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ON SUPREME COURT COMMENTARIES AND DEVELOPING CONSTITUTIONAL LAW

David M. O'Brien*

THE SUPREME COURT: TRENDS AND DEVELOPMENTS, VOLUME 3: 1980-1981. By *Jesse Choper*, *Yale Kamisar* and *Laurence Tribe*. Minneapolis, Minn.: National Practice Institute. 1982. Pp. xvi, 348. \$30.

I. INTRODUCTION: SUPREME COURT COMMENTARIES

The proliferation of annual reviews of developments in constitutional law might suggest, to some, an increasing public awareness of the Supreme Court. To others, however, these commentaries and symposia reveal the extent to which we have taken seriously Oliver Wendell Holmes's admonition that the rational study of law is "to a large extent the study of history."¹

At the turn of the century, Holmes and other "legal realists"² successfully challenged the prevailing jurisprudence, thereby lending credence to Charles Evans Hughes' controversial declaration: "We are under a Constitution, but the Constitution is what judges say it is"³ Legal education and public understanding of the Court's construction of the Constitution has since remained profoundly affected.

Beginning in 1929, Holmes' alma mater conducted surveys (at regular intervals) of the Court's disposition of major cases.⁴ Twenty years later, the *Harvard Law Review* commenced annual reviews of developments in constitutional adjudication and the Justices' voting alignments.⁵ To these reviews Harvard law professors added Forewords, or commentaries, on

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1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. See, e.g., G. GILMORE, *THE AGES OF AMERICAN LAW* 74-91 (1977) (legal realism characterized by emphasis on facts rather than doctrine, leading to recognition that judges often make law rather than simply declaring it); W. RUMBLE, *AMERICAN LEGAL REALISM* (1968).

3. C. HUGHES, *ADDRESSES* 185 (2d ed. 1916). Compare Hughes' observation with that of Chief Justice Marshall: "[The constitution's] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). For recent discussions of the Court's power of judicial review, see J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); J. ELY, *DEMOCRACY AND DISTRUST* (1980); O'Brien, *Judicial Review and Constitutional Politics: Theory and Practice* (Book Review), 48 U. CHI. L. REV. 1052 (1981).

4. See, e.g., Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579 (1940); Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238 (1934); Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1928*, 43 HARV. L. REV. 33 (1929).

5. See *The Supreme Court, 1948 Term*, 63 HARV. L. REV. 119 (1949).

broader judicial and jurisprudential trends.⁶ There thus emerged a kind of tradition of annual reviews and extended commentaries — chronicling, explaining, analyzing and criticizing the Court's rulings, term by term.

Annual reviews and commentaries indicate the extent to which lawyers adhere to Hughes' view that the Constitution means whatever nine, or at least five, members of the Supreme Court say it means in any given term.⁷ Such reviews and commentaries ostensibly explain the Court's rulings to practicing attorneys and to the laity. Moreover, they provide ample opportunity for professional criticism, and possibly instruction, of the Justices.

In some quarters, fuller explanation, if not more persuasive justification for a particular decision, is thought commendable and even prudent. For along with the Court's expanding docket,⁸ the number of decisions handed down with full opinions has increased incrementally. During the 1968 Term, the Court heard arguments in 140 cases and rendered 116 full and 10 *per curiam* opinions.⁹ By comparison, during the 1980 Term the Court heard 154 arguments from the bench and disposed of 144 cases with full opinions and another 8 by *per curiam* opinion.¹⁰ More dramatic, however, has been the rise in the *total* number of opinions (including dissents and concurrences) authored by the Justices. The number of written opinions almost doubled during the tenure of Chief Justice Warren, from 138 opinions in 1953 to 243 in the 1968 Term.¹¹ The 1980 Term concluded with the Justices filing no less than 318 opinions, surpassed only by the record number of 352 opinions filed in the previous Term.¹²

The increasing number of plurality¹³ and five-four decisions¹⁴ has

6. The first of these Forewords appeared in 1951. Jaffe, *The Supreme Court, 1950 Term — Foreword*, 65 HARV. L. REV. 107 (1951). Initially, the Forewords were brief introductions by Harvard law faculty. E.g., Freund, *The Supreme Court, 1951 Term — Foreword: The Year of the Steel Case*, 66 HARV. L. REV. 89 (1952) (8 pages). However, with Henry Hart's Foreword to the 1958 Term, the Forewords became major, extended scholarly essays. Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (42 pages); see, e.g., Cox, *The Supreme Court, 1979 Term — Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1 (1980) (73 pages). For articles discussing the constitutional views of various Harvard professors, see Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695 (1980); Deutsch, *Harvard's View of the Supreme Court: A Response*, 57 TEX. L. REV. 1445 (1979).

7. See note 3 *supra* and accompanying text.

8. To be sure, the Court's docket continues to grow: from a bare 565 cases in 1920 to over 1,300 in 1950, over 2,300 in 1960, 4,212 in 1970 and 5,144 by the end of the past decade. See *Statement Showing the Number of Cases Filed, Disposed of, and Remaining on Dockets*, Office of the Clerk, Supreme Court of the United States, for October Terms 1920, 1950, 1960, 1970 and 1980 [hereinafter cited as *Statement of Cases*]; *Statistical Recap of Supreme Court's Workload During the Last Three Terms*, 50 U.S.L.W. 3044 (1981). Still, docket size portrays little of the prestige or power enjoyed by the contemporary Court in this "litigious society." See, e.g., G. GILMORE, *THE AGES OF AMERICAN LAW* (1977); W. RUMBLE, *AMERICAN LEGAL REALISM* (1968).

9. See *Statement of Cases*, *supra* note 8, for October Term 1968.

10. See *id.*, for October Term 1980.

11. See *Number of Printed Opinions and Memoranda Filed*, Office of the Clerk, Supreme Court of the United States, for October Terms 1953 and 1968.

12. See *id.*, for October Terms 1979 and 1980.

13. From 1801, when Chief Justice Marshall discontinued the practice of issuing seriatim opinions, until 1955, there were 45 plurality decisions. Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99, 99 n.4 (1956). From 1955

drawn criticism for contributing to confusion.¹⁵ Annual reviews and commentaries seem salutary precisely because what the Justices mean and how a majority of the Court will rule in the future appears problematic. Accordingly, practitioners — especially those contemplating appeals — appreciate Holmes' "bad man" theory of law,¹⁶ and thus generally welcome Supreme Court commentaries that explain, and possibly predict, developments in constitutional adjudication.

II. THE 1980 TERM AND A SUPREME COURT COMMENTARY

There is no particular cause for celebrating yet another annual review *cum* commentary dedicated to marking the passing of the Supreme Court's Term. This symposium, *The Supreme Court: Trends and Developments 1980-1981*,¹⁷ nonetheless, deserves special attention for it brings together three leading constitutional authorities: Jesse Choper,¹⁸ Yale Kamisar,¹⁹ and Laurence Tribe.²⁰ The book is a transcript of their commentaries on what they consider to have been the major recent decisions of the Court, and of their subsequent discussions and responses to questions posed by other eminent legal commentators, lawyers and judges (pp. 235-316).²¹ The volume is generally well edited and often makes for lively reading, particu-

through the end of the Warren Court, 42 plurality decisions were delivered — an almost equal number. Davis & Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 60. From the 1969 Term until the 1979 Term, the Burger Court has rendered no less than 88 plurality decisions. Note, *Plurality Decisions and Judicial Decision-making*, 94 HARV. L. REV. 1127, 1127 n.1 (1981).

