MR. JUSTICE WILLIAM JOHNSON AND THE COMMON INCIDENTS OF LIFE: I

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WHEN Justice Oliver Wendell Holmes filed his brief dissenting opinion in \textit{Lochner v. New York} in 1905\(^1\) he must have noticed something new on the American horizon. In this now famous opinion he initiated the first steps which were to usher in a new era in American jurisprudence. “General propositions do not decide concrete cases,” he announced with axiomatic brevity and, thus, gave the first telling blow to what may well be termed “introspective jurisprudence.” This generalization on the subject of generality was followed in the opinion by a more concrete application, the implementing asser-

\(^{1}\) 198 U.S. 45 at 74 (1905). A New York statute enacted in 1897 limited employment in bakeries to 60 hours in any one week, or an average of ten hours a day. The United States Supreme Court held the act unconstitutional as an arbitrary interference with the freedom of contract guaranteed by the United States Constitution.

It seems strange that neither in the Holmes dissent nor in subsequent cases was there reference to the fact that the regulation of the hours of labor and other conditions of employment was common practice in England and, therefore, in the colonies at the time the Constitution was adopted. Laws respecting masters and their servants, clerks, journeymen and manufacturers had been enacted by Parliament. However, in those days these laws were considered in furtherance of the welfare of the society because they restricted the freedom of the employee. This unilateral conception of freedom and public welfare was the prevailing one. We can hardly imagine, therefore, that even Chief Justice Marshall would have considered that the states did not enjoy the right to extend such regulation for the benefit of employees had the occasion arisen. A collection of such laws is found in III \textit{Selections from the Laws of England}, 4th ed., rev. by James Barry Bird, (1798). See VII, C of text, infra. The second Statute of Labourers (1350) contained severe penalty provisions directed against artisans and ordered stocks to be erected in every town. The Statute of Labourers (1351) regulated wages and prices for the purpose of restoring economic conditions to the level which existed before the pestilence of the “Black Death.”

“The fourth sort or class amongst us, is of those which the old Romans called \textit{capite censi} . . . day labourers, poor husbandmen, yea merchants or retailers which have no free land, copyholders and all artificers. . . . These have no voice nor authority in our commonwealth, and no account is made of them, but only to be ruled.” I Sir Thomas Smith, \textit{Commonwealth of England}, chs. 17-34 (1589). Found in Prothero, \textit{Select Statutes and Other Constitutional Documents} 177 (1913). See also id. 45-54 where Statutes will be found.
tion that a *reasonable* man might think the New York law limiting the hours of employment a proper measure on the score of health, "Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work." Since that time the federal and state legislatures have gone much beyond that first installment.

Yet this great turn which Justice Holmes gave to constitutional jurisprudence—and which seemed so new—had its counterpart in early American constitutional history. Justice William Johnson of South Carolina, who ascended the bench of the Supreme Court almost exactly one hundred years earlier, had pointed the way, likewise, to the need for a less repressive conception of the judicial process and legal relationships. But they did not arrive at their points of view by identical paths or means. Holmes was a solitary man in the depth of his inner feeling, sadly resigned to the influence of force in human life; whereas, Johnson, on the contrary, was decidedly empathetic—alone only by reason of his choice of objectives and consequent unpopularity, but always expressing confidence in the ultimate future of humanity.

By a coincidence, the advent of Justice Holmes demonstrated the historical forecast of the statement Johnson made in the preface of his *Life of Nathanael Greene* that "true history seldom commences under a century after important events have occurred." And Holmes, looking backward to the times of Johnson, also thought in terms of a hundred years. "We must realize," he warned those who would attempt to evaluate what the writers of the Constitution attempted to accomplish, "that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters .... It has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." There is undoubtedly some psychological significance to the

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1. William Johnson, *Sketches of the Life and Correspondence of Nathanael Greene* x (1822) hereafter referred to as William Johnson. Later on, Johnson asserted that a tax of a penny a pound on the consumption of tobacco in the colonies had, in North Carolina, produced "a minor revolution one hundred years before" the American Revolution of 1776. He also remarked that "just one hundred years elapsed between the commencement of the colonial system, and its final oppressive extension." Id. 228. Johnson also spoke of "one hundred years of English History." Id. 16.

tendency of the human mind to think more easily in terms of a century, and more recently in the span of a thousand years. Some are still able to recall the fin de siècle state of mind which preceded the beginning of this present century.

A. The Action of Cycles and Their Mental Origin

It has been pointed out that the dominant beliefs of one age may be regressive in the next. Movements seem to proceed in cycles and various symbols are consciously and unconsciously chosen upon which to fasten emotional changes that, for one cause or another, are taking, or are about to take place. The American historian and anthropologist, Francis Parkman, had a keen capacity for observing and evaluating such changes. Intense ardors, he observed, “cannot be permanent, they must subside.” He found a pattern of action and reaction in the French Revolution following the reign of Louis XIV “... Crushing taxation, misery, and ruin followed, till France burst out at last in a frenzy, drunk with the wild dreams of Rousseau. Then came the Terror and the Napoleonic wars, and reaction on reaction, revolution on revolution, down to our own day.” Sir Henry Maine once said that when we examine fashions historically we “are sometimes tempted to regard Fashion as passing through cycles of form ever repeating themselves.”

spoke of the “secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought. ...” SPEECHES 24 (1913); also SHRIVER, OLIVER WENDELL HOLMES, BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 162 (1936). Dr. Oliver Wendell Holmes, his brilliant father, wrote a popular poem which began with this stanza:

“Have you heard of the wonderful one-hoss shay,
That was built in such a logical way
It ran a hundred years to a day,
And then, of a sudden, it—ah, but, stay,
I'll tell you what happened without delay.”

John Tyndall suggested that “every advance is balanced by a partial retreat, every amelioration is associated more or less with deterioration.” “Science of Man,” 2 FRAGMENTS OF SCIENCE 355 (1898). Under such a view the cycles would be (1) amelioration (2) deterioration, and then back to amelioration and so on.

Levin, “Language, Symbol Cycles and the Constitution,” 71 U.S. L. REV. 258 (1937). The writer is not presently in accord with the view expressed in this article that “human language is a living thing” after once it is uttered or written, but submits the reference here for its emphasis on emotional cycles and because it stresses the study of language as intimately related to the study of jurisprudence which the writer now considers as another means of communication.

PARKMAN, A HALF CENTURY OF CONFLICT, c. 1, p. 2 (1933).

Sumner voiced the same idea when he said that “philosophy goes through a cycle of forms by fashion.” Economic cycles have been noticed for a long time. Coming down to our very latest days we find psychiatry recording the discovery of some relationship between illnesses and cyclic movements amongst social groups. The baffling problem, usually, is to find out what emotional factors give rise to the change in symbol adherence and what are the events in one age or time which are to be expected to bring similar dynamic results in another. Progress in the understanding of this phenomenon, which is attracting some popular interest, is fortunately being made. But

8 William Graham Sumner, Folkways, c. 5, § 194 (1913). “The logic of one age is not that of another. It is one of the chief useful purposes of a study of the mores to learn to discern in them the operation of traditional error, prevailing dogmas, logical fallacy, delusion, and current false estimates of goods worth striving for.” Id., c. 1., § 37.

9 Dr. Gregory Zilboorg in Zilboorg and Henry, A History of Medical Psychology 13 (1941) says: “Apparently the problem of illness awakens in man wherever and whoever he may happen to be, a definite reaction which is responsible for many similarities in the folklore and primitive sciences of people widely separated by oceans and continents. This phenomenon is indicative of a certain universality in human psychology of which we should never cease to be aware; similar emotional states produce similar deeply seated psychological reactions and imagery, regardless of many cultural and historical differences. It is thus possible for us to use the history of the ancient philosophical psychologies as a source of our understanding of the problems with which medico-psychological sciences of today find themselves confronted.”

This great work is written in a non-technical style and may be considered a history of culture viewed from the eye of one who is looking at the development of the human mind. The references to legal history are so numerous and appropriate as to render the work an important aid to the student of jurisprudence. The author poignantly remarks: “Medical psychology is but a stepchild of jurisprudence, as it was a stepchild of theology in previous centuries.” Id. 244.

10 H. A. L. Fisher, the Oxford historian, has recognized the alternating actions in human events: “One intellectual excitement has, however, been denied me. Men wiser and more learned than I have discerned in history a plot, a rhythm, a predetermined pattern. These harmonies are concealed from me, I can see only one emergency following upon another as wave follows upon wave, only one great fact with respect to which, since it is unique, there can be no generalizations, only one safe rule for the historian: that he should recognize in the development of human destinies the play of the contingent and the unforeseen. This is not a doctrine of cynicism and despair. The fact of progress is written plain and large on the page of history; but progress is not a law of nature. The ground gained by one generation may be lost by the next. The thoughts of men may flow into the channels which lead to disaster and barbarism.” History of Europe, Ancient and Medieval vii (1935).

A work recently published by Judge Jerome Frank, Fate and Freedom (1945) vigorously attacks “long-spanned historical rhythms or cycles” (p. 37) and “scientific” history. The author resorts to the proof of the accidental as a negation of determinism. The argument against inevitability is well stated but the author does not make it sufficiently clear whether he is inveighing against the self-serving determinists or actually advancing an anti-scientific philosophy. To this reader it seems that the
merely to observe these cycles is not enough for the scientist. It has been well put that “strong mass emotions, and honest, if misguided convictions cannot be treated as mere unfortunate accessories of an otherwise legal case.”

B. Cycles and the Individual

Scientists in the field of human behavior who have given objective consideration to the cyclic tendencies in group behavior have gone to the source of all behavior, the individual, for clues which might aid in throwing light on this most challenging of all human experiences. John Stuart Mill, who was very much concerned with cycles of human progress, looked for the answer in the analogy of astronomy very much as ancients sought advice from the stars and the flight of birds. He reasoned with logical artificiality that when the same circumstances occur for a planet it must travel in the same path as before. Dugald Stewart, a predecessor in the field of human behavior, had the insight, however, to look, not to the skies, but to human individuals for the phenomenon of the recurring tendency in behavior. He called it “memory” but actually observed a psychodynamic fact of repetition by the adult of earlier events of childhood: “In recollecting any particular oscillations of belief between fate and freedom are per se evidence of psychodynamic processes so oft repeated as to challenge understanding. They are processes to be observed as Robert H. Lowie has pointed out; they are to be the subject of much careful investigation in the future—the greater need is for this spade work more than for polemical treatment.

Thomas Jefferson hoped to avoid these social convulsions by providing periodic revisions of the Virginia Constitution. With his usual insight he saw a connection between human discoveries and the change in institutions, although he did not approve of “frequent and untried changes in laws and constitutions.” This was necessary, otherwise; “... it will make itself heard through that of force, and we shall go on, as other nations are doing, in the endless circle of oppression, rebellion, reformation; and oppression, rebellion, reformation, again; and so on forever.” Letter to Samuel Kercheval dated July 12, 1816. Quoted by CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, 211 (1944).

“... Lawlessness breeds lawlessness. Always has and always will. History of the world. Every so often there is another moral collapse. Runs in cycles. Then when we get down to the nadir of anarchy there is a revulsion, a great revival, and we start all over again.” Malcolm W. Bingay, Columnist in THE DETROIT FREE PRESS, 6:4 (Aug. 11, 1943).


12 See the discussion in WILLIAM GRAHAM, ENGLISH POLITICAL PHILOSOPHY, Am. ed., 280 (1899). This is a narrow and outdated work but is an excellent statement of the viewpoint of the last century, well arranged.
occurrence, whether prosperous or adverse, of our past lives, by which we are deeply affected at the moment, how indelible do we find the impression left on the memory, by the most trifling and accidental details which distinguished the never-to-be-forgotten day on which it happened; and how apt are similar details, if at any time they should present themselves in somewhat the same combination, to inspire us with gaiety or with sadness, according to the complexion of the event with which they were associated!" Later, Sir John Lubbock (Lord Avebury), who did so much to stimulate an interest in the study of human origins through his books and lectures on anthropology, remarked that, "The opinion is rapidly gaining ground among naturalists, that the development of the individual is an epitome of that of the species, a conclusion which, if fully borne out, will evidently prove most instructive." While the emphasis here is from the group as the cause, the engaging fact is that the connection with the individual was observed. The poet, Shelly, who was a sensitive thinker, had also been attracted by the subject, and with extraordinary prescience saw the answer in the mental behavior of individuals. Some psychologists see in these cyclic upheavals the evidence of mass neuroses finding their origin in the neurotic behavior of individuals whose childhood repressions, disturbed from their seeming slumber by emotional and economic privation, are stimulated by leaders to exert a conscious influence on the affairs of mankind.

