” 93 Holmes exhibited “the judicial function at its purest,” according to Justice Frankfurter, “whenever he upheld, as he so often did, legislation in the substance of which he disbelieved.” 94

If the views apparently fairly attributable to Justices Stone, Black and Frankfurter may be taken as any indication of the tendency the Court is destined to follow in its general approach to legislation, there will have been accomplished a significant change in American constitutional practice. 95 Given the institution of judicial review, and granted the essentially valuative nature of the process of constitutional interpretation, the most important element in the judicial application of constitutional principles is the underlying attitude in accordance with which legislation is viewed. The broader theory back of many of Justice Field’s dissents represented essentially a restrictive and distrustful attitude toward legislation in general. It came eventually to be accepted in constitutional construction during the latter part of the last century. So today, the attitude behind many of Justice Holmes’ dissents, embodying a tolerance and self-restraint with regard to legislation and a disposition to look less narrowly on the attempts of other branches of the government to govern, may achieve a long-delayed ascendancy.

92 Barnett, “Mr. Justice Black and the Supreme Court,” cited supra, note 90.
93 FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 92 (1938).
94 Id. 92-93. See also FRANKFURTER, LAW AND POLITICS (1940).
95 For a popular discussion of this change, see Davis, “Revolution in the Supreme Court,” 166 ATLANTIC MONTHLY 85 (July 1940).