14. See Note, *Five-Four Decisions of the United States Supreme Court: Resurrection of the Extraordinary Majority*, 7 SUFFOLK U.L. REV. 807, 916 (1973).

15. See, e.g., Davis & Reynolds, *supra* note 13; Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980); Comment, *supra* note 13.

16. See Holmes, *supra* note 1, at 459 ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . .").

17. 3 J. CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1980-1981* (1982). This is the third volume in a series of edited transcripts of an annual symposium on the Supreme Court, sponsored and published by the National Practice Institute, with the cooperation of the Bureau of National Affairs, Inc.

18. Jesse Choper is Dean and Professor of Law at the University of California at Berkeley. He is coauthor of *Constitutional Law: Cases, Comments and Questions* (5th ed. 1980) (with Yale Kamisar and William Lockhart). He was awarded the Coif Triennial Book Award for his recent book, *Judicial Review and the National Political Process* (1980). Choper was law clerk to Chief Justice Earl Warren (1960-61).

19. Yale Kamisar is the Henry King Ransom Professor of Law at the University of Michigan. His books include *Police Interrogation and Confessions: Essays in Law and Policy* (1980), *Constitutional Law: Cases, Comments and Questions* (5th ed. 1980) (with Jesse Choper and William Lockhart), and *Modern Criminal Procedure* (5th ed. 1980) (with Wayne Lafave and Jerold Israel).

20. Laurence Tribe is a Professor of Law at Harvard University. His treatise, *American Constitutional Law* (1978), received the Coif Triennial Book Award. Tribe was law clerk to Justice Potter Stewart (1967-68).

21. The symposium was moderated by CBS law correspondent Fred Graham and joined by Judge Ruth Bader Ginsberg of the United States Court of Appeals for the District of Columbia Circuit, Associate Judge Charles E. Moylan, Jr. of the Court of Special Appeals of Maryland, and Paul Wojcik, managing editor of *United States Law Week*.

larly when the discussion among the panelists produces some rather provocative statements that might not otherwise appear in print.²²

Professor Choper attends to much of the recent litigation arising from the persistently troubling reconstruction amendments²³ to the Constitution. He pays particular attention to cases resurrecting the thirteenth amendment²⁴ and those involving the recurring issue of gender discrimination under the fourteenth amendment's equal protection clause (pp. 19-50).²⁵ In addition, Choper devotes substantial space to a discussion of the Burger Court's treatment of economic and social regulation under the fourteenth amendment (pp. 1-18). Finally, Choper thoughtfully addresses recent cases in an equally prominent area of contemporary constitutional adjudication, religious claims under the first amendment's establishment and free exercise clauses (pp. 51-68).²⁶

Professor Kamisar dissects and renders more understandable (if not more satisfactory) the Court's pronouncements on criminal procedure²⁷ (pp. 69-149 and 171-78). He also tackles the important ruling in *Chandler v. Florida*,²⁸ in which the Court approved of televising criminal trials (pp. 149-70).

Whereas Choper and Kamisar concentrate their analyses on several of the Term's leading decisions, Tribe's sketch is broader. Endeavoring to portray some of the more jurisprudential themes as trends, he canvasses the Term's rulings on the commerce power²⁹ and states' rights,³⁰ draft registra-

22. See 2 J. CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1979-1980*, at 196 (1981). A discussion of televised trials led to an exchange between Kamisar and Graham over whether there should be a first amendment right to televise executions. Kamisar comments: "Maybe we need a certain amount of rousing of primitive instincts in this country. Maybe the great majority of people will not grasp the horror of the death penalty until they see an execution on TV." 2 J. CHOPER, Y. KAMISAR & L. TRIBE, *supra*, at 198. Agreeing, Graham contends that, despite the controversy over television coverage of the Viet Nam War, the media's portrayal of the war perhaps changed the course of events. 2 J. CHOPER, Y. KAMISAR & L. TRIBE, *supra*, at 199. The dialogue is stimulating, regardless of what one thinks of the merits of such arguments and hypotheses.

The transcripts also contain some refreshing reminders of the hubris and the peril of predicting what the Court will decide in future cases. For example, after noting that in the previous symposium, Tribe had wrongly predicted the outcome of the draft registration case, *Rostker v. Goldberg*, 453 U.S. 57 (1981), Choper concludes in good spirit, "Well, you see just about what our predictions were worth . . ." 3 J. CHOPER, Y. KAMISAR & L. TRIBE, *supra* note 17, at 27. The temptation to engage in prophecy, however, often proves too great. See 3 J. CHOPER, Y. KAMISAR & L. TRIBE, *supra*, at 67-68.

23. U.S. CONST. amends. XIII, XIV, XV.

24. *E.g.*, *City of Memphis v. Greene*, 451 U.S. 100 (1981).

25. *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *H. L. v. Matheson*, 450 U.S. 398 (1981).

26. *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Stone v. Graham*, 449 U.S. 39 (1980).

27. *New York v. Belton*, 453 U.S. 454 (1981); *Robbins v. California*, 453 U.S. 420 (1981); *California v. Prysock*, 453 U.S. 355 (1981); *Michigan v. Summers*, 452 U.S. 692 (1981); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Estelle v. Smith*, 451 U.S. 454 (1981); *Steagald v. United States*, 451 U.S. 204 (1981).

28. 449 U.S. 560 (1981).

29. *Hodel v. Virginian Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

30. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981).

tion,³¹ presidential immunity³² and separation of powers,³³ judicial independence and remuneration,³⁴ and first amendment freedoms,³⁵ as well as on due process³⁶ and equal protection of the law³⁷ (pp. 179-234).

The presentation and treatment of particular decisions by Choper, Kamisar and Tribe are thus diverse; together they provide fairly good coverage of the 1980 Term. Unfortunately, they entirely neglect some important areas and rather significant cases. Noticeably, there is no mention of *American Textile Manufacturers Institute, Inc. v. Donovan*,³⁸ a much awaited and controversial case involving the authority of the Occupational Safety and Health Administration (OSHA) to set standards for occupational exposure to toxic substances. In the previous Term, five members of the Supreme Court, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,³⁹ held that OSHA, when striking down a standard for exposure to benzene as not "reasonably necessary"⁴⁰ under the Occupational Safety and Health Act (OSH Act), must demonstrate that compliance with its standards will in fact mitigate the health risk of workers. Justice Stevens, however, joined the four dissenters — Justices Brennan, White, Marshall and Blackmun — a year later in affirming OSHA's standard for "cotton dust."⁴¹ There, they held that the OSH Act does not require cost-benefit analysis to buttress reasonably necessary and feasible health standards.⁴² The "cotton dust" decision thus clarified the earlier benzene ruling. *American Textile Manufacturers Institute*, moreover, may have broader implications for agency rulemaking and resolution of future science-policy disputes⁴³ and, more generally, the evolution of the "judicial/administrative partnership" in regulatory politics.⁴⁴

31. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

32. *Kissinger v. Halperin*, 452 U.S. 713 (1981).

33. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

34. *United States v. Will*, 449 U.S. 200 (1980).

35. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *United States Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114 (1981); *Heffron v. International Socy. for Krishna Consciousness*, 452 U.S. 640 (1981); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Democratic Party of the United States v. LaFollette*, 450 U.S. 107 (1981); *Chandler v. Florida*, 449 U.S. 560 (1981).