13 PHILOSOPHICAL ESSAYS, Am. ed., 453 (1811). (Italics the writer's.)

14 THE ORIGIN OF CIVILIZATION AND THE PRIMITIVE CONDITION OF MAN 522 (1882). "Savages may be likened to children, and the comparison is not only correct, but also highly instructive. Many naturalists consider that the early condition of the individual indicates that of the race,—that the best test of the affinities of a species are the stages through which it passes. So also it is in the case of man; the life of each individual is an epitome of the history of the race, and the gradual development of the child illustrates that of the species. Hence the importance of the similarity between savages and children. Savages, like children, have no steadiness of purpose." SIR JOHN LUBBOCK, PRE-HISTORIC TIMES 563 (1913). See also SIR HENRY MAINE, POPULAR GOVERNMENT, Essay No. III, p. 143 (1886).

15 See Preface to poem, "Prometheus Unbound" and Introduction to poem, "Revolt of Islam."

16 This subject is being scientifically studied by observation of the conduct of children. A popular interest in the scientific experiments and findings of the Iowa Child Welfare Research Station has been developing. See Wilbur Schramm, "Why Your Child Acts Like That," 217 THE SATURDAY EVENING POST 26 (March 31, 1945). The existence of a relationship between the action of the child's mind and the institution of democracy or other institutions is suggested.

The University of Iowa has issued a Bibliography on "Group Dynamics" revealing observations made by scientists engaged in this research. The titles of a few of
Cycles are disapproved, therefore. But little has been yet accomplished beyond the employment of inadequate legal or economic mechanisms to deal with them and to harness them. But what is far worse is that, usually, the profession of the law has avoided touching the origin of such matters. Said Professor Hughes Parry in England, and the situation holds true in America, if not for the whole world—"We have entered upon a period of profound social and legal adjustments, particularly in the department of social and legal legislation. Yet the general body of English lawyers is wholly untrained in legal science. This fact is ominous, particularly when we are reminded that legal progress, like trade depressions, appears in cycles, and that these cycles have more frequently than not been heralded and guided by legal philosophies." 17

C. Cycles as Psychodynamic Uniformities or Laws

Johnson believed that, "Man, with the same principles, the same motives, the same means, and the same education, is ever capable of the same efforts when roused into action." 18 As we look back, a comparison may be made with the period in which Johnson lived, which may be considered as ushering in the beginning of a one hundred year cycle. Some writers have discerned a similarity between the periods beginning the nineteenth and twentieth centuries. At the beginning of the one hundred year period was Johnson; at the end of the cycle of the papers will indicate the scope of the field of study of the relationship between child behavior and the existence of institutions:

1. An experiment with young people under democratic, autocratic and laissez-faire atmosphere.
2. Experiments on autocratic and democratic atmosphere.
3. An experimentally created conflict expressed in a projective technique.
4. The influence of frustration upon the social relationship of young children.

17 Quoted by C. K. Ogden in his Introduction, BENTHAM, THE THEORY OF LEGISLATION xxviii (1931).

"Jurisprudence, again, is gradually tending to regard law not as a self-contained universe of discourse, but as one of the several systems of social control in which concepts of purpose, value, moral constraint, and customary force have to be considered, besides the purely formal apparatus of code, court, and constabulary. Thus, not merely anthropology, but the STUDY OF MAN in general, comprising all the social sciences, all the new psychologically or sociologically oriented disciplines, may and must cooperate in the building of a common scientific basis, which perforce will have to be identical for all the diverse pursuits of humanism." BRONISLAW MALINOWSKI, A SCIENTIFIC THEORY OF CULTURE 6 (1944).

18 Oration delivered at St. Phillips Church, Charleston, S. C. at 17 (1813).

a century Holmes marked the beginning of another period similar in many respects.

The uniformities and diversities of one period may, in a psychological sense, reappear and, therefore, the mental pattern of history in a dynamic sense repeats itself even though the specific events obviously do not. Some scientifically tested conclusions are conceded, even by those who are antagonistic to the notion of historical laws and theories of cultural diffusion. Thus the anthropologist, Robert H. Lowie, who has confessed admiration and regard for the methods of Sir Henry Maine, asserts that the "renunciation of historical laws does not imply the renunciation of uniformities independent of the time factor and veritably inherent in the essence of social existence." He adds that it is precisely "the singular combination of traits forming the context or past history of a given feature" that, in conjunction with certain general sociological principles, furnishes an interpretation of its meaning, "as nothing else whatsoever can." Although he does not minimize the difficulty in finding uniformities he expresses a hopeful note: "When from definite customs and institutions we turn to the dynamics of social history, the result is again the impossibility of grading cultures, but for a different reason. Institutions are generally different and not comparable; processes are not only comparable but identical in the simpler and the higher civilizations. Thus we find the cooperative motive and the need for congenial companionship incarnated in a variety of forms among primitive peoples and at times even stimulating the semblance of quite modern institutions, as in the case of the Samoan trade unions . . . .

"Nor are the facts of culture history without bearing on the adjustment of our own future. To that planless hodge-podge, that thing of shreds and patches called civilization, its historian can no longer yield superstitious reverence. He will realize better than others the obstacles to infusing design into the amorphous product; but in thought at least he will not grovel before it in fatalistic acquiescence but dream of a rational scheme to supplant the chaotic jumble."\(^{19}\)

To a critical examination of the distorted term "history" we must add, therefore, what is even more valuable to human welfare. We must, at our peril, determine what factors in our past and present have

\(^{19}\) Lowie, PRIMITIVE SOCIETY 436, 439, 441 (1920). Italics added.

The manner in which "history" fails to answer legal questions appears in Cramer v. United States, (U.S. 1944) 89 L.Ed. 937 where Mr. Justice Jackson, who has been known to look to history for help, said that "historical materials" were "of little help"; whereas the dissenting justices took issue with the viewpoint that the treason clause "taught a concept that differed from all historical models."
contributed to “historical” results. It may be assumed, except by those who believe in the reappearance of phenomena, that any repetition is not of the identical thing but of something similar thereto. But even an unremitting search is not alone of all consequence in any attempt to understand the psychodynamic causes of behavior. What should concern us more is that Jeremy Bentham, a contemporary of Johnson, dared to ask, “What is history, but a collection of the absurdest animosities, the most useless persecutions.” One may not draw a sharp line between the dynamic effects of legal precedents and historical recurrences according to “historical laws.”

D. The Purpose and Style of the Lochner Dissent

The Lochner opinion has been characterized as the beginning of a constitutional revolution. Dynamically, its worthy contribution was psychological rather than political. At a time when constitutional law

20 George Boas, who overemphasizes the analogy of organic cultural growth, says: “In spite of an old proverb, the very essence of history is not to repeat itself. Its supposed repetitions are but superficial similarities occurring at different times, and their very prominence is proof of their unusualness. No one has yet been able to prove that any event happening in Ancient Rome has ever been repeated since. For, after all, what makes it of historical interest is not merely that it is an event of such and such a general character, but that it is the particular event which occurred in Rome. All men die and must fall in love, but the biographer is more interested in why his particular subject died or fell in love than in the general causes of death and falling in love. History changes, but once a change occurs, it never recurs, for it is obvious that however similar two historical events may be, differences in the historical epochs alone are great enough to make the similarity unimportant.” OUR NEW WAYS OF THINKING 107 (1930). But he adds that there can be “no modern mind, no civilization, in the best sense of the word until we are aware of exactly how the present age differs from its predecessors.” Id. 193.

The “irrational psychologists” complain that the yearning for historical repetition is emotional in origin and takes on compulsive routine patterns; that because this is a departure from reality, history has been dominated by crises caused by these conflicting traditions. While there is much to be learned here, this view thus far is negative and seems to belittle man’s effort to understand.

Franz, Boas, the ‘brilliant and very scientific anthropologist, has called attention to the difficulties in dealing with “controlled experiments” in modern life and concluded that the “conditions are so complex that it is doubtful whether any significant ‘laws’ can be discovered.” He based this largely on the fact that every “change in one aspect of social life acts as an accident in relation to others only remotely related to it” and that, for that reason, anthropology “will never become an exact science.” FRANZ BOAS, ANTHROPOLOGY AND MODERN LIFE 211 (1928). (Italics the writer’s.) See also id. 209. What Boas and other anthropologists and historians who over-emphasize the accident factor in human life overlook is that it is the scientific psychodynamic investigation of some of these factors previously considered as accidental which offers solutions not only of scientific accuracy but intense dramatic interest!

was considered to be largely a matter of intramural introspection, Holmes injected the viewpoint of greater judicial detachment and objectivity. His agreement or disagreement had nothing "to do with the right of a majority to embody their opinions in law," since a constitution was made "for people of strongly differing" views. By a policy of judicial avoidance he meant to allow government by majority to exercise its constitutional functions. He was little concerned, however, whether the majority embodied prejudice, superstition or unsound scientific concepts into law. Johnson also followed a policy of judicial restraint but he was more concerned judicially with the future of democratic government and the elimination of superstition from constitutional jurisprudence.

To demonstrate that the very purpose of government necessarily involved some individual restraint, Holmes proceeded in his dissent in the *Lochner* case to recite such instances. The passage of the opinion quoted below has now become part of the heroics of our jurisprudence. It was the beginning of what is fast becoming a Holmes legend or myth—something which he would himself have abhorred.

"... It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law.... United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court.... Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California.... The decision sustaining an eight hour law for miners is still recent.... Some of these laws embody convictions or prejudices which judges are likely to share. Some may not...."

22 198 U.S. 45 at 75, 25 S.Ct. 539 (1905).
E. Muller v. Oregon and the Analogy from Patent Law

The opinion in the *Lochner* case was followed three years later by *Muller v. Oregon* which upheld an Oregon statute forbidding the employment of females in a mechanical establishment, factory or laundry in the State of Oregon for more than 10 hours during any one day. Here the major credit must go to the remarkable insight of Mr. Justice Brewer who, in the course of his opinion, drew a very pertinent analogy between patent cases and cases involving constitutional questions, and, thereby, emphasized the relationship between artificially separated legal categories:

"In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin.

"While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation . . . [citing cases].

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."28

The comparison with patent cases should not be considered as a mere chance and happy choice. Patent law originally had for its aim,  

as expressed in the Constitution, the promotion of the “progress of the science and useful arts,” although later this original and promising purpose was distorted by the application of subjective and restraining standards—one of the truly distressing anomalies in our jurisprudence. Nevertheless, the general preoccupation of patent law with experiment was outstanding and furnished an example of unusually dynamic significance. It had been repeatedly held that in patent cases the courts could take judicial notice of what was generally known. “A rule of evidence came to the rescue of our constitutional system. Thus, what really happened was an extension of judicial competency and fitness by resort to the technical legal mechanics then available.” The decision is not the private possession of “labor,” “capital,” “state sovereignty,” “administrative agencies” or any other artificially isolated group in our society. It is part of the psychodynamic history of the American people.

F. Adoption of a Pattern in Supreme Court Opinions

After Muller v. Oregon it became common practice for the Supreme Court Justices in their opinions on constitutional questions or questions of broad public interest to examine into the prior and existing instances of legislative action which could furnish a fact basis for the law under consideration. This was less for the purpose of finding a precedent than for the more important objective of illustrating the needs of government. The prior and existing art was examined to find out what the “equivalents” were, to use a term common to the patent bar, in the prior and existing art. It was, in the beginning, a momentous step forward. The practice, now easily identifiable by lawyers and jurists, has also grown up of supplementing such recitations by marginal notes. Typical of this method—there are many other examples—is Mr. Justice Stone’s opinion in Apex Hosiery Co. v. Leader, where the conclusions of the opinion are supported by copious historical, social and economic data. Unfortunately, the pattern has now become so firmly established as to offer resistance to further progress in the development of the judicial function.

24 Sec. 8, Art. I.
25 Brown v. Piper, 91 U.S. 37 at 43 (1875); and cases cited in Walker on Patents (Deller, ed. 1937) 2024.
27 310 U.S. 469, 60 S.Ct. 982 (1940).