36. *Parratt v. Taylor*, 451 U.S. 527 (1981).

37. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

38. 452 U.S. 490 (1981).

39. 448 U.S. 607, 644 (1981).

40. 448 U.S. at 642-46 (interpreting § 3(8) of the Occupational Safety and Health Act, 29 U.S.C. § 652(8) (1976), requiring that OSHA promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment").

41. Occupational Safety and Health Standards - Toxic and Hazardous Substances, 29 C.F.R. § 1910.1043 (1982).

42. *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 506-12 (1981).

43. See, e.g., THE BROOKINGS INSTITUTION, THE SCIENTIFIC BASIS OF HEALTH AND SAFETY REGULATION 8-10, 71-114 (R. Crandall & L. Lave eds. 1981); D. O'BRIEN & D. MAR-CHAND, THE POLITICS OF TECHNOLOGY ASSESSMENT (1982).

44. See, e.g., Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978

In addition to ignoring developments in administrative law, the Choper-Kamisar-Tribe triumvirate also fails to discuss the Court's disposition of cases under Section 1983 of the Civil Rights Act;⁴⁵ first amendment challenges during the Term to regulations governing, for example, live entertainment;⁴⁶ access to the broadcast media by candidates for public office;⁴⁷ and issues of federal common law.⁴⁸

For jurists and inveterate Court-watchers, every Supreme Court Term holds a certain fascination, promising some favorite decisions. In this regard, the 1980 Term was neither unique nor especially remarkable.

The Term, however, was eventful and momentous in another respect: it marked the departure of Justice Potter Stewart, after twenty-three years of service.⁴⁹ Accordingly, conclusion of the Term brought the fourth change in the Court's composition since the appointment of Warren E. Burger as Chief Justice in June 1969.⁵⁰ With the appointment of the ninety-first Associate Justice, new alignments on the bench would certainly emerge and a range of constitutional doctrines could take completely new directions.

Justice Stewart's retirement was perhaps overshadowed by speculation about the eventual performance of the first woman to sit on the high bench — Sandra Day O'Connor.⁵¹ Choper, Kamisar and Tribe, likewise, speculate on the "O'Connor factor" (pp. 31-34, 109, 117, 291-94, 307-08). Choper remarks on Justice O'Connor's possible position on "women's movement issues" (pp. 31-34) and abortion (pp. 307-08); Kamisar mentions her in connection with recent rulings on searches and seizures under the fourth amendment (pp. 109, 117); and Tribe ventures to discuss her views on the role of state courts in civil rights litigation (pp. 239-40). Choper, Kamisar and Tribe also engage in a further exchange on Justice O'Connor and the death penalty (pp. 291-94).

Such speculation is neither surprising nor altogether idle. Still, there is a certain disappointment that in reviewing the 1980 Term Choper, Kamisar and Tribe do not seize the opportunity to examine Justice Stewart's contributions to constitutional and statutory interpretation, and what *his* absence from the bench bodes for future alignments and decisionmaking among the Justices.

SUP. CT. REV. 345 (1979); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

45. *E.g.*, *Allen v. McCurry*, 449 U.S. 90 (1980).

46. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

47. *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

48. *See Middlesex County Sewage Auth. v. National Sea Clammers Assn.*, 101 S.Ct. 2615 (1981) (holding that the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444 (1981), established an exclusive federal legislative scheme for controlling pollution of marine waters); *City of Milwaukee v. Illinois*, 101 S.Ct. 1784 (1981) (ruling that the 1972 amendments to the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1981), precludes federal construction of a federal common law of nuisance for interstate waters).

49. *See, e.g.*, Powell, *Justice Stewart*, 95 HARV. L. REV. 1 (1981); Sandalow, *Potter Stewart*, 95 HARV. L. REV. 6 (1981).

50. The oaths of office were taken by Associate Justices Harry Blackmun on June 9, 1970; Lewis F. Powell, Jr., and William Rehnquist on January 7, 1972; and John Paul Stevens on December 19, 1975.

51. *See, e.g.*, *Washington Post*, Sept. 11, 1981, § A, at 2, col. 1.

During his tenure, Justice Stewart authored approximately 662 opinions: some 304 opinions announcing the Court's rulings, 22 separate opinions, no less than 137 and 199 concurring and dissenting opinions, respectively, and 114 additional separate statements.⁵² Stewart joined the Court in 1958 at a time when the Justices were sharply divided into two blocs — on the one hand, Chief Justice Warren and Justices Hugo Black, William Douglas and William Brennan; and, on the other hand, Justices Felix Frankfurter, Tom Clark, John Marshall Harlan, Jr., and Charles Wittaker. His voting, especially in the early years, established his reputation as a "swing voter" and "middle-of-the-roader."⁵³ Yet, during his last 11 years, Stewart cast a dissenting vote only 16.3% of the time,⁵⁴ and in the 1980 Term, he supplied only 12 "swing votes."⁵⁵ This is only 10% of the total number of "swing votes" that Term, as compared with 15.3% and 13.5% of such votes provided by, respectively, Justices White and Rehnquist.⁵⁶

Justice Stewart, to be sure, switched his vote from time-to-time on some important issues, most notably the constitutionality of the death penalty statutes.⁵⁷ However, he also assumed the vexing responsibility for the Court's opinions in a number of leading cases in which the Justices were sharply divided.⁵⁸ In particular, he wrote for the Court in several crucial first amendment cases, including those involving a first amendment "right of access" in *Pell v. Procunier*,⁵⁹ *Saxbe v. Washington Post Co.*⁶⁰ and *Gannett v. DePasquale*.⁶¹ In addition to other important concurring and dissenting opinions on the first amendment,⁶² he authored opinions for the

52. From tabulations by the author.

53. He also has been described as the contemporary Court's "second moderate conservative" based on voting patterns and "disagreement rates." See, e.g., Israel, *Potter Stewart*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2921, 2925-27 (L. Friedman & F. Israel eds. 1969) (observing that in the majority of cases in which the Court divided along activist-passivist lines, Stewart clearly sided with those Justices most commonly identified as taking the passivist viewpoint); Galloway & Lewis, *Justice Stewart and Fourth Amendment Probable Cause: "Swing Voter" or Participant in a "New Majority"?*, 22 LOY. L. REV. 713 (1976).

54. From tabulations by the author.

55. *The Supreme Court, 1980 Term*, 95 Harv. L. Rev. 91, 341 (1981).

56. From tabulations by the author, based on *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91 (1981).

57. Compare Justice Stewart's opinions in *Gregg v. Georgia*, 428 U.S. 153 (1977), with *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (per curiam). In *Furman*, Justice Stewart held that Georgia's capital-sentencing system was unconstitutional, but in *Gregg* he upheld a new statutory scheme which complied with the requirements set forth in *Furman*.

58. See, e.g., *New York v. Belton*, 453 U.S. 454 (1981); *Brewer v. Williams*, 430 U.S. 387 (1977); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); see also cases cited in notes 59 and 60 *infra*.

59. 417 U.S. 817 (1974).

60. 417 U.S. 843 (1974).

61. 443 U.S. 368 (1979).

62. Some of Justice Stewart's most notable separate opinions on the first amendment include: *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 (1980) (concurring opinion); *Herbert v. Lande*, 441 U.S. 153, 199 (1979) (dissenting opinion); *FCC v. Pacifica Foundation*, 438 U.S. 726, 777 (1978) (dissenting opinion); *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (concurring opinion); *Zurcher v. Stanford Daily*, 436 U.S. 547, 570 (1978) (dissenting opinion);

Court that expanded the law of standing⁶³ and broke new ground in civil liberties litigation.⁶⁴

Still, perhaps most memorable are Justice Stewart's "[I] know it when I see it"⁶⁵ approach to defining obscenity, and his pronouncement in *Katz v. United States*⁶⁶ that "the Fourth Amendment protects people, not places."⁶⁷ There is no gainsaying that he left a lasting imprint on our constitutional constellation with a long line of opinions for the Court on the fourth amendment's prohibition of "unreasonable searches and seizures" and protection for individuals' "reasonable expectations of privacy."⁶⁸ Though solicitous of privacy claims — claims asserted more and more frequently during the decades he sat on the bench⁶⁹ — Justice Stewart dissented, in *Griswold v. Connecticut*,⁷⁰ from the Court's creation (out of whole constitutional cloth) of a right of privacy when invalidating what he termed an "uncommonly silly law"⁷¹ forbidding the use of contraceptives by married couples. Years later, he again objected to the Court's extravagant exercise of judicial creativity and reiterated that "there is no 'general constitutional right to privacy'"⁷²

"[T]he first duty of a Justice," Justice Stewart observed upon announcing his retirement, is "to remove from his judicial work his own moral, philosophical, political, or religious beliefs."⁷³ Indeed, perhaps one of the hallmarks of Justice Stewart's jurisprudence, in the words of one commentator, was his "insistence upon limiting the scope of the Court's rulings"⁷⁴ and persistent concern about unbridled interpretations of the fourteenth amendment's due process and equal protection clauses. In his opinion in

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848 (1978) (concurring opinion); Young v. American Mini Theatres, Inc., 427 U.S. 50, 84 (1976) (dissenting opinion); Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (dissenting opinion); New York Times Co. v. United States, 403 U.S. 713, 727 (1971) (concurring opinion).

63. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

64. Justice Stewart's opinions in the civil liberties area include: *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Greer v. Spock*, 424 U.S. 828 (1976); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

65. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

66. 389 U.S. 347 (1967).

67. 389 U.S. at 351.

68. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 269-75 (1973); *Schneekloth v. Bustamonte*, 412 U.S. 218, 223-49 (1973); *Collidge v. New Hampshire*, 403 U.S. 443 (1971); *Vale v. Louisiana*, 399 U.S. 30, 33-35 (1970); *Chimel v. California*, 395 U.S. 752 (1969); *Hoffa v. United States*, 385 U.S. 293, 300-03 (1966); *Stanford v. Texas*, 379 U.S. 476, 480-86 (1965); *Mapp v. Ohio*, 367 U.S. 643, 672 (1961) (Stewart, J., dissenting) (mem.).

69. See D. O'BRIEN, *PRIVACY, LAW, AND PUBLIC POLICY* 51-78 (1979).

70. 381 U.S. 489 (1965).

71. 381 U.S. at 527.

72. *Whalen v. Roe*, 429 U.S. 589, 607-08 (1977) (Stewart, J., concurring).

73. *Washington Post*, June 20, 1981, § A, at 1, col. 1.

74. *Israel*, *supra* note 53, at 2933.

Harris v. McRae,⁷⁵ Stewart thus explained:

It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply "because they may be unwise, improvident, or out of harmony with a particular school of thought."⁷⁶

Justice Stewart eschewed labels such as "liberal" and "conservative." He simply wanted to be remembered as "a good lawyer who did his best."⁷⁷ Constitutional history duly recorded his accomplishments and ultimately will assess his contributions.

III. DEVELOPMENTS AND TRENDS: JUDICIAL REVIEW AND REVIEWING THE SUPREME COURT

Although a final assessment of Justice Stewart's jurisprudence obviously would have been premature and pretentious, Choper, Kamisar and Tribe do seem remiss in not addressing the role he played in the 1980 Term's further unfolding of constitutional law, especially in the area of fourth amendment searches and seizures⁷⁸ and a first amendment "right of access" to criminal trials.⁷⁹ In concluding with a brief review of their exposition of the Term's leading cases, I shall raise some concerns about Justice Stewart's role but focus primarily on three principal trends that Choper, Kamisar and Tribe identify with the constitutional developments of the 1980 Term: failure to achieve consensus and articulate coherent, persuasive standards, judicial deference to other political branches, and assertive, self-protective judicial independence.

The dilemma of judicial line-drawing⁸⁰ is perennially vexatious, as suggested by Chief Justice Marshall's observation: "We must never forget that it is *a constitution* we are expounding."⁸¹ His immediate successor, Chief Justice Roger Taney, stated more fully the crucial problem in constitutional interpretation:

The Constitution speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court and make it the mere reflex of the popular opinion or passion of the day.⁸²

75. 448 U.S. 297 (1980).

76. 448 U.S. at 326 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955), quoted in *Dandridge v. Williams*, 397 U.S. 471, 484 (1970)).

77. *New York Times*, June 30, 1981, § A, at 9, col. 3.

78. See *New York v. Belton*, 453 U.S. 454, 457-63 (1981); *Robbins v. California*, 453 U.S. 420, 423-29 (1981).

79. See *Chandler v. Florida*, 449 U.S. 560, 583 (1981) (Stewart, J., concurring).

80. See generally H. ABRAHAM, *THE JUDICIAL PROCESS* 338-46, 372-400 (4th ed. 1980).

81. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

82. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857).

Debate in and out of the Supreme Court's chambers continues over the proper exercise of judicial review and the Court's articulation of constitutional principles and standards.⁸³

Two decisions in the 1980 Term, *United States Railroad Retirement Board v. Fritz*⁸⁴ and *Schweiker v. Wilson*,⁸⁵ prompt Choper to reexamine the Court's standards for interpreting and applying the fourteenth amendment's equal protection guarantee to individuals challenging economic and social regulation (pp. 1-18). In the twentieth century, the Court typically and rather consistently (at least after its flirtation with "substantive equal protection" analysis)⁸⁶ has employed a "minimal scrutiny" test or a "rational basis" approach when reviewing economic legislation.⁸⁷ Choper argues, however, that the standards governing that test have not remained constant (pp. 1-18). During roughly the first third of the century, under *F.S. Royster Guano Co. v. Virginia*,⁸⁸ any legislative classification required a demonstrably fair and substantial relation to its legislative objective in order to pass the Court's scrutiny. Between 1935 and 1970, the Court nonetheless tended to adopt a less activist, more lenient standard, associated with *Lindsley v. National Carbonic Gas Co.*,⁸⁹ under which legislative classifications merely had to have some reasonable, conceivably possible and not wholly arbitrary basis to pass constitutional muster. In the last decade, Choper persuasively argues, the Court's holdings so vacillate between the *Guano* and *Carbonic Gas* standards that it is difficult to ascertain the controlling standard instructing the application of the "rational basis" approach to socio-economic regulation.

In the *Railroad Retirement* case,⁹⁰ the Court divided seven to two, with Justice Stevens concurring and Justices Brennan and Marshall dissenting. Writing for six members, Justice Rehnquist invoked the lenient *Carbonic Gas* standard in finding a conceivable, rational basis for a congressional scheme that curtailed "windfall benefits" to railroad employees who were eligible to receive both retirement benefits under the Railroad Retirement Act and social security benefits because they had also engaged in some nonrailroad work.⁹¹ Less than three months later the Court divided five to four in *Schweiker*,⁹² upholding a provision for supplementary security income benefits — a \$25 per month stipend given to patients in *public* mental institutions *only* if the institution received Medicaid on their behalf. This

83. Compare R. BERGER, *GOVERNMENT BY THE JUDICIARY* (1977), with J. CHOPER, *supra* note 3, and J. ELY, *supra* note 3.

84. 449 U.S. 166 (1980).