Another typical earlier example of the style referred to is found in the dissent of Justice Holmes in Western Union v. Kansas, 216 U.S. 1, 52 at 55 (1910), where
Fletcher v. Peck at the Beginning of the Cycle

A. Fletcher v. Peck, the First Test of the Contract Clause

In Fletcher v. Peck in the year 1810, about six years after he had taken his seat on the bench, Johnson filed one of the truly outstanding and forward looking opinions in the history of the Supreme Court. The case arose out of the efforts of the Yazoo claimants to receive recognition of their titles to a portion of a tract of some 20,000,000 acres—later estimated to contain 35,000,000 acres—which had been deeded to four land companies. The title was predicated upon a statute, enacted by the Legislature of the State of Georgia in 1795, and revoked by the succeeding legislature in the year 1796 upon a showing of fraud and corruption in its enactment. In the meantime, rights of persons claiming to be innocent third parties had intervened and many of the tracts had found their way into the hands of investors in New England and other states. In 1802 the United States acquired the title to the lands by cession from the State of Georgia and immediately the federal government became a focal point for heated discussion and political turmoil which reverberated, not only from the nation’s capitol, but from protesting peoples throughout the nation who had become emotionally stimulated and enraged by the affair.

Two cases had considered the question prior to the decision in the case of Fletcher v. Peck. One, said by Charles Warren to have “hither-

he objected to the holding that a charter fee imposed by the State of Kansas, based upon percentage of total capitalization of a foreign corporation, was a burden on interstate business, and furnished a list of actual experiences of the past to support this view:

"Whatever the corporation may do or acquire there is infected with the original weakness of dependence upon the will of the State. This is a general principle, illustrated by many cases. Thus a water company cannot take away the power of a city to establish rates by making contracts with its customers. . . . Private individuals cannot cut down the police power by their arrangements together. . . . A city cannot limit the power of the legislature over property by making a lease. . . . Or, to pass at once to the most recent and most conspicuous example, the power of Congress to regulate a commerce among the States cannot be affected by the acquisition of property or of values dependent upon the continuance of its assent."

28 6 Cranch (10 U.S.) 87 (1810).

29 No effort is here made to set out a detailed account of the historical incidents of the affair since an excellent and very recent account may be found in Charles Grove Haines, The Role of the Supreme Court in American Government and Politics 1789-1835, 309 et seq. (1944); also in 3 Beveridge, The Life of John Marshall (1919), particularly at 559 et seq. where the author paints a vivid picture of the popular feeling of unrest which was aroused by the transaction.
to escaped attention," was brought in the United States Circuit Court for the Second Circuit, and another was an action in the Supreme Court of Massachusetts as early as 1799 holding the Georgia statute of revocation to be in violation of the federal Constitution. 30

This early case was the first in the Supreme Court to test the provisions of the Constitution that "no State shall pass any law impairing the obligation of contracts." 31 While to this decision has been ascribed the origin of the doctrine of vested interests, it was also the most vigorous of the early judicial steps in the direction of a strong federal union. It has been said of this decision that it "swept away the supremacy of the States and subjected every legislature to the Constitution as interpreted by the Federal voice." 32 Throughout the century following, the political effects of the decision have been discussed under the headings of "vested rights," "states rights" and state "sovereignty." No attempt has been made even to venture a discussion of the psychodynamic factors which led to the result.

B. Adoption of Exclusion of Motive as a Principle:
Marshall's Influence

The dynamic aspects of this decision are neither simple nor single. There is first discernible the effort to attain some uniform order in a cooperative legal system out of the new federation of states each asserting its separatist sovereignty, a process which had gone on intermit­tently amongst primitive tribes and appears in the ancient history of western civilization, in the federation of the Greek states, and later in the ius gentium of the Roman Empire. Second, there was the effort to attain for the new government some authority, certainty and finality—these are the words most frequently employed—in what seemed to some of the new judges a chaos of conflicting and disparate emotions. Chief Justice Marshall, who delivered the opinion of the Court, tried to solve this situation by exclusion, that is, by shutting out all evidence of the motive of legislators. Haines has shown that this argument was

30 I WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 393, note 1 (1922).
31 According to Isaac N. Phillips, twenty-six subsequent cases in Marshall's time held state statutes void as being in conflict with the Constitution. These figures are stated in an address found in 2 DILLON, JOHN MARSHALL LIFE, CHARACTER AND JUDICIAL SERVICES 389 (1903). Altogether there had been, until 1943, seventy-five instances of judicial nullification. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 47 (1943).
32 From address of A. B. Cummins, 2 DILLON, JOHN MARSHALL LIFE, CHARACTERS AND JUDICIAL SERVICES 458.
made by Harper, one of the eminent counsel, who feared that the admission of such evidence would shake the foundations of legislative authority. The judicial right to interpret and construe statutes, even to supply omissions by implication, and the right to apply laws was seemingly not affected. The method of exclusion, though it had functional value in the development of the legal system, has since yielded to some degree though often still heard. In times past it had been responsible for every superstition and effort to suppress knowledge the world had known.

And, at the same time that the right of the "sovereign" states to nullify their own contracts was restrained by this decision of the Supreme Court, the finality of the earlier Georgia Act of 1795 was established. While the opinion of the Court condemned retrospective legislation aimed to divest the rights which had become vested under the earlier statute, it created a legislative immunity for the earlier statute no matter how enacted.

As was to be expected in a matter of such grave importance at this early stage in the history of the new democracy, the opinion was groping and involved, but not without some profound insight as to the problems presented. The political effects of the decision are well known but its understanding has been considered less pertinent. The fact that the decision established a strong precedent for the judicial exclusion of evidence in dealing with human relationship has barely been dwelt upon.

As a matter of actual fact the Supreme Court and other courts have, ever since Fletcher v. Peck, and even before Muller v. Oregon, investigated the motives of legislators, but they have done so fictionally. Legislative wisdom has been continually inquired into under different labels. Often the court has discovered some ambiguity—which may

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38 Quoted by Haines, The Role of the Supreme Court in American Government and Politics, 1789-1835, 312 (1944). The writer has shown that Marshall's famous dictum, "The power to tax involves the power to destroy" was uttered first by Daniel Webster in argument before the Supreme Court. See Levin, "Does the Power to Tax Involve the Right to Destroy a Lawful Business?" 67 U.S. L. Rev. 448 at 449 (1933).

34 "... the decision of the Court fell with a stunning shock upon the State-Rights politicians and enhanced their hostility towards the judicial power. They failed to see that the doctrine established by the Court was, in fact, a strong bulwark to State authority; for if the Court had acceded to the contention that a State statute could be invalidated by a Federal tribunal, on allegations of fraud or bribery in its passage, a wide door would have been opened for the attack upon State legislation in countless instances in subsequent years." I Warren, The Supreme Court in United States History 397 (1922). Historical events have proved the correctness of this analysis.
be found in almost any statute if one will look for it—and then has proceeded to consider the surrounding circumstances, the objects of the legislators as revealed by reports of committees of Congress, and other matters which would shed light on legislative purpose and motive. The fact that the result of a particular decision might be to approve of legislation rather than to nullify it does not affect our view of the analysis of the method. No principle of law has ever stopped this method of judicial review of the motives of legislation. When the Supreme Court has delved into the motives of legislation, whether the result was to declare it void or refuse to do so, there always have appeared writers who have said that such investigation was characteristic of the highest statesmanship. Yet, it must be said that fictional or rationalized means can hardly be considered the highest attainment of the mind. Nor is "statesmanship" a special category of thought.35

How Johnson dealt with some of these questions of evidence we shall consider as we proceed to analyze some of the dynamic aspects of the problems presented. At this point it is sufficient to say that he, too, did not feel it to be part of his function generally to inquire into the wisdom or motive of legislation when the legislature had clearly spoken. But his belief was based more upon a feeling of the lack of judicial competence to do so rather than upon a theory of right. When it became evident that the judicial task to do so was unavoidable he did not hesitate to investigate into motive wherever it could be found and, in doing so, he usually avoided the common accompaniment of rationalization.

C. Psychodynamic Basis for Exclusion-of-Motive Principle: Mental Economy, Avoidance of Work

This human practice of seeking finality by mental economy36 instead of making avowed preparation for the efforts which human judgment involves is still a prevailing tendency, and is particularly evident

35 "Various obscurities can be removed if we generalize our terms from the narrowly institutional to the broadly functional plane. Terms like 'statesman' and 'despot' were minted of the metal of political experience in communities where the high road to power was governmental. It is true that in Athens it was difficult to draw very sharp lines between governmental and other forms of communal activity, on account of the intimate interlacing of all institutional processes. Nevertheless, terms like 'statesman' and 'despot' came to refer to forms of political activity in a narrow institutional sense, and such is their connotation to-day." LASWELL, PSYCHOPATHOLOGY AND POLITICS 46 (1934).

36 Robert H. Lowie, examining critically the bias of certain anthropologists for their theories relating to the origins of social classes, has noted that it is a human trait to be interested in cultural origins. He says of them: "So far as they are human, they
among some primitive peoples who easily become fatigued by mental exertions. It is difficult, and in some instances, impossible to overcome, since the inertia of thought becomes a means for simple solutions, it is the triumph of adherence over understanding. The principle which excluded the evidence of the "motive" of the legislators, though its function in mental thought-saving processes is most attractive to judges who would wish to avoid such intricacies, has for its psychodynamic basis the shutting out of facts for reasons which have but recently been subjected to any careful examination.87

A careful study of Marshall's opinion shows how the real energy forces of events may be barred when we close them out summarily by prohibiting a consideration of what is verbalistically referred to as "motive." When Marshall said that an executed grant of land is a contract containing an obligation, he did so because he found that it cannot divorce themselves from an interest in the origins of cultural phenomena. Now, while the 'historical realists' among them see abundant evidence of human inventiveness in the adaptations made by man to varying environments, it is clear that the fund of original ideas is, after all, strictly limited and that man has no inexhaustible reservoir of originality to draw upon, that often enough the most desirable or, from our civilized point of view, obvious steps in advance fail to be made. From this angle the evolution of castes from a conflict of distinct tribes economizes thought [Italics the writer's] on the problems of origins." Lowrie, THE ORIGIN OF THE STATE 34 (1927).

87 Sir Henry Maine pointed out that the most ancient law was preserved in rude verse or rhythmical prose and that at times it was difficult to distinguish the lawyer from the poet. "There is no question, I conceive," he offers by way of positive explanation, "that this ancient written verse [he is referring to the Irish Senchus Mor] is what is now called a survival, descending to the first ages of written composition from the ages when measured rhythm was absolutely essential, in order that the memory might bear the vast burdens placed upon it." EARLY HISTORY OF INSTITUTIONS, Am. ed., Lect. I, p. 14 (1875). He recalls also that Julius Caesar had commented on the practice in the Druid schools of learning enormous quantities of verses venturing the opinion that the object was not merely to prevent sacred knowledge from being popularized, but to strengthen the memory. Id. 32.

But long before this de Fontenelle (writing under the assumed name, Dr. Van Dale) considering the phenomenon of the ancient oracle, declared: "In the first Ages, Poetry, and Philosophy were the same thing, and all Wisdom was contained in Verse." VAN DALE, THE HISTORY OF ORACLES AND CHEATS OF THE PAGAN PRIESTS (Mrs. Behn's translation), c. VI, p. 177 (1718).

Maxims and epigrams and witticisms, though often containing correct factual material, are of the same type of excluding means.

On the importance of the question of exclusion or inclusion of evidence see C. Sumner Lobingier in "What of the World Court Now?" 43 Mich. L. Rev. 833 at 852 (1945) and especially notes 113 and 114 and cases cited. See also Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 Mich. L. Rev. 497 at 515, note 47.

Jeremy Bentham said of the prohibition of knowledge, "It has produced the censorship of the press; it has produced the inquisition; and wherever it is employed it will always produce the brutalization of mankind." THE THEORY OF LEGISLATION 366 (1931).
“implies a contract not to re-assert that right...”

Yet when he rejected the argument that the clause of the Constitution prohibiting the impairment of the obligation of contracts does not include contracts into which a state may enter, he obviously disregarded or forgot what he had said earlier in the opinion and proceeded to ask, “What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?”

Psychologically, there is no more explicit basis for implication in the one situation than in the other. Has not Marshall, by his antinomous references to motive, really furnished us with a clue to what so often actually takes place when the judicial mind is at work? Often it is a matter of individual choice as to where the judicial economy will be applied and no amount of argument can obscure this fact; but what is more important is to know why this is so.

Though it is not our purpose here to criticize any particular decision as such, but rather to dwell on the dynamic aspects of decisions, it may be said in passing that it is surely conceivable that subsequent legislation based upon actual knowledge of earlier fraud could satisfy recent decisions. The basis for such a conclusion could be that reasonable men would not differ as to the existence of factual grounds for the later statute.

D. Personal Peculiarities as Motives or Finalities

Charles Grove Haines begins his work on The Role of the Supreme Court in American Government and Politics 1789-1835, published last year, with these important words: “American constitutional law has frequently been treated in a detached and mechanical manner separated from the facts and historical conditions out of which it arose. The result of this treatment has been to surround the record of the development

38 6 Cranch (10 U.S.) 87 at 137 (1810). (Italics the writer’s.)
39 Id. at 138. (Italics the writer’s.)