85. 450 U.S. 221 (1981).

86. See generally B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 204-22 (1980); Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

87. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

88. 253 U.S. 412, 415 (1920).

89. 220 U.S. 61, 78-79 (1911).

90. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

91. 449 U.S. at 174-78.

92. *Schweiker v. Wilson*, 101 S.Ct 1074 (1981).

time, Justice Blackmun, writing for the majority, observed that the Court's "minimal scrutiny" test was not "toothless" and that the rational basis for any legislative classification must be evidenced by a deliberate, considered congressional choice.⁹³ Moreover, here, Justices Powell and Stevens joined the two dissenters from *Railroad Retirement*; with Justice Powell now arguing that, unless Congress explicitly articulates the purpose for the lines it draws, the Court should employ the *Guano* standard and not presumptively accept any conceivable, rational basis when sustaining congressional enactments.⁹⁴

The consequence, as Choper points out (pp. 14, 17, 262), is uncertainty for attorneys who must advise clients and for lower court judges who must decide cases in light of the Court's recent rulings. Yet, the problem is not new nor merely that Justices occasionally fail to reach unanimity or are "switching horses" (p. 16). For, as Choper notes in speaking to which standard — *i.e.*, either the *Guano* or *Carbonic Gas* standard — he would employ: "[A]n act of Congress ought not be put in jeopardy because some junior U.S. attorney could not think up any good interest to defend it" (p. 18). Implicitly, Choper recognizes that the Court expends its precious institutional capital when invalidating legislation⁹⁵ and that, in Justice Louis Brandeis's felicitous words, "the most important thing [Justices] do is not doing."⁹⁶ Also tacitly (and unfortunately not more explicitly) Choper disagrees with Tribe's politically naive prescription for aggressive judicial scrutiny *cum* imposition of "a meaningful requirement . . . upon the legislature that it act in the service of some coherent conception of the public good" (p. 259).

Choper is no less helpful with regard to another perplexing problem in line-drawing: cases presenting religious claims under the first amendment's establishment and free exercise clauses.⁹⁷ Indeed, religion in public schools and governmental assistance to religious schools promises to be an area of increasingly hard-fought litigation. In a series of cases,⁹⁸ the Supreme Court has ruled that to survive the strictures of the establishment clause, governmental regulations or actions must have a secular purpose and neither advance nor inhibit particular religions; moreover, they must pose no threat of excessive governmental entanglement with religion. In tackling this timely topic, Choper once again provides thoughtful and critical guidance. Notably, he suggests that the establishment clause should not be interpreted to turn on whether a law's purpose *or* primary effect is to ad-

93. 101 S.Ct. at 1082.

94. 101 S.Ct. at 1088 (Powell, J., dissenting).

95. See generally 3 J. CHOPER, Y. KAMISAR & L. TRIBE, *supra* note 17.

96. H. ABRAHAM, *supra* note 80, at 391.

97. See *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 713-20 (1981); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

98. See, e.g., *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980); *Meek v. Pittenger*, 421 U.S. 349, 367-72 (1975); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772-74 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Commn.*, 397 U.S. 664, 667-72 (1970); *School Dist. v. Schempp*, 374 U.S. 203, 222-27 (1963); *Engel v. Vitale*, 370 U.S. 421, 422-36 (1962); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 209-12 (1948).

vance religion, but instead on whether it has a religious purpose *and* has an effect that influences or compromises religious beliefs (p. 53).

In terms of judicial line-drawing, there is perhaps no comparable area to that of searches and seizures, police interrogations and the rights of the accused. Judicial line-drawing in this area has indeed proven vexatious. Over the years, the Court has constructed a seemingly endless, inescapable labyrinth marked by numerous, subtle distinctions and exceptions. "Bright lines" drawn one Term reverberate with uncertainties, inviting future revisions and redefinitions.

For a unanimous Court in *Mincey v. Arizona*,⁹⁹ Justice Stewart concisely stated a fundamental principle of fourth amendment jurisprudence:

The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."¹⁰⁰

Exceptions to the fourth amendment's warrant requirement, nonetheless, have been more numerous and less clearly defined than suggested by Justice Stewart.

Specifically, and particularly problematic, cases involving automobile searches have engendered several overlapping exceptions and special considerations. In *Weeks v. United States*,¹⁰¹ the Court approved a warrantless search by police when conducted incident to a lawful arrest. Some eleven years later, in *Carroll v. United States*,¹⁰² the Court provided another exception: the so-called "automobile exception" authorizing warrantless searches of cars if police have probable cause to believe that they contain evidence of a crime and exigent circumstances render it impractical for police to obtain a warrant.

Although these two exceptions occasionally run together, the Court has periodically narrowed and broadened each, often without a majority of the Court agreeing on the scope of either. Thus, on the one hand, in 1969 Justice Stewart, writing for the Court, narrowed *Weeks* to permit warrantless searches of only those areas in the "immediate control" of an arrestee and to require a valid warrant for searches of the rest of an arrestee's apartment, house or car.¹⁰³

The *Carroll* doctrine, on the other hand, was also subsequently enlarged and then contracted. In 1970, the Court ostensibly eliminated the second-prong of *Carroll* when upholding a warrantless search of an automobile taken to a police station based on the police officers' probable cause and the exigent circumstances at the time the vehicle was first stopped to arrest the driver and search the car.¹⁰⁴ A year later in *Coolidge v. New Hampshire*,¹⁰⁵

99. 437 U.S. 385 (1978).

100. 437 U.S. at 390 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

101. 232 U.S. 383, 392 (1914).

102. 267 U.S. 132, 155-56 (1925).

103. See *Chimel v. California*, 395 U.S. 752, 762-63 (1969). See also *Gustafson v. Florida*, 414 U.S. 260, 263-66 (1973); *United States v. Robinson*, 414 U.S. 218, 224-37 (1973).

104. *Chambers v. Maroney*, 399 U.S. 42, 48-51 (1970).

105. 403 U.S. 443, 453-73 (1971).

for a plurality including Justices Douglas, Brennan and Marshall, Justice Stewart found impermissible a similar search of a car parked in a driveway; thereby suggesting that *Carroll* extended only to those warrantless searches of cars stopped on open-highways. Three years later, however, the *Coolidge* plurality dissented from the majority's opinion in *Cardwell v. Lewis*,¹⁰⁶ which upheld a warrantless search of an arrestee's car in a police impoundment lot after it had been towed there from a nearby public parking lot. The prevailing majority indicated that *Carroll* had been pushed too far. Furthermore, while distinguishing the circumstances in *Coolidge* and *Cardwell* to show that *Carroll* remained intact, Justice Blackmun introduced another, gratuitous consideration:

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view.¹⁰⁷

The privacy rationale, as Kamisar astutely points out, "has nothing to do with whether a car is 'a fleeting target for a search' or whether 'the car's contents may never be found again if a warrant must be obtained' " (p. 81).

The imposition of fourth-amendment-protected privacy concerns upon *Carroll* by the *Cardwell* plurality not only obscured matters, but led to further line-drawing problems over the scope of permissible warrantless search of the contents of automobiles. Prior to *United States v. Chadwick*,¹⁰⁸ handed down in 1977, police and prosecutors generally assumed that if *Carroll* sustained a warrantless search of a vehicle, then the doctrine also sanctioned the simultaneous search of luggage or containers found in the vehicle. In *Chadwick*, over protests by Justices Blackmun and Rehnquist, the Court found unacceptable a warrantless search of a locked footlocker placed in the truck of an automobile. There, Chief Justice Burger observed that:

By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.¹⁰⁹

That *Chadwick* limited *Carroll* was underscored two years later, in *Arkansas v. Sanders*,¹¹⁰ as the Court found impermissible a warrantless search of a suitcase found in a car. This time, Justice Powell, writing for the Court, reiterated that at least personal luggage, if not other kinds of containers found in vehicles during permissible warrantless searches, receives special protection. A suitcase, he reasoned,

is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. One is not less inclined to

106. 417 U.S. 583, 588-92 (1974).

107. 417 U.S. at 590. See also *Arkansas v. Sanders*, 422 U.S. 753, 761 (1979); *United States v. Chadwick*, 433 U.S. 1, 12 (1977); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).

108. 433 U.S. 1 (1977).

109. 433 U.S. at 11.

110. 442 U.S. 753 (1979).

place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them.¹¹¹

For fourth amendment jurisprudence, warrantless searches of automobiles and their contents present, in the words of Judge Charles E. Moylan, Jr., a "troubled area,"¹¹² in part due precisely to the interplay among *Weeks's* "incident to lawful arrest" exception, the *Carroll-Coolidge-Cardwell* line of cases on the "automobile exception" and the *Chadwick-Sanders* introduction of a calculus of "reasonable expectations of privacy" about various kinds of containers — e.g., footlockers, suitcases, brown bags, etc. — found in a vehicle during a warrantless search. Even more strongly, Justice Powell lamented that "the law of search and seizure with respect to automobiles is intolerably confusing."¹¹³

In the 1980 Term, two cases — *New York v. Belton*¹¹⁴ and *Robbins v. California*¹¹⁵ — held the potential for clarifying and refining the lines drawn by *Weeks*, *Carroll*, *Chadwick*, and their progeny. Unfortunately, the Court's opinions in these cases, both written by Justice Stewart, fell short of fulfilling that promise.

In *Belton*, Justice Stewart wrote an opinion for the Chief Justice and Justices Blackmun and Powell, and was joined with concurrences by Justices Rehnquist and Stevens. There, he held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment"¹¹⁶ and examine the contents, including, as here, a jacket containing cocaine in an unzipped pocket. Although Justice Stewart maintained that *Belton* would "establish the workable rule this category of cases requires,"¹¹⁷ Kamisar, along with the dissenters,¹¹⁸ points out the ambiguities and uncertainties of the ruling. Specifically, does *Belton* authorize searches of *all* of a vehicle's interior, including door panels, searches of locked containers or only of closed but unlocked containers, and searches of what kind of containers — jackets, luggage, briefcases, brown bags, etc.? If *Belton* does not apply to car trunks, then "what about station wagons and hatchbacks, where the 'luggage compartment' may be reached through the interior"; and indeed, asks Kamisar, "why doesn't *Belton* apply to the search of a container incident to arrest in a small room or office" (pp. 90-94)? The larger, looming question, Kamisar concludes, "is whether the *Belton* Court should have taken a 'search incident-to-arrest' approach at all or whether instead it should have invoked the *Carroll* Doctrine" (p. 96).

111. 442 U.S. at 764 (footnote omitted).

112. 3 J. CHOPER, Y. KAMISAR & L. TRIBE, *supra* note 17, at 113.

113. *Robbins v. California*, 453 U.S. 420, 430 (1981) (Powell, J., concurring).

114. 453 U.S. 454 (1981).

115. 453 U.S. 420 (1981).

116. 453 U.S. at 460 (footnote omitted).

117. 453 U.S. at 460.

118. *See* 453 U.S. at 463-72 (Brennan, J., dissenting); 453 U.S. at 472 (White, J., dissenting).

On the same day *Belton* was handed down, its dissenters — Justices Brennan, Marshall and White — joined Justice Stewart's brief opinion in *Robbins*, with the Chief Justice and Justice Powell concurring in the judgment and Justices Blackmun, Rehnquist and Stevens dissenting. Finding impermissible a warrantless search of a closed, opaque container holding bricks of marijuana, Justice Stewart sought to clarify the *Chadwick-Sanders* rule on warrantless searches of containers in which individuals had "reasonably 'manifested an expectation that the contents would remain free from public examination.'" ¹¹⁹ Alas, the language of his opinion was neither clear nor convincing to a majority of the Justices.

As Kamisar, after a careful, detailed analysis, puts it: "the *Belton* 'bright line' rule [does] not have a bright future . . . [but] the *Robbins* plurality's 'bright line' rule has an even dimmer future" (p. 111). This indictment, at least of *Robbins*, has thus far proved correct. The following Term in *United States v. Ross* ¹²⁰ a new plurality, ¹²¹ led by Justice Stevens, overruled *Robbins* and sharply limited *Chadwick-Sanders*. Though undoubtedly not the last word in this most troubled area, *Ross* held that when police have probable cause to stop a vehicle and to believe that contraband is contained somewhere within, they may conduct a warrantless search of the interior and contents of the vehicle. Moreover, the scope of that search is governed *not* by the nature of the container found and inspected but "by the object of the search and the places in which there is probable cause to believe that it may be found." ¹²²

In addition to *Belton*, *Robbins* and other cases involving the scope of authority granted by warrants issued under the fourth amendment, ¹²³ and the scope of permissible police interrogations under the fifth and sixth amendments, ¹²⁴ Kamisar devotes considerable attention to *Chandler v. Florida*. ¹²⁵ In *Chandler*, writing for the Court, Chief Justice Burger reexamined *Estes v. Texas*, ¹²⁶ concluding that *Estes* had not banned televised trials and that there was not now a need to establish a *per se* rule against television coverage of criminal trials. The Chief Justice held, for seven members of the Court, that states may experiment with televised trials subject to due process considerations and constitutional objections raised by criminal defendants to their convictions based on the broadcast coverage their trials received. Justices Stewart and White, concurring only in the judgment, would have had the Court explicitly overrule *Estes* and establish a *per se* rule permitting televised criminal trials.

119. *Robbins v. California*, 453 U.S. 420, 426 (1981) (quoting *United States v. Chadwick*, 433 U.S. 1, 11 (1977)).

120. 102 S.Ct. 2157 (1982).

121. Newly appointed Justice O'Connor, along with Chief Justice Burger and Justice Rehnquist, joined Justice Stevens's plurality opinion. 102 S.Ct. at 2157-73. Justice Blackmun filed a short concurring opinion as did Justice Powell. 102 S.Ct. at 2173.

122. 102 S.Ct. at 2172.

123. See, e.g., *Steagald v. United States*, 451 U.S. 204 (1981); *Michigan v. Summers*, 452 U.S. 692 (1981) (discussed by Kamisar at pp. 121-36).

124. See *California v. Prysock*, 453 U.S. 355 (1981) (discussed by Kamisar at pp. 137-48).

125. 449 U.S. 560 (1981).

126. 381 U.S. 532 (1962).