The conscious memory of an author who, with obvious sincerity, seeks to criticize what others have done may not always reveal to him the extent to which his critique is a struggle against his own tendencies. Thus, while Haines takes Marshall to task in Fletcher v. Peck and elsewhere for his broad constructions based on implications, he answers Marshall’s reasoning in the Dartmouth College case as to the division of corporations into two classes in these words: “But this division, it is claimed, was unknown to English law wherein all chartered rights were political privileges over the exercise of which Parliament had plenary power. The charter to Dartmouth College was granted on this implied condition.” (Italics the writer’s.) HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, 408 (1944). C. H. Hill is cited in the footnote as a supporting reference.
of this branch of the law with an atmosphere of certainty and logical exactness, thereby tending to conceal the underlying forces and motives which give color and life to the growth of the constitutional structure." While he stresses the importance of the concealed underlying forces and motives, the work does not go beyond an effort to declare that "personal, social, and political factors" contribute to judicial judgments the more "elusive" factors. He asserts in his introduction that it is "apparent today, if not always admitted, that personal peculiarities, predilections, and political leanings affect the writing of histories as they do the administration of justice. Personal views and political attitudes will be apparent to anyone who ventures to examine this study of the conflicts and controversies aroused by judicial decisions and of the place of the Supreme Court in the evolution of political and legal doctrines and practices." With a critique so correctly and directly stated we, nevertheless, still search in vain for any departure from the acceptance of the personal factors as historical finalities in themselves. If, for instance, an underlying contributing motive for Marshall's decision in a certain case is asserted by the author to be personal interest, such personal interest is assumed to be the historical fact. But personal interest is itself affected by so many complex factors that we

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40 Id. 9. (Italics the writer's.) In footnote 98, at 321 Haines quotes Beveridge's statement that "had not Jefferson, who placed Johnson on the Supreme Bench...ardently desired the disposition which Marshall made of the case, Justice Johnson would have placed on record a stronger statement of the nature of the litigation." We cannot accede to such a view which emphasizes the impotency of a man of Johnson's character. It is more correct to say that Johnson had said quite enough for the occasion under the circumstances.

Beveridge was one of those who really did not understand Johnson or he never would have chided him for what he described as his "unctuous sentences" or his "inept opinion" in Fletcher v. Peck. 3 BEVERIDGE, THE LIFE OF JOHN MARSHALL 592 (1919) and 4 id. 165.

Warren criticizes those who, though they oppose the right of the Supreme Court to determine the constitutionality of statutes, yet attack the Court for failing to exercise the much more extensive and the more dangerous power of inquiry into motives of legislation. 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 398 (1922). Of course, the error here is psychodynamic in origin. It is based upon the assumption that human incapacity must be countenanced in order to achieve make-shift finality. At every stage in history the door has been slammed shut upon the spread of knowledge and the means of knowledge for so-called "practical reasons." That there is a no-man's land of the mind has always been the theory of those who fear the expansion of its scope. The difficulties surrounding the examination of motive are difficulties of education—the course of American jurisprudence could easily have gone in the direction of its inquiry rather than its denial. It is "dangerous" because we have thought little about it. The law, nevertheless, has never been at a loss to discover intent (motive) in civil or criminal situations when it chose to do so.
are hardly able to ascribe to it in any given situation more than a start-
ing point value.

The human tendency to label and compartmentalize historical figures and events has often obscured their dynamic origin. The under-
lying assumption of some that judicial review is *per se* undemocratic without having really retested it in the light of increasing knowledge about processes of human behavior itself calls for re-examination. That the Supreme Court of the United States in its insulated position as an organization of men who confer and decide in secret must be re-
appraised as to its functioning in the light of Jefferson’s criticisms is not disputed; since, the atmosphere of isolation and awesomeness has ren-
dered that institution, in following such procedure, comparable to the “inner voice” of the oracles of ancient Greece. The confusion of tradi-
tion with a scientific examination of the “prior art” has converted the Supreme Court during its history into a commanding and omnipotent body which excludes more often than it examines. The effect on the development of jurisprudence is obvious. But this is not inherent in the institution itself.

III

MARSHALL’S DISCOVERY OF A BILL OF RIGHTS WITHIN THE MAIN BODY OF THE CONSTITUTION

A. An Attempt at a Psychological and Objective Explanation

Any estimate of the contribution of Marshall, who did so much to prepare civilization for the understanding of the real difficulties to be encountered in constitutional government, must attempt as far as possible to divest itself of the distracting influences of that personal “passion” which Marshall so greatly feared in government itself. Even with the sincerest desire to remain objective, complete impartiality is fraught with many obstacles, which, however, should cause us all the more to try to achieve it. \(^41\) Marshall felt that “the passions” of men

\(^41\) John Dollard, et al., the authors of the enlightening work *Frustration and Aggression*, Institute of Human Relations, Yale University (1939) frankly confessed their own difficulties in their foreword—which may well serve as an example in the study of jurisprudence. They say: “If each member of this group could have kept a record of his own emotional tensions and of how he managed his own aggressive tendencies, an important body of data bearing on the major thesis of this book would have accrued. It is no wonder that cooperative research is unpopular in our scientific culture. It can be carried on effectively only when those who engage in it are prepared in advance to pay the price it demands. Inasmuch as the number of problems which require cooperative endeavor for their effective treatment seems to be multiplying, any light on the difficulties of cooperative procedure is most welcome.”
had to be checked by principles, although he was not consciously aware of the extent to which he himself departed from them. The time to dispense with compulsive processes had not come in his time and is not yet arrived, but the time to study and to convert them is here, because the studies have already been begun and the urgent need exists. The consideration of the dynamic factors of jurisprudence is, however, usually brushed aside as "psychological," as if a mystic stigma is to be attached to anything which deals with the mind of man. Some see in the psychological inquiries which try to distinguish between fiction and reality a problem which has "so long perplexed the philosophers and which therefore lawyers can hardly hope to solve"; the practical lawyer "has no call to solve it."\(^{42}\) What is happening under the very eyes of the lawyers is that medical science has discovered that many of our physical ills are emotional ills which originate in and are aggravated by the distortions which begin in family relationships and are then intensified by the individual's effort to integrate himself into the surrounding society. The psychiatrist today deals with the effects of laws and compulsions and their conversion into mental and physical ills as elements of personal therapy with amazing results.\(^{43}\) None the less important is the by-product—which may in time become pre-eminent—which has shed significant scientific light on the dynamics of cultural development. This latter work has been greatly aided by the contributions of the anthropologists. The condition of the medieval ages may yet return when the doctors were the jurists.

Critics of Marshall, looking only at the political side, with singular lack of objectivity have too often seen him as a reactionary and as a protector of vested interests without attempting to penetrate the novel

\(^{42}\) J. W. JONES, HISTORICAL INTRODUCTION TO THE THEORY OF LAW 178 (1940).
\(^{43}\) See Wickware, "Psychopathic Medicine," 18 Life 49 (Feb. 19, 1945). While not all psychologists are in accord with the specific conclusions stated in this article, mostly all psychiatrists are seriously concerned with the relationship between illness and mental causes. Law, whether it exist in the home or in the community, is the most universal of all such causes.

A lawyer, a jurist or an economist would not see any connection between the Sherman Anti-Trust law and gastric ulcers. Nevertheless, the idealization of competition without emotional preparation turns what should be the high aim of democracy, namely—liberty—into a grave tragedy. "The aggressive type of business man, who has repressed longings for a retreat to love, care, and protection, often has a tendency to express his hidden conflicts in a gastric ulcer." George W. Gray, "Anxiety and Illness," 178 Harper's Magazine 606 at 615 (May 1939).

See also Louis Wirth, "Group Tensions and Mass Democracy," 14 The Am. Scholar 231 at 232 (1945). The author there says that "each one of us as a person must assume the responsibility of composing his many and often conflicting loyalties to a variety of organizations, each of which represents only one segment of life's interests."

human situation with which he was confronted and which he tried to solve. Thus the humanitarian background of the opinion in *Fletcher v. Peck* has been virtually lost. But a careful study of the opinion leaves little doubt that Marshall believed that the ultimate decision on all individual human rights of whatever kind must be protected by the unifying supervision of the government. Said Marshall, "... the Constitution of the United States contains what may be deemed a bill of rights for the people of each state." A bill of right within the Constitution itself! Has this phase of the jurisprudence of Marshall been consciously or unconsciously repressed or by-passed by constitutional jurists?

This does, however, seem to be the case since the decision has been cited and relied upon for its negative prohibitions rather than for its positive protections. Professor Thayer, for example, has included *Fletcher v. Peck* in "those cases which are concerned with the specific restraints and limitations upon the States." The positive side of the opinion reflecting the need to protect individual rights wherever they may be asserted has, indeed, virtually remained unnoticed and forgotten by critics and partisans. This may be due in part to the later addition of a Bill of Rights in the first ten amendments to the Constitution. It is only in recent years that the idea has prevailed on the Supreme Court that the rights guaranteed by the First Amendment and protected against infraction by the Federal Government are also guaranteed against infringement by the individual states by the provisions of the Fourteenth Amendment.

The Fourteenth Amendment protects the individual against deprivation of his rights by the individual states and is, therefore, supplementary to the Bill of Rights which Marshall discovered in the Constitution itself. Whether his conception of rights was precisely the same as that of ours of today or whether it was even technically sound is a less material matter than his recognition that the Constitution, despite statements to the contrary, was essentially a human docu-

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44 6 Cranch (10 U.S.) 87 at 138 (1810). (Italics the writer's.)

45 From address of James Bradley Thayer in 1 Dillon, John Marshall 209 at 234 (1903).


47 "The convention which met in 1787 was as reactionary as the other had been revolutionary and democratic; the Declaration of 1776 was concerned with the rights of man. The convention of 1787 entirely ignored them." Quoted in George R.
ment marking a significant advance in civilization. To Marshall, who looked back at centuries of human failures, contract rights were human rights, evidences of the striving of men to deal with one another on a less aggressive basis than had existed under conditions of self-help. If one does not accept in its entirety his conception of what the rights consisted, he aimed none the less at an effective protection against stronger power even though exercised by the state. Marshall's principle of subordination was of an ambivalent pattern, it is true, but its force was directed mainly toward the states, which had the power of suppressing individual right in whatever form it might appear. One must surely disavow, in the light of the opinion in *Fletcher v. Peck*, the characterization of Marshall which would make of him a cold mental machine resorting to "inexorable rules of logic," and likewise the statement that "his opinions are practically devoid of theories of government, sovereignty and the rights of man."48

It was in this same opinion that Marshall declared that courts were "established for the security of property, and to decide on human rights . . . ."49 Beveridge, who devotes considerable space to an examination of Farnum, "Walter Clark, The Saga of a Fighting Career," 30 A.B.A.J. 515 at 516 (1944). See also Haines, *The Role of the Supreme Court in American Government and Politics 1789-1835*, 73 (1944) and elsewhere throughout the work.

48 Quotations are from article by William Draper Lewis on John Marshall in 14 *Encyclopædia Britannica*, 14th ed., 969. (Italics the writer's.)

49 6 Cranch (10 U.S.) 87 at 133 (1810). (Italics the writer's.)

The following quotation from Thorpe by Haines leaves the impression, which we consider unjustifiable, that Marshall was not interested in the rights of man: "It is contended, however, that 'one never finds in Marshall's decision any theory of government, or natural rights, or of sovereignty.' Francis Newton Thorpe, "Hamilton's Ideas in Marshall's Decision," 1 *Boston Univ. Law Rev.* (1921), 10." Haines, *The Role of the Supreme Court in American Government and Politics 1789-1835*, 410, note 109 (1944).

Marshall very definitely spoke of natural rights in Ogden v. Saunders, 12 Wheat. 212 at 344 (1827). Elsewhere Haines quotes from a letter from Marshall to Story wherein Marshall complained of the reaction to his opinion in Cohens v. Virginia, 6 Wheat. 264 (1821): "There is on this subject no such thing as a free press in Virginia . . . ." Haines, cited supra this note, at 458. 'The very insistence that vested rights dominated the mind of a man of Marshall's type to the exclusion of all else is unreal and not based on fact and is psychologically an impossibility. The extravagant statement that "there was not a spark of liberalism in John Marshall," made by James Truslow Adams and approved by Haines (id. 659), ignores the fact that the Constitution has been the foremost liberalizing influence of all times and that Marshall was admittedly its outstanding formulator. But the author offers, in the place of this, the following: "With a more natural and direct outlet for political feelings and prejudices and with greater feeling for the expression of particularist tendencies, may it not have been that the issues of expansion and of slavery could have been settled without such long and bitter controversies?" Id. 656. (Italics the writer's.) There is nowhere in this work to be found the suggestion that these feelings and prejudices
tion of the turbulent circumstances which preceded the decision, was satisfied with a mere reference—without comment—to Marshall’s declaration of a Bill of Rights within the Constitution itself. His requirement further understanding. However, this is a common omission. So long as “political feeling and prejudices” are asserted to be the means to be employed, de Tocqueville’s statement concerning judicial power to declare legislation invalid remains a psychological warning that it “forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies. . . .” Quoted by Haines, id. 660. Obviously, Marshall’s contribution cannot be measured by the word “liberal” as a yardstick.

There would not appear to be any reason to believe, as does Haines, that Marshall had later changed his view when he wrote the opinion in Barron v. Baltimore, 7 Pet. 247 (1833). In this case he held that the amendments to the Constitution, known as the Bill of Rights, were not a restriction on state governments. A sharp about-face in the case of a man who had spent a large portion of a lifetime in the establishment of the right of judicial review over state action was not to be expected. But Marshall actually lived through the period of our early history and the events following the Constitutional Convention. It is because he knew that history that he was alert to find a Bill of Rights as an inherent part of the Constitution itself. See Haines’ quotation from Justice Story as to Marshall’s “steadfastness and consistency of principle . . . During more than half a century of public service he maintained with inflexible integrity the same political principles he begun.” Id. 618; see also id. 608. Marshall “feared” that democracy would destroy itself; but to picture him as a conniving “politician” resorting to “stratagem,” “devices” and the tendency to “conceal” is to ignore the huge task which, psychologically, confronted him. Retrospective condemnation of this type is based upon the unreal notion that democracy, as a new creation, should have been born a full grown adult. Upon a scientific basis the usual criticisms of Marshall are already obsolete in method—even though the applicable science is seldom applied. A psychodynamic evaluation of the man and his work has yet to be made. Haines’ comment that there was in Marshall “nothing of what Beveridge calls ‘the humanitarian fervor’” (id. 659) is negatived by a long and vigorous life devoted to the cause of mankind, even though we may differ with some of his views and methods.

Beveridge’s statement reads: “Such limitations, declared Marshall, constitute a bill of rights for the people of each State. Would anyone pretend to say that a State might enact an _ex post facto_ law or pass a bill of attainder? Certainly not! How then could anybody pretend that a State could by legislation annul a contract?” 3 BEVERIDGE, THE LIFE OF JOHN MARSHALL 591 (1919). Warren does not mention the passage. 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 392-399 (1922).

Rose’s note to the opinion of Fletcher v. Peck, 6 Cranch (10 U.S.) 87 (1910), contains the following statement:

“Federal limitations upon State power are founded upon desire to protect life and property from sudden and strong passions to which men are exposed [and the Constitution contains what may be deemed a bill of rights for the people of each State, p. 138].”

insistence that individual rights included both property and human right was tied in with his idea that the very nature of society prescribed

423. See also 3 L.Ed. 414. In the last cases cited the same principle was held applicable to a State Constitution.

In Federalist No. XLIII, of January 25, 1788, the provisions in question were clearly considered as part of a bill of rights. Publius says: "Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this Constitutional bulwark in favor of personal security and private rights; [Italics the writer's] and I am much deceived, if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents." 1 THE FEDERALIST, Dawson ed., 310 (1883).

In Federalist No. LXXXIV, Publius, addressing the people of the state of New York, answered the argument that the proposed Federal Constitution did not contain a bill of rights, by saying that though the Constitution of New York had no bill of rights affixed to it "yet it contains, in the body of it, various provisions in favor of particular privileges and rights, which, in substance, amount to the same thing..." Publius then went on to say that the proposed constitution adopted "in their full extent, the common and statute law of Great Britain, by which many other rights [italics the writer's] not expressed in it, are equally secured." After listing some of these he adds: "The establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and of Titles of Nobility, to which we have no corresponding provisions in our Constitution (New York), are perhaps greater securities to liberty and republicanism than any it contains." Publius further argued that, since bills of rights are in their origin stipulations between king and subjects, they have no signification to the Federal Constitution founded on the power of the people and, since the people surrender nothing and retain everything, they have no need for reservations. Eventually this argument was repudiated by the enactment of the first ten amendments containing a Bill of Rights. But Marshall, apparently, despite these amendments, was not willing to reject the idea that the Constitution itself protected human rights. 1 THE FEDERALIST, Dawson ed., 595, 596 (1883).

There is good reason to believe that Johnson's reference to Publius in Fletcher v. Peck is to the above excerpts and their context.

Charles Grove Haines in his very recent work which covers the period of both the Marshall and Johnson incumbencies disposes of Marshall's bill of rights in a few sentences. After stating Marshall's contention that the Constitution, employing general language, must be held to have included executed as well as executory contracts, he goes on to say: "Is a contract of a state prohibited by the Constitution from being impaired by the State? Marshall thought so. Employing the familiar check argument of the Federalists that the framers of the Constitution feared the acts of state legislatures and intentionally placed restrictions on them, including the prohibition against bills of attainder and ex post facto laws, he said they viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and, hence, in adopting the Constitution the people had manifested a determination to shield themselves and their property from the effects of the sudden and strong passions to which men are exposed. Hence, it was also provided that no state shall pass a law impairing the obligation of contracts. These limitations, Marshall maintained, constituted a bill
limits to legislative power. But “where are they to be found,” he asked, “if the property of an individual, fairly and honestly acquired,
of rights for each state.” Haines adds that, “unfortunately for his purpose, the Supreme Court had limited the ex post facto phrase of the Constitution to acts affecting criminal conduct.” He then proceeds, however, to quote the portion of Marshall’s opinion which shows that Marshall applied the analogy of criminal acts even though he did not reverse the former precedent. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, 320 (1944). It is interesting to note that by use of this analogy Marshall in effect agreed with Johnson’s criticism of the ex post facto decision which restricted it to criminal acts.

Haines, after quoting from Johnson’s opinion in Satterlee v. Matthewson wherein Johnson stresses individual rights, concludes with one of those sweeping characterizations which invites the need to quote what he has said about the personal element in legal history: “Is it not pertinent, then, to direct attention to some phases of legal history where politics impinges upon law and where personal political convictions give direction to constitutional interpretation?” Id. 41. In six-hundred sixty-two closely printed pages of vigorous writing, reflecting much research about a much neglected period of our judicial history, we find but a few scattered references to Justice Johnson. Nevertheless, because Johnson spoke out against “arbitrary and despotic” legislative acts and urged that the restriction of the ex post facto clause to criminal cases left “a large class of arbitrary legislative acts without the prohibitions of the Constitution,” Haines reaches the startling conclusion which we state in his own words: “Johnson, appointed to the Court as a Jeffersonian Republican, had now repudiated the principles of Jeffersonian democracy to such an extent that he would have had the Court, by simple process of interpretation, create a broad doctrine for the protection of civil rights against legislative attacks. It remained for future Justices to accomplish this result by the interpretation of the phrase ‘due process of law.’” Id. 583. To assume even remotely that Johnson’s views here, expressed could be interpreted as a departure from “Jeffersonian democracy” is to apply that personal element to research which is so deprecated by Haines in the subject he is writing about. Jefferson himself, as late as 1822, spoke of Johnson’s “candor and devotedness to the Constitution” and directed his attention mainly to the faulty procedure of the Supreme Court and its secret sessions. See Levin, “Mr. Justice William Johnson, Creative Dissenter,” 43 MICH. L. REV. 497 at 513 (1944). Donald G. Morgan who has made a special study of Johnson, on the contrary, calls him “Johnson, the Jeffersonian.” See Morgan, “Mr. Justice William Johnson and the Constitution,” 57 HARV. L. REV. 328 at 361 (1944). Morgan, earlier, falls into somewhat the same error as Haines does when he says that Johnson “eschewed a strict construction of the powers of Congress” and adds that the “grounds on which he rested this apostasy from the Jeffersonian Creed were varied. . . .” Id. at 335. Jefferson, however, had no such unalterable “creed” when he wished to effect the Louisiana Purchase or in the quarrel with Justice Johnson over the Embargo Acts when Jefferson was attempting to enforce his executive order as President of the United States. Jefferson’s antagonism to the Supreme Court was not directed to the right to declare acts of Congress unconstitutional—a main point in the Federalist doctrine—but rather was directed to the right of the coordinate branches of government to do likewise. HAINES, cited supra this note, 23 and 207. This notion of Jefferson’s was extreme even according to his standards because he understood only too well the tendency of those who seek power to pull in their own direction whether it be by affirmative action or by negation and avoidance. That Jefferson, in some respects, went farther than did Johnson and was at times more impatient with what he considered obstructions to popular government is undoubtedly
may be seized without compensation?" 51 This momentous conclusion was not in the realm of implication, for the power of the state legislature over "the lives and fortunes of individuals" he found "expressly restrained." 52

What is astonishing to the student of our early history who would venture forth beyond the usual linguistic categories of state and federal "sovereignty" is that it should have been generally assumed that it was necessary to restrain the federal government by the enactment of the Bill of Rights contained in the first ten amendments to the Constitution but that—somehow or other—the individual states, in which the residuum of power was considered to remain, could be counted upon at all times to recognize and protect the civil rights of their respective citizens! That this illusion still remains in the minds of many is one of those peculiar inversions which requires much understanding and explanation. The ideas revolve mainly around emotional condemnations of property. So, we find that even as sincere and conscientious a scholar as Haines stigmatizes the question as a partisan one in accord with historical and psychological fact. This, however, does not warrant the inference that Johnson abandoned Jeffersonian democracy at any time.

"Together with most of the liberal and democratically minded men of the time, Lee [Richard Henry Lee] saw grave dangers in the failure to include a bill of rights in the original draft of the Constitution." Id. 75. The author also recalls that Jefferson, writing to Madison, declared himself as favoring a bill of rights for the federal Constitution and stressed "the legal check which it puts into the hands of the judiciary" as a desirable objective if the judiciary be "rendered independent and kept strictly to their own department. . . ." Id. 206. It is difficult, therefore, for the writer to follow Haines in his comment upon Marshall's discovery of a bill of rights in the Constitution to the effect that Marshall employed the "familiar check argument of the Federalists." Since, according to Haines, the Federalists were not the liberal and democratically minded people as a rule and since, surely, Jefferson was not a "Federalist" the idea of a bill of rights within the Constitution need not necessarily be connected with the picture of a propertied class seeking domination by the protection of vested rights. See also Id. 326.

The rationalized notion that the Amendments to the Constitution were in effect a bill of rights affecting the states appears in the writing of William Rawle, a contemporary of Marshall. "The constitution of some of the states contains bills of rights; others do not. A declaration of rights therefore, properly finds its way into the general constitution, where it equalizes all and binds all. It becomes part of the general compact. Each state is obliged while it remains a member of the Union, to preserve the republican form of government in all its purity and all its strength. The people of each state, by the amended constitution, pledge themselves to each other for the sacred preservation of certain detailed principles, without which the republican form of government would be impure and weak." RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 121 (1825). (Italics the writer's.) This, of course, is not what Marshall meant by a bill of rights affecting the states.

51 6 Cranch (10 U.S.) 87 at 135 (1810).
52 Id. at 138. (Italics the writer's.)
and devotes but a few sentences to this most important aspect of Marshall's opinion.

B. Psychodynamic Projections in Concepts of Contract and Property

The idea that the ownership or acquisition of property, which is an outgrowth of man's need to preserve himself, is "per se" "inhuman" or tabu not only ignores the progress which our civilization—still very young—has already made, but is psychologically a projection. It is as unsound in any endeavor at a psychodynamic evaluation as the notion that "property" is the cause of everything good in society. The idea of an inimical property is a negative personalization upon which is focused much of the aggression of conflicting groups. It is as much a primitive projection as the belief that good spirits reside in trees and evil ones in the stone that accidentally hurts the native, and side by side with it must be considered the wholly imaginary analogue that all humanitarians are always humane in purpose or means.

These discordant factors have heretofore attached to ideas such as religion, trading, sovereignty and now are centering in part around the activities of incorporated and laboring groups. The attempt to understand the psychological factors motivating these emotional attitudes is seldom made by jurists and not often by anyone outside the psychiatric profession. Looking from a distance one may say that the Russian experiment has little reason to boast of the substitution of a theory of economics, which must necessarily deal in logical causations, for what is called the capitalistic or property system. What they have accomplished, however, has been a diversion of some of the surplus emotions of aggressive accumulation to other channels so that, despite the existence of many races in its borders, there is a high degree of emotional participation and feeling of cooperation amongst these diverse groups. It is doubtful whether this accomplishment could long remain under the aegis of a pure economic theory without further psychological insight and application.\(^3\) One thing we may learn from

\(^3\) Anthropologists have found the rights of private property in primitive tribes arising when game is struck by the hunter, in "the legal idea of common property in land belonging to the clan or tribe," family freehold, family and personal property in moveables. Edward B. Taylor, Anthropology 419, 420 (1881).

The acquisition of what a human being requires for existence is a human need and thus can give rise to a human right in the usual sense of the term; but it does not always appear in connection with the practical need for survival. Compare W. Deane, Fijian Society 118 et seq. (1921), with Sir John Lubbock, Origin of
observing these things from the viewpoint of a dynamic study is that what civilized men need more than anything else is a better distribution of individual emotional energy—in which case economic distribution is no longer an isolated problem.

Civilization and Primitive Condition of Man 444-445 (1882), who records the situation where even a distinct tree has a separate owner.

Bronislaw Malinowski challenges the prevalence of ideas of primitive common ownership by pointing out with much insight that the ownership is defined by the manner in which "the object is made, used and regarded by the group of men who produced it and enjoy its possession." Ownership is a "Compound and complex system of holding property, which in no way partakes of the nature of 'socialism' or 'communism.' A modern joint-stock company might just as well be called a 'communistic enterprise.' As a matter of fact, any descriptions of a savage institution in terms such as 'communism,' 'capitalism' or 'joint-stock company,' borrowed from present-day economic conditions or political controversy, cannot but be misleading." Malinowski, thus, rejects categorial classifications borrowed from modern life and emphasizes dynamic relationships in which the reasons for the interest in property plays a part.

Malinowski, Crime and Custom in Savage Society 18-19 (1932). This small but excellent work deals with the legal aspects of Trobriand society.

Between the primitive needs of individuals, and the conversion of the satisfaction of those needs into an emotional experience which substitutes the means for the end, much can happen. Indeed, the whole of legal society then becomes excessively devoted to the means. Benjamin Franklin saw this as far back as 1775. He knew the American Indian well. "Simple and mild laws" were sufficient to guard his bow, hatchet, and his skins which "were sufficiently secured, without law, by the fear of personal resentment and retaliation. When, by virtue of the first laws, part of the society accumulated wealth and grew powerful they enacted others more severe, and would protect their property at the expense of humanity." Franklin then referred to the conviction of a woman in London for stealing some gauze out of a shop, value fourteen shillings and three pence. The letter, from which the excerpt was taken, was published by Sir Samuel Romilly who did so much to reform English criminal law. Van Doren, Benjamin Franklin 712 (1938). But even Franklin's wise observation is only partially correct, since laws have often been enacted for emotional causes and the forms of punishment often have had no other real basis than the satisfaction of aggressive and sadistic purposes. See Earle, Curious Punishments of Bygone Days (1896).

Max Schmidt, the ethnologist, with typical logical method posits an "economic principle" of the attainment of the greatest possible economic result with the least possible expenditure of energy, notes the progressive human socialization of the economic process as "an inherent tendency in the human race." This is typical a priori reasoning based upon superficial observation of fact and it proposes an economic law of nature. Unconsciously, however, he notes the emotional factor when he observes "that the socializing of life has been pushed beyond the amount necessary for man's existence..." Schmidt, The Primitive Races of Mankind 187-188 (1926).

Lowie criticizes the economic interpretation of history as applied to primitive man. He asserts that the utilitarian doctrine "completely breaks down in the interpretation of aboriginal consciousness. Primitive man is not a miser nor a sage nor a beast of prey but, in Tarde's happy phrase, a peacock." Lowie, Primitive Society 356 (1920).

The writer does not accept William Graham Sumner's statement—followed by
C. Johnson's Concurrence in the Views of Marshall: Emphasis on Differentiation

What is also of psychodynamic import here is that Johnson, the dissenter, really went farther than did Marshall in condemning retroactivity. While Marshall insisted bluntly that "the past cannot be recalled by the most absolute power," he was not willing to say openly that the *ex post facto* provisions of the Constitution should be applied to civil cases—a position which Johnson urged at intervals and emphatically during his whole judicial career, although we have seen that Marshall did so by analogy. In a lengthy note which he appended to the case of *Satterlee v. Mathewson*, Johnson unequivocally rejected and condemned the notion that the *ex post facto* clause was to be confined to laws affecting only criminal acts. And later in *Ogden v.*

some old-line historians and economists and sociologists—that what produced the American Revolution of 1776 and the French Revolution of 1789 "was the fact that some new classes had won wealth and economic power and they wanted political recognition. To get it they had to invent some new 'great principles' to justify their revolt against tradition. That is the way in which all 'great principles' are produced." *Folkways*, c. 4, 165 (1913). This is an oversimplification which accepts such words as 'classes,' 'wealth,' 'economic power,' and 'politics' as finalities, whereas these are forms by which individuals have acted. The science of the future must concern itself with the mental processes which give rise to such group classifications and with the underlying causes which give rise to such oversimplifications. Both of the Revolutions Sumner speaks of had their origins in deep psychological processes. To mention one factor, the pioneer atmosphere of America and the presence of the individualistic Indian tribes combined with the Anglo-Saxon mind, long trained in the struggle for liberty, to produce a dynamic revolutionary point of view. Much of this found its way into France and then found its way back to a fearful America which had already had one revolution.

The existence of underlying psychodynamic components of the concept of "property" is suggested when we find Justice Oliver Wendell Holmes using the indeterminate word "faith" to describe what is beneath it in *Dupont v. Maisland*; "The word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith." 244 U. S. 100 at 102, 37 S. Ct. 575 (1917).

Anthropologists have emphasized the extent to which primitive man depends on luck and the extent to which he attempts to entice luck to act in his favor. Robert R. Marrett prefers to emphasize the element of faith which in hunting or fishing counts far more than skill or anything else. Anthropology, 2 *Encyclopaedia Britannica*, 14th ed., 41 at 45 (1932). The important fact to notice in this viewpoint is that here, as in law, there is an underlying element which is dealt with only linguistically. The accident theory of history, the hunch theory of law, the flash of genius doctrine in patent law, the intuition theory wherever found, are all related to the primitive method. It is customary, as Justice Holmes did in his definition of property in trade-marks, to stop with faith, whether it be good or bad faith.

6 Cranch (10 U.S.) 87 at 135 (1810).
Saunders we find Johnson in basic agreement with Marshall, saying of the same provisions which Marshall characterized as a Bill of Rights: "By classing bills of attainder, \textit{ex post facto} laws, and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, \textit{whether of person or of property}." Here, certainly, Johnson was in agreement that some limitation on the power of the states over persons was provided in the Constitution.

We discern here no dynamic difference in principle between Marshall's view in \textit{Fletcher v. Peck} and Johnson's statement just quoted. Indeed, in \textit{principle} Johnson was a more outspoken opponent of retroactivity as to property or personal rights than Marshall. If a contract was found to be impaired, one would, therefore, justifiably expect Johnson to favor the imposition of the restraint which the Constitution required. Marshall and Johnson both recognized property rights and personal rights as human rights. Johnson differed only in the interpretation of the meaning of the words "impairing the obligation of contracts." Where Marshall would readily find an impairment Johnson in practice would hesitate. But once Johnson discovered the obligation, the contract and the impairment, he applied the constitutional restraint without hesitation. The difference of approach was perhaps most clear in his detection of the positive purpose of government as extending beyond the mere negative conception of a restraint on human action. He was a jurist far in advance of his day because he saw in the contract clause a problem of \textit{differentiation} and not merely one of exclusion.

By projecting backward present habits of mind—a common and distorting error—the contemporary historian and jurist is too often tempted to belittle Marshall's firm insistence on the protection of individual freedom as a worthy and necessary aim and achievement. It is true that he surveyed the problem in a narrower compass than we are accustomed today, since he stressed the certainties, the absolutes and the authoritative. His principal concern on the surface seems to have been the logical problem of solving opposites where "the judge feels a clear and strong conviction of their incompatibility with each other." To say that he was more absorbed in property than in human liberty is to ignore the fact that he spoke out strongly for human rights.

\footnote{12 Wheat. (25 U.S.) 212 at 285 (1827). (Italics of words "whether of person or property" are by the writer.)}

\footnote{6 Cranch (10 U.S.) 87 at 128 (1810).}
as he saw them. That he felt that human liberty was to be achieved by restraints rather than by understanding and the diffusion of the knowledge of the dynamic bases of human behavior is understandable even when we look about the world today. Then, as today, it was the prevailing view that all that men required was to erect legal fortresses "to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed." 58 Marshall's jurisprudence was adapted to the problem before him but he used the well known logical methods of his day. Exclusions were required, according to his way of thinking, not only as instruments of adaptation but because the past had already spoken. Yet, in this very opinion, he reveals again his own inner lack of confidence in his finalities, for he saw the difficulty in determining "how far the power of giving the law may involve every other power, in cases where the constitution is silent," and concluded that this "never has been, and perhaps never can be, definitely stated." 59

IV

JOHNSON'S MODEL SEPARATE OPINION IN FLETCHER v. PECK: THE BEGINNING OF MODERN CONSTITUTIONAL JURISPRUDENCE.

A. A Warning Against the Announcement of Principle of Judicial Exclusion of Legislative Experience

Justice Johnson filed a concurring opinion in *Fletcher v. Peck* which most writers have termed a dissent. 60 It was bold and psy-

58 Id. at 138.
59 Id. at 136. (Italics the writer's.)

George Van Santvoord goes too far in his characterization of Marshall's thinking in his dissent in *Ogden v. Saunders*: "The dissenting opinion of the Chief Justice on this question of the constitutionality of State insolvent laws, is distinguished by his usual clearness, directness, and logical vigor. Like his previous opinions in the Dartmouth College case, and in *Sturgess v. Crowninshield*, and, indeed, it may be said like all his opinions on constitutional law, it is purely an effort of ratiocination—a piece of simple, logical reasoning and deduction—unsustained by precedent and authority, unaided by analogies, almost severe and hard in its rigid rejection of illustration and ornament. The reasons of Marshall were the suggestive inferences of his own mind; his manner of expression was the natural result of the mode he adopted in the investigation of the subject before him. He was in the constant habit of interpreting the Constitution by itself, of reading it by the steady torch of his own reason, of bringing to bear upon it the illumination of his own clear and strong intellect, of studying it, not in isolated portions and detached sentences, but as a whole." Van Santvoord, *Sketches of the Lives and Judicial Services of the Chief Justices of the Supreme Court of the United States* 401 (1854).

60 DILLON, JOHN MARSHALL, COMPLETE CONSTITUTIONAL DECISIONS 216, note (1903). It was referred to as "an acute" dissenting opinion in *Joseph P. Cotton, The Constitutional Decisions of John Marshall* 231 (1905); Beveridge rather
chologically sound and, in the light of future events, prophetic. In modern terminology, it could be called Johnson's trial balloon, his try for a jurisprudence which was to be based upon evidence rather than unsupported conviction, facts rather than unproven assumptions handed down from a superstitious past. This may help to explain what Morgan has called "the riddle of his [Johnson's] career," and Johnson's silence while the majority molded the contract clause "into a formidable barrier to state action." However, it would be expecting much of a lone dissenter in those days to force an issue which would virtually change the very methods of thinking which were so much a part of the judicial system. The task of interpreting the Constitution along new paths could not be an easy one. When we recognize the arduousness of the road which Marshall had to traverse and his reluctance in critical situations, even while he followed the traditional common law method, we can better understand Johnson's hesitancy. Nor was Johnson, as we have already seen, without inner fears and anxieties as is often the case with one who seeks to be creative in the face of the fixed ideas of a preponderant society. Psychological inhibitions are more appropriately the subject for study than for retroactive condemnation.

In his brief concurring opinion Johnson first declared, in agreement with Marshall, that he did "not hesitate to declare that a state does not possess the power of revoking its own grants." This could have disposed of the case. He struck immediately to the heart of the problem. "A contrary opinion," he added, "can only be maintained vaguely says, "Thus far the opinion was unanimous. As to the Indian title, Justice Johnson dissented." 3 BEVERIDGE, THE LIFE OF JOHN MARSHALL 591, 592 (1919); also Hale, "The Supreme Court and the Contract Clause: III," 57 HARV. L. REV. 852 at 873 (1944).


62 See note 181, infra and text.

63 6 Cranch (10 U.S.) 87 at 143 (1810). See id. at 132 where Marshall said: "The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice."

64 "... On any of three grounds Marshall might easily have disposed of this case before coming to the principal question. In the first place, it was palpably a moot case; that is to say, it was to the interest of the opposing parties to have the rescinding act set aside. The Court would not today take jurisdiction of such a case, but Marshall does not even suggest such a solution of the question, though Justice Johnson does in his concurring opinion." EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 151 (1919); also HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, 309 at 321 (1944).
upon the ground, that no existing legislature can abridge the powers of those which will succeed it. To a certain extent, this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil." 65 After discussing questions of sovereignty and jurisdiction as related to ownership over property, Johnson went on, with an insight into the problems of government which we can appreciate best now after having gone through the changes of recent decades: 66

"I have thrown out these ideas, that I may have it distinctly understood, that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification had not been adopted in that article of the constitution. There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures. Whether the words, 'acts impairing the obligation of contracts,' can be construed to have the same force as must have been given to the words 'obligation and effect of contracts,' is the difficulty in my mind.

"There can be no solid objection to adopting the technical definition of the word 'contract,' given by Blackstone. The etymology, the classical signification, and the civil law idea of the word, will all support it. But the difficulty arises on the word 'obligation,' which certainly imports an existing moral or physical necessity. Now, a grant or conveyance by no means necessarily implies the continuance of an obligation, beyond the moment of executing it. It is most generally but the consummation of a contract, is functus officio the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

"I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and

65 6 Cranch (10 U.S.) 87 at 143 (1810).
66 Id. at 143-144. (Italics the writer's.)
most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet *where to draw the line*, or how to define or limit the words ‘obligation of contracts,’ will be found a subject of extreme difficulty.

“To give it the general effect of a restriction of the state powers in favor of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of every individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.”

Morgan, after commenting on the “tardiness” of Johnson’s resistance and his acquiescence in silence in three important decisions in the next decade wherein the contract clause 67 was involved, goes on to say that “in the *Fletcher* case alone, did he express himself and there with ambiguity.” 68 While it is true that Johnson did not elaborate, particularly in the early part of the opinion, his caustic criticism of the draftsmanship of the contract clause, which he regretted had not been put in words of “less equivocal signification,” would itself indicate a strong aversion for ambiguity. 69 In its two main features, both of them of telling importance, Johnson’s opinion speaks with clarity and vigor. First of all, he calls attention to the fact—and for the first time in the history of the Supreme Court—that there were certain acts of the legislature which could not have been intended to be affected by the constitutional provision against impairment of the obligation of contracts. This was an outspoken questioning of the legalistic theory that impairment was an insulated logical problem. But more significant is his warning against a general restriction of state power which would go “very far beyond the obvious and necessary import of the words.” Here is clearly stated the keynote of all of his thinking on constitutional law. Whether it was the federal government or the individual state which was at a particular time affected, the capacity of the state to function adequately was not to


68 Id at 352.

69 Johnson, in a number of his opinions, insisted upon the unequivocal where possible. This has been pointed out in an earlier article by the writer.
be restricted by the narrow meaning of the words used. Marshall's opinion was threatening the scope of the function of the individual states. And, while there has been a considerable reversion to the conception of "states' rights" recently as an attempt to check the trend toward the extension of federal function, it must not be forgotten that *Muller v. Oregon* in a real sense gave back to the individual states what Johnson feared was to be taken from them, viz., their ability to function well as local units of government. The dynamic purpose of this focusing of attention upon the import of the words used was to suggest a freedom of perspective, and a broadening of the evidence base to permit of the adequate consideration of the actualities of government. This was needed in order to carry out the constitutional purpose. Nor can this be considered as a hindsight rationalization of Johnson's position. His tenure on the bench produced instance after instance of the same approach.

**B. A Recognition of the Difficulty of "Drawing the Line": Comparison with Holmes**

It was in this opinion that Johnson first confessed himself to be confronted by the difficulty of drawing the line in constitutional questions, a difficulty which persisted even though the legislative acts appeared to be "within the most correct limits of legislative powers, and most-beneficially exercised." He saw in some of the reasoning of the majority opinion the adherence to a theoretical and logical conception as to what a legislature may or may not do in the face of the pressure of common experience which he later chose to characterize as "the common incidents of life." In opinions to follow he continued from time to time to point out that legal questions were questions of degree and questions of drawing the line.

Justice Holmes in recent years sounded this as the dynamic note in a new jurisprudence. Thus, we find Justice Holmes in our day at one point declaring that the boundary at which the conflicting interests balance "cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side." As early as 1871 Holmes had spoken of the tests which fall

“on one side or another of a line which no hand is skillful enough to draw” but which he insisted must be drawn.

Some time after Fletcher v. Peck, the difficulty of drawing a line led Johnson in The Nereide to pass the problem on to the legislature: “Where are we to draw the line? If a vessel is not to be armed, what is to amount to an exceptionable armament? It extends to an absolute and total privation of the right of arming a hostile ship. Resistance, and even capture, is lawful to any belligerent that is attacked . . . . I can very well conceive, that a case may occur, in which it may become the policy of this country to throw down the gauntlet to the world, and assert a different principle. But the policy of these states is submitted to the wisdom of the legislature, and I shall feel myself bound by other reasons, until the constitutional power shall decide what modifications it will prescribe to the exercise of any acknowledged neutral right . . . .” Again in Fullerton v. Bank of United States he remarked: “It is not easy to draw the line between the remedy and the right, where the remedy constitutes so important a part in the right . . . .” In Green v. Biddle, consistently with his previous declarations of fallibility, he said: “I acknowledge, that I cannot perceive where the line is to be drawn . . . .” In Craig v. Missouri the task seemed hopeless: “This is a case of a new impression, and intrinsic difficulty; and brings up questions of the most vital importance to the interests of this Union . . . . That the states have an unlimited power to effect the one, and are divested of power to do the other, are propositions equally unquestionable, but where to draw the discriminating line is the great difficulty. I fear it is an insuperable difficulty.” In the great case on the commerce clause, Gibbons v. Ogden, Johnson in his concurring opinion, demonstrated his capacity for mental differentiation where a question of conflict of state and federal power was necessarily involved, in these words: “It would be vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one, and the commercial powers of the other. In some points, they meet and blend, so as scarcely to admit of separation.” Nor was this a judicial pose, for we find evidences of

71 SHRIVER, HOLMES, HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 62 (1936). See also other examples, id. at 27, 28 and 29.
72 9 Cranch (13 U.S.) 388 (1815). (Italics the writer’s.)
73 Id. at 434.
74 1 Pet. (26 U.S.) 604 at 614 (1828). (Italics the writer’s.)
75 8 Wheat. (21 U.S.) 1 at 105 (1823). (Italics the writer’s.)
76 4 Pet. (29 U.S.) 410 at 438, 442 (1830). (Italics the writer’s.)
77 9 Wheat. (22 U.S.) 1 at 238 (1824). (Italics the writer’s.)
similar applications of Johnson’s thinking in his non-legal writings. In his *Life of Greene* the effect of a general principle, occupying his attention at the moment, he qualified with the addition that, "It is difficult to draw the line with precision, but in general it may be laid down..." 78

C. Recognition of Distinction of Degrees: Comparison with Holmes

The majority view of Johnson’s day and of the decades following left little room for anything which challenged a theoretically con­formative concept of constitutional law. How the Supreme Court settled constitutional questions in the intervening period between Justice Johnson and Justice Holmes is stated in the test expressed by Justice Woodbury in 1848 in a case which considered the question of impairment of the obligation of contracts under the Federal Constitution. The test, he insisted, was “not the extent of the violation of the contract, but the fact, that in truth its obligation is lessened, in however small a particular, and not merely altering or regulating the remedy alone.” 79 In other words, the diminution of the value of the contract was “not a question of degree, or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force.” 80

In *Green v. Biddle* in 1823 Mr. Justice Washington accurately stated the prevailing view on the impairment of the obligation of contracts which barred all consideration of degrees of application. “The objection to a law,” he wrote, “on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation.” 81 This method of solving constitutional questions was, it is not too improbable to assume, borrowed from the precedents in maritime insurance cases where any deviation of the vessel might avoid the policy on the theory that the risk was changed. While, as we shall see, Johnson recognized the propriety of a rule in insurance cases that

78 1 WILLIAM JOHNSON 184. (Italics the writer’s.)
79 Planters Bank v. Sharp, 6 How. (47 U.S.) 301 at 330 (1848). (Italics the writer’s.)
80 Id. at 327.
81 8 Wheat. (21 U.S.) 1 at 85 (1823). (Italics the writer’s.)
voluntary deviation without necessity did not allow of degrees he dis­

sented strongly when such "precise notions of the common law" were being applied to constitutional questions.

The name of Justice Holmes has been associated with the idea that law and legal process is a matter of degree. Holmes, for example, re­

jected the hard and fast aphorism of Chief Justice Marshall that "the power to tax is the power to destroy" with the statement that, "In those days it was not recognized as it is today that most of the distinct­
tions of the law are distinctions of degree." In Osborn v. Bank of The United States Marshall disposed of an argument as involving "a difference in degree, not in principle." But Johnson, in those very days, saw degrees where others wished to see only rigid absolutes. To illustrate, Johnson began his dissenting opinion in Green v. Biddle in Holmesian style, anachronistically speak­
ing. The question, he said, was one of "intrinsic difficulties . . . on which two minds may differ, without incurring the imputation of wilful or precipitate error"; and in reverse, departed from the prevailing view of Marshall and the majority when he discerned a law which

62 Maryland Insurance Co. v. Leroy, 7 Cranch (II U.S.) 26, 30 (1812).


Typical statements by Holmes on degree may be found in Haddock v. Haddock, 201 U.S. 562, 26 S.Ct. 525 (1905); Quaker City Cab Co. v. Penn, 277 U.S. 389, 48 S.Ct. 553 (1927). Also in SHRIVER, HOLMES, His BooK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 27 et seq. (1936). In Schlesinger v. Wisconsin, 270 U.S. 230 at 241, 46 S.Ct. 553 (1925), Justice Holmes declared that "the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall."

See discussions by the writer, "Does the Power to Tax Involve the Right to Destroy a Lawful Business?" 67 U.S. L. Rev. 448 and 512 (1933), particularly pages 452 and 453 where the writer discussed Marshall’s aphorism and his views on the taxing power in the light of the setting of logical thinking and abstract philosophy of that day. Also Mr. Justice Frankfurter’s opinion in Graves v. New York, 306 U.S. 466 at 489, 59 S.Ct. 595 (1939).

84 9 Wheat, (22 U.S.) 738 at 848 (1824). In the same case Johnson also said: "I will not undertake to define the limits within which the discretion of the legislature of the Union may range, in the adoption of measures for executing their constitutional powers. It is very possible, that in the choice of means as 'proper and necessary' to carry their powers into effect, they may have assumed a latitude not foreseen at the adoption of the constitution." Id. at 895.

65 8 Wheat. (21 U.S.) 1 at 94 (1823).

Jeremy Bentham often dwelt on the need of distinguishing between differences of degree and of kind. See BENTHAM, THE THEORY OF LEGISLATION 33, 47 and elsewhere (1931). "When a legislator studies the human heart," said Bentham about a century and a half ago, "when he makes provision for the different degrees, the different kinds of sensibility, by exceptions, limitations, and mitigations, these tempera­ments of power charm as a paternal condescension. It is the foundation of that approval which we give to the laws, under the names, a little vague it is true, of humanity,
“is, in degree, not in principle,” variant from other laws. He staunchly refused to subscribe to a method of interpretation which would bar all considerations of change. “I cannot admit, that it was ever the intention of the framers of this constitution, or of the parties to this compact, or of the United States, in sanctioning that compact, that Kentucky should be forever chained down to a state of hopeless imbecility—embroiled with a thousand minute discriminations drawn from the common law, refinements on mesne profits, set-offs, etc., appropriate to a state of society, and a state of property, having no analogy whatever to the actual state of things in Kentucky—and yet, no power on earth existing to repeal or to alter, or to effect those accommodations to the ever varying state of human things, which the necessities or improvements of society may require. . . . And if it be admitted, that the state of Kentucky might, in any one instance, have legislated as far as the state of Virginia might have legislated on the same subject, I acknowledge, that I cannot perceive where the line is to be drawn, so as to exclude the powers asserted under, at least, the first of the laws now under consideration.” Obviously, Johnson’s reference to a “thousand minute discriminations” was in part Johnson’s answer to Justice Washington and the majority, which held to the view that not only any impairment of a contract or deviation from a written document was void, but—what was of more stifling effect—construed material and immaterial deviations alike as impairments, and contrary to law. In The Atlanta Johnson indicated that he perceived size and proportion and number as only variants in degree from lesser things: “Thus, if it be unlawful to employ an armed belligerent carrier, then what proportion of armament or equipment will render it unlawful? Between one gun and one hundred, the difference is only in degree, not in principle; and if it is left to the courts of the belligerent to apply the exception to successive cases as they arise, it evidently becomes a destroying principle, which will soon consume the vitals of the rule. And the neutral will soon consider it as a snare, not a privilege.”

equity, adaptation, moderation, wisdom.” Id. 47. In J. W. Jones, Historical Introduction to the Study of Law 178 (1940), the author discusses Bentham and devotes a footnote to the matter of degree.

86 Id. at 101. (Italics the writer’s.)
87 Id. at 104-105. In his Life of Greene, Johnson said of a lawsuit in which Greene’s father had become involved that it “elicited all the abstruse learning on contingent remainders and executory devises.” 1 William Johnson 15 (1822). He was wary of the “delicate and magnified point” which might prove the destruction of a whole expedition. Id. 111.
88 3 Wheat. (16 U.S.) 409 at 426 (1818). It must not be assumed that there
Consideration of the Common Incidents of Life

A. Reappearance of the Original Thought of Fletcher v. Peck in "The Common Incidents of Life"

Johnson did not forget what he had said presciently in Fletcher v. Peck. In his opinion in Bank of Columbia v. Okely, where he spoke for the Court, we discover that what he had said earlier was more than a meteoric flash. The case involved the constitutionality of a summary process against the body and debt of the debtor, issued by the bank under a statute of Maryland which provided for the ripening of the action into a judgment unless issue was joined. The defendant argued that his right to a trial by jury as secured by the Constitution of the United States and the State of Maryland had been violated. Johnson acknowledged this to be a question "of the deepest interest; and if the complaint be well-founded, the claims of the citizen on the protection" of the court were "particularly strong." Since the provisions of the law were "in derogation of the ordinary principles of private rights" they "must be subjected to a strict construction..." If the law was unconstitutional in the State of Maryland, he maintained, it was void in the Supreme Court and went on to cite common instances as he had done in Fletcher v. Peck:

"Was this act void, as a law of Maryland? If it was, it must have become so, under the restrictions of the constitution of the state, or of the United States. What was the object of those restrictions? It could not have been to protect the citizen from his own acts, for it would then have operated as a restraint upon his rights; it must have been against the acts of others. But, to con-

were no other critics of the common law as practiced in America in Johnson's day. A sharp criticism of the common law appeared as a review of William Sampson, Dis- course in 19 North Am. Rev. 41 (1824). The writer of the review complained that the certainty of the law was "a phrase, which it is feared, will be scarcely intelligible to any but the initiated" and charged that the law was notoriously and "even pro-verbially uncertain." Id. 425.

89 4 Wheat. (17 U.S.) 235 (1819).

90 Id. at 240, 241-242. The old English statute-merchant was a form of acknowledgment from debtor to creditor who could invoke the issuance of an execution without the usual judicial process. The lot of the debtor in England had been a sorry one and required examination in the light of individual right under the democ ratic form of government. Some states still retain the procedure of confession of judgment on notes and other written documents in advance of maturity—a relic of the ancient oppressive practice of imprisonment for debt in modified form. Summary procedure in general has gained approval in recent years as a means of preventing abuses of the legal machinery.
stitute particular tribunals for the adjustment of controversies among them, to submit themselves to the exercise of summary remedies, or to temporary privation of rights of the deepest interest, are among the common incidents of life. Such are submissions to arbitration; such are stipulation bonds, forthcoming bonds, and contracts of service. And it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the law of the contract, that this remedy was given. . . . It is true, cases may be supposed, in which the policy of a country may set bounds to the relinquishment of private rights. And this court would ponder long, before it would sustain this action, if we could be persuaded, that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. But a power is reserved to the judges, to make such rules and orders, 'as that justice may be done'; and as the possession of judicial power imposes an obligation to exercise it, we flatter ourselves that in practice, the evils so eloquently dilated on by the counsel do not exist. . . . As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind was at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. With this explanation, there is nothing left to this individual to complain of. What he has lost; he has voluntarily relinquished, and the trial by jury is open to him, either to arrest the progress of the law, in the first instance or to obtain redress for oppression, if the power of the bank has been abused. The same answer is equally applicable to the argument founded on the third article of the Maryland constitution.91

This language dispels any notion that Johnson might not have been solicitous about private rights. It was the integration of the conflict of one private right with another, the right of the debtor and the right of the bank—and both in relation to the problem of government—which he held before his mind. Here the decision was in favor of the recognition of a harsh remedy but on another occasion it might be otherwise. This capacity for synthesis and its actual practice in the face of besetting obstacles is what distinguishes his judicial career.

The common incidents of life were part of what the judge's mind's eye had to consider. Magna Charta was meaningful to him as a pro-

91 Id. at 242 et seq.
tection of the individual against the arbitrary action of government rather than a restriction on the individual's right to act for himself. In the protection of individual right, the government was not restrained by "principles of private rights and distributive justice." This means that the underlying purpose of government to protect its citizens cannot be bargained away, and it enables us to understand better Johnson's conception of the impairment of the obligation of contract, and other views. In this sense the judiciary acts to help the state to protect the individual. This conception of the judicial function emanated from a judge who, early in our history, fought sincerely for personal independence, and the protection of the individual right! Here again is found the ambivalence of his thinking—so characteristic of all human behavior. The key to the understanding of his method in this case, as in others, is the comprehension of the nature of that inner resolution of emotions which gives rise to legal results. One writer who has studied some of these neglected psychological aspects of law-in-the-making, correctly remarked that, "Every opinion amounts to a confession." 92

B. Emergencies as Common Incidents

During the following year the case of Houston v. Moore93 came before the Court on a writ of error to the Supreme Court of Pennsylvania; wherein was drawn into question the effect of a state statute of 1814 enacting, among other things, that every non-commissioned officer and private of the militia who shall have neglected or refused to serve when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of the Congress of the United States, passed on the 28th of February, 1795. Houston, a private, enrolled in the Pennsylvania militia, neglected to march when ordered out by the governor pursuant to the requisition of the President. For this delinquency he was tried before a court-martial as a violator of the state statute, held guilty and sentenced to pay a fine.

The opinion of the Court, two justices dissenting, rendered by

92 Theodore Schroeder, "The Psychologic Study of Judicial Opinions," 6 CAL. L. REV. 89 at 94 (1917). This is very often true in literary works. Somerset Maugham has admitted that the first chapter of his book OF HUMAN BONDAGE was entirely autobiographical, although he did not himself realize how true this was. "Profiles," 20 THE NEW YORKER 28 at 29-30 (Jan. 6, 1945).

Charles J.V. Murphy and John Davenport in "The Lives of Winston Churchill," 18 LIFE 93 at 100 (May 21, 1945) have recalled Balfour's comment on Churchill's writings: "Between 1923 and 1929 he finished the five-volume WORLD CRISIS, that wonderful narrative of World War I which Lord Balfour acridly described as 'Winston's brilliant autobiography, disguised as a history of the universe.'"

93 5 Wheat. (18 U.S.) 1 (1820).
Justice Washington "after the most laborious examination of this delicate question," was that the state court-martial had a concurrent jurisdiction with the tribunal pointed out by the acts of Congress. Justice Johnson filed a concurring opinion. He declared that if Houston had any complaint it was between himself and his state government. He understood the exigencies of military life and realistically saw that the pressing need for action could be obscured by legalistic impediments. "To have paused on legal subtleties, with the enemy at her door, or to have shrunk from duty, under shelter of pretenses which she could remove, would have been equally inconsistent with her character for wisdom and for candor." These were the words of the man who was the biographer of a great soldier, chosen by him for his hero. As an historian of the American Revolution he undoubtedly recalled the difficulties encountered by Major General Nathanael Greene when confronted by aggressive and frustrating logic as an obstacle to his conduct of the war. When it was contended that "if the states cannot all legislate or adjudicate on the subject they may affect to aid, when their real object is nothing less than to embarrass the progress of the general government," he replied, "I acknowledge myself at a loss to imagine how this could ever be successfully attempted. Opposition, whether disguised or real, is the same thing." This uncanny capacity for piercing the veil of pretense was his outstanding trait, and likewise the source of much of his unhappiness.

Here again we find Johnson citing common instances and seeking to understand the usual or common circumstances of human behavior in a like situation: "The actual exercise of this concurrent right of punishing is familiar to every day's practice. The laws of the United States have made punishable in their courts many offenses which were, and still continue to be, punishable under the laws of the states. Witness the case of counterfeiting the current coin of the United States, under the act of April 21, 1806, in which the state right to punish for the offense is expressly recognized and preserved. Witness also the crime of robbing the mail on the highway, which is unquestionably cognizable as highway robbery under the state laws, although made punishable under those of the United States." Thus, again, Johnson tried to keep the door open to the admission of evidence which would throw light on the solution of the particular governmental and individual problem involved. The mere application of a precedent as such meant little to him except in the case of titles to property. What he

94 Id. at 46. (Italics the writer's.)
looked for rather was whether the precedent furnished a fact of human behavior by which the court might be guided.

At this stage of our analysis we may already conclude that Johnson would hardly have created a new legal category out of an emergency, or have gone to special pains to read reservations into contracts or to assume that "the reasonable exercise of the protective power of the State" must be read into all contracts, as Mr. Justice Hughes stated. Muller v. Oregon may not even have been necessary and certainly the distorted concept of police power would not have been; for, Johnson, while he would have recognized the finality of the mandate of the people as expressed in the Constitution, would have considered the factual surrounding circumstances, the common incidents of mankind, before he would have struck down the capacity of the state to function well. If there were an emergency it would be considered as part of the setting or context in which the language of the Constitution was to operate.

There is no function in fact for the theory of interpretation of the Constitution which would deal mainly with the resolution of crises by invoking emergency powers. It is true, as Mr. Frankfurter said before his appointment to the Supreme Court, that "the history of the Supreme Court would record fewer explosive periods if, from the beginning, there had been more continuous awareness of the rôle of the Court in the dynamic process of American society." However, "the healthy play of informed criticism" which he hoped for must call attention to his recent rejections of the very psychological factors which contribute so much to the production of these explosions, as well as to his conception of the law as in a large measure a compulsive system dealing with externals and not with the inner man. If history is to

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95 This question is raised by Home Building and Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231 (1934) which will be discussed later on in this article.

96 Frankfurter, Mr. Justice Holmes and the Supreme Court 3-4 (1939), quoted by Haines, The Role of the Supreme Court in American Government and Politics, fly-leaf. (Italics the writer's.) See also XI, A of text, infra. Mr. Felix Frankfurter then asked for "that healthy play of informed criticisms" of which the Supreme Court had been deprived.

The following passage recently appeared in the opinion of Mr. Justice Black in Bridges v. California, 314 U.S. 252 at 270, 62 S.Ct. 190 (1941). "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."
exclude knowledge about man, then may we, indeed, recall what Justice Holmes once wrote: "Frankfurter was quoted the other day for a suggestion that I might write a book about the law. I can think of a first sentence, but after that I should like to study and I doubt if I shall study any more." \(^{97}\)

Some, relying on *ex parte Milligan*, would interpret the Constitution so as to prevent its normal functioning in a situation of exigency. "No doctrine, involving more pernicious consequences, was ever invented by the wit of man," said the Court in that case, "than that any of its provisions can be suspended during any of the great exigencies of government." \(^{98}\) The strangeness of this viewpoint is that the very dealing with the exigency of government is considered a suspension of the Constitution. It presupposes an impotent Constitution, one which is unable to deal with serious and unprecedented situations or at the same time safeguard human rights in serious situations. Thus, the mind of the citizen and the function of the government are left opposing each other without guidance.

Benjamin Franklin, possessing the rare combination of a creative scientific mind and the capacity to assimilate facts with a high degree of objectivity, made the observation about the North American Indians that they were able to treat even an extraordinary fact as a fact. \(^{99}\) Civilized society has not been able to deal as yet with the condition which G. B. Shaw has so well described as that of "provoking revolutionary emergencies." Thus, it has been considered a breach of peace quite summarily to be dealt with for two persons to resort to self-help by engaging in fisticuffs on a main highway or to settle a line-fence dispute by the drawing of blood. But in world affairs or domestic affairs involving large groups of peoples there has been a passive acceptance of the ever-recurring cycle of repression followed by violent social eruptions taking the form of war or economic disturbances or other explosive actions.

Nevertheless, the knowledge which may serve to eradicate some of these violent is on the increase. Such occurrences need no longer be considered as finalities. An interesting example of the incomplete part which the legislative or judicial law plays in such situations is well illustrated by what has recently occurred in the management-labor conflict. The National Labor Relations Act and later the War Labor