Agreeing with Justice Stewart, who had issued a sharp dissent in *Estes*,¹²⁷ Kamisar maintains that *Chandler* "really overturns" the earlier Warren Court ruling (p. 149). Kamisar disagrees with his co-author and Justice Stewart's former clerk, Tribe, who views *Chandler* "not [as] a first amendment decision [but as] a due process non-decision" (p. 234). Indeed, Kamisar reads *Chandler* against the background of claims to a general first amendment "right of access" to judicial proceedings and the controversial rulings in *Gannett Co. v. DePasquale*¹²⁸ and *Richmond Newspapers, Inc. v. Virginia*.¹²⁹ Accordingly, he concludes that *Richmond Newspapers* and *Chandler* yield compelling first amendment arguments for recognizing a constitutional "right of access" on behalf of the electronic media to cover criminal trials. He also finds occasion to endorse the provocative proposal, advanced by Justice Stewart,¹³⁰ for television coverage of federal trial and appellate court proceedings. "The place to begin," Kamisar emphasizes, "may well be the place that is likely to be the last holdout — the United States Supreme Court" (p. 169).

While others may debate the wisdom of Kamisar's policy prescription for televised appellate court proceedings, until *Globe Newspapers Co. v. Superior Court*,¹³¹ Kamisar's reading of a first amendment "right of access" would have appeared unpersuasively extravagant.

In *Gannett* Justice Stewart, writing for a badly divided Court,¹³² held that the sixth amendment provision for a public trial did not embrace a right of the public or media to attend pre-trial hearings. He also argued that the Court need not decide whether the public enjoyed a first amendment "right of access."¹³³ Justice Stewart's opinion, however, was so broadly framed as to invite not only three separate concurring opinions¹³⁴ and a long dissent;¹³⁵ it also prompted no fewer than five Justices to attempt to clarify, explain and defend the ruling with off-the-bench comments.¹³⁶ Because Justice Stewart stated no less than a dozen times that the

127. 381 U.S. at 601 (Stewart, J., dissenting).

128. 443 U.S. 368 (1979).

129. 448 U.S. 555 (1980).

130. Justice Stewart has said that:

Our courtroom is an open courtroom: the public and the press are there routinely, and since today television is part of the press, I have a hard time seeing why it shouldn't be there too so long as it is not a disruptive influence I think it is difficult to make an argument to keep television out when you allow everybody else in.

Editorial Opinion and Comment: Justice Stewart Retires, 67 A.B.A.J. 954, 954 (1981).

131. 102 S.Ct. 2613 (1982).

132. For a further discussion, see O'Brien, *The Trials and Tribulations of Courtroom Secrecy and Judicial Craftsmanship: Reflections on Gannett and Richmond Newspapers*, 3 COM. & LAW 1, 3-33 (1981).

133. 443 U.S. at 391-92.

134. 443 U.S. at 394 (Burger, C.J., concurring) (emphasizing that the decision dealt only with pre-trial hearings); 443 U.S. at 397 (Powell, J., concurring) (addressing first amendment claims to a right of access); 443 U.S. at 403, 404 (Rehnquist, J., concurring) (emphasizing that "the public does not have any Sixth Amendment right of access to such proceedings" and discussing Justice Powell's understanding of the first amendment).

135. 443 U.S. at 406 (Blackmun, J., concurring in part and dissenting in part, joined by Brennan, White and Marshall, JJ.).

136. See, e.g., Stevens, *Some Thoughts on a General Rule*, 21 ARIZ. L. REV. 599 (1979);

public and press have no constitutional "right of access" to *either* pre-trial hearings or trials, his opinion reached issues not raised by the instant case and invited confusion as to the Court's ruling. The ambiguity of *Gannett* had considerable impact on public and press access to judicial proceedings. In the year following the decision, defendants, prosecutors, witnesses and judges sought to close proceedings in no less than 13 federal courts and 259 state courts.¹³⁷

A year to the day after handing down *Gannett*, the Court unveiled *Richmond Newspapers*. There, Chief Justice Burger's plurality opinion found, in the intersection of the first and sixth amendments, a right of the public and press to attend criminal trials.¹³⁸ Justice Stewart likewise construed the nexus between the amendments to create a constitutionally protected public forum, and thereby endeavored to distinguish the decision here from his opinion for the Court in *Gannett*.¹³⁹ Justices Stevens, White and Blackmun added brief concurrences celebrating the Court's decision because, in Justice Blackmun's words, it was "gratifying . . . to see the Court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett*."¹⁴⁰ Justice Brennan's concurrence, joined by Justice Marshall, relied on a more extensive theory of the first amendment.¹⁴¹ The sole dissenter, Justice Rehnquist, lamented the Court's activism and incursion on states' rights.¹⁴² Most significantly, however, Chief Justice Burger, obviously troubled by a declaration of unenumerated constitutional rights,¹⁴³ grounded the Court's decision on the nexus between the first amendment's protection of public forums and the sixth amendment's presumption of openness in criminal trials. He assiduously and creatively justified the constitutionality of open trials without committing the Court to an independent affirmative right of access *per se*.

In *Globe Newspapers*, Justice Brennan was able to command a clear majority¹⁴⁴ when striking down as violative of the first amendment a state statute permitting the closure of trials during the testimony of rape victims

Brennan Assails Media Criticisms of Court Decisions, Washington Post, Oct. 18, 1979, § A, at 12, col. 1; N.Y. Times, Sept. 9, 1979, § A, at 14, col. 1; N.Y. Times, Sept. 4, 1979, § A, at 15, col. 1; N.Y. Times, Aug. 14, 1979, § A, at 13, col. 1; *Justice Marshall Hits Colleagues on Rights*, Seattle Post-Intelligence, June 3, 1979, § B, at 2. These articles represent the views of Justices Stevens, Brennan, Powell, Blackmun and Marshall.

137. See O'Brien, *supra* note 132, at 13-20 & app.

138. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (White and Stevens, JJ., joined in the opinion and authored separate concurring opinions).

139. 448 U.S. at 598-601 (Stewart, J., concurring in judgment).

140. 448 U.S. at 601 (Blackmun, J., concurring in judgment).

141. 448 U.S. at 584-98 (Brennan, J., concurring in judgment). For a pre-*Richmond Newspapers* statement of the structural theory, see Brennan, *Address*, 32 RUTGERS L. REV. 173, 176-82 (1979). See also O'Brien, *The First Amendment and the Public's "Right to Know"*, 7 HASTINGS CONST. L.Q. 579 (1980); O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 1 (1980).

142. 448 U.S. at 604-06 (Rehnquist, J., dissenting).

143. 448 U.S. at 579-80.

144. Justices Marshall, White, Powell and Blackmun joined the opinion authored by Justice Brennan in *Globe Newspapers v. Superior Court*, 102 S.Ct. 2613 (1982). Justice O'Connor concurred in the judgment. 102 S.Ct. at 2627. The Chief Justice and Justices Rehnquist and Stevens dissented. 102 S.Ct. 2623, 2627.

under the age of eighteen. According to Justice Brennan: "The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials."¹⁴⁵

Kamisar thus seems to have correctly read the Court — *i.e.*, correctly counted and predicted the votes. Nevertheless, I would, along the lines previously argued elsewhere,¹⁴⁶ still submit that he misinterprets by so broadly reading the opinions in *Richmond Newspapers* and *Chandler*, and moreover errs when applauding the creation of yet another unenumerated constitutional right. Line-drawing is always vexatious and at times aggravated by the political dynamics of judicial decision-making and the interrelationships of strong-willed, independent Justices. But, line-drawing becomes even more vexing and perilous when the Court moves into what Justice Stevens has called the "shadows" of the Constitution.¹⁴⁷

From the rather perennial and intricate problems of judicial line-drawing,¹⁴⁸ Tribe turns to a survey of various rulings during the 1980 Term to uncover two more general themes: judicial deference to other political branches and judicial independence (pp. 179-99, 201-11).

Tribe does not argue — as does his co-author, Choper¹⁴⁹ — that the Court should defer to Congress and the executive branch on all matters except those raising claims to constitutional rights and independence. No less startling, however, he strikes the theme of "how *selectively* and how *manipulatively* the Court has begun to treat Congress's inaction" (p. 189). He finds, on the one hand, in cases such as *Dames & Moore v. Regan*,¹⁵⁰ a dangerous precedent "that congressional silence may sometimes be read as a green light for compromising or confiscating private rights and private claims" (p. 182). On the other hand, relying for illustrative purposes on cases like *Pennhurst State School & Hospital v. Halderman*,¹⁵¹ Tribe asserts that "[t]here is a whole string of decisions in the United States Supreme Court rejecting implied rights of action where Congress is silent or is ambiguous . . ." (p. 189). "But you see what the Court is doing," Tribe rhetorically concludes, "[i]t is quite shamelessly, and I suspect unconsciously, using its barometer — as to where it thinks, as a matter of general good sense, the case ought to come out — as a way of reading the tea leaves of congressional silence" (p. 190).

Accompanying the tradition of court commentaries — a tradition dating back at least to Sir Edward Blackstone¹⁵² and, as noted earlier,¹⁵³ carried to fruition in the *Harvard Law Review's* annual surveys — is an inherent

145. 102 S.Ct. at 2618.

146. See O'Brien, *supra* note 132, at 20-33; see also D. O'BRIEN, *THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT* 125-46 (1981).

147. *Whalen v. Roe*, 429 U.S. 589, 598-99 n.23 (1977).

148. Tribe does discuss line-drawing problems with regard to the commerce power and "Federal-State Relations in Constitutional Doctrine."

149. See J. CHOPER, *supra* note 3.

150. 453 U.S. 654 (1981) (upholding the President's hostage settlement agreement).

151. 451 U.S. 1 (1981).

152. 1-4 W. BLACKSTONE, *COMMENTARIES* (London 1766).

153. See notes 4-6 *supra* and accompanying text.

temptation to engage in hyperbole, rather than to remain content with mere analysis and commentary on particular decisions. In other words, cases must be "fitted" into "doctrines," and underlying "secret" agendas must be uncovered and exploited. Tribe, in particular, appears to succumb to this temptation in several ways.

Tribe's rendition of *Dames & Moore* and selective comparisons with the Court's bitterly divided decision in the "Steel Seizure" case¹⁵⁴ (pp. 183-85) overshadows Justice Rehnquist's careful language and reemphasis on the narrowness of the Court's ruling — a ruling notably unlike either the Steel Seizure or the Pentagon Papers case,¹⁵⁵ in which there was all but unanimity among the Justices.¹⁵⁶ So, too, when discussing *Pennhurst* and the draft registration case — *Rostker v. Goldberg*,¹⁵⁷ which he takes not as a war powers case, as does Choper (pp. 34-40), but as a gender discrimination case (pp. 190-92) — Tribe tends to treat the Justices as a more cohesive, indeed conspiratorial, body than can be supported by the record. His charge that the Court selectively manipulates congressional silence on so-called "implied rights of action" glosses over both the fact that individual Justices from time-to-time vary in their views on congressional silence and that, given the various possible combinations, nine Justices' shifting views may yield some interesting, if not occasionally inconsistent or contradictory, results. Consider, for example, Justice Powell's opinions and reading of congressional silence on private causes of action in *Regents of the University of California v. Bakke*¹⁵⁸ and, a year later, in *Cannon v. University of Chicago*.¹⁵⁹ Even more disturbing, however, is when a Justice — such as Justice Brennan in *United Steelworkers of America v. Weber*¹⁶⁰ — manipulates congressional history in the face of clear statutory language: "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."¹⁶¹ Tribe's exaggeration is perhaps inevitable given his broad canvas, but sweeping generalizations are nonetheless more suggestive than enlightening, more provocative than persuasive.

From judicial deference to Congress and the executive branch, Tribe turns to the issue of judicial independence. The Court confronted the issue

154. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

155. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*) (to which six concurring and three dissenting opinions were added for a total of 10 opinions from a nine-member Court). By comparison, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where Justice Black announced the Court's opinion, there were five concurring opinions and a dissenting opinion written by the Chief Justice and joined by two Associate Justices. For a further discussion of these cases, see D. O'BRIEN, *supra* note 146, at 155-65.

156. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), Justice Stevens filed an opinion concurring in part and Justice Powell wrote an opinion concurring in part and dissenting in part.

157. 453 U.S. 57 (1981).

158. 438 U.S. 265, 281-84 (1978).

159. 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting).

160. 443 U.S. 193 (1979).

161. 443 U.S. at 201 (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

in the 1980 Term in *United States v. Will*,¹⁶² ruling that when Congress enacts a schedule of cost-of-living increases for federal judges, among other federal employees, it may be repealed only prior to the date of the scheduled increase. The issue of judicial independence has become especially salient due to congressional proposals to cut back federal courts' jurisdiction in some areas of civil liberties/civil rights.¹⁶³ Here, Tribe imaginatively proceeds from *Will's* defense of judicial independence to a position, based on the due process clause of the fifth amendment,¹⁶⁴ asserting rigorous judicial review of *any* congressional encroachment on the judicial power (pp. 205-08). He concludes:

[T]he strongest argument is that, whenever Congress acts under *any* grant of constitutional authority — whether under Article I, or Article III, or Section 5 of the Fourteenth Amendment (to enforce the rights of a new category of beings), or whatever — whenever Congress acts legislatively, it acts subject, among other things, to the restraints of the Due Process Clause of the Fifth Amendment. [P. 208.]

Tribe's argument, not as fully developed here as elsewhere,¹⁶⁵ serves as an important reminder that Congress and the executive branch, as much as the Court, are subject to the Constitution.

IV. CONCLUSION: COMMENTARIES, THE SUPREME COURT AND THE CONSTITUTION

Given our so-called "litigious society"¹⁶⁶ — increasing numbers of lawsuits, ever greater propensity to turn private matters into public issues, transformation of political disputes into constitutional conflicts, and substitution of the judicial process for the political process — the proliferation of annual surveys *cum* commentaries on the Supreme Court could perhaps have been anticipated. The Choper, Kamisar and Tribe volume, though not unique in capitalizing on our litigious proclivities, nonetheless remains noteworthy for bringing together three distinguished, commendable constitutional scholars. Practicing attorneys, sitting judges and incurable Court-watchers should find the volume provocative at times, and on the whole beneficial as well as, one hopes, a salutary reminder to return to basics — to the text of the Constitution as a measure both of the Supreme Court's opinions and the Court's commentators.

162. 449 U.S. 200 (1980).

163. See, e.g., *Constitutional Restraints upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. J-97-30 (1981); *Limiting Federal Court Jurisdiction*, 65 JUDICATURE 178 (1981).

164. See also Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

165. See Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

166. See note 8 *supra* and accompanying text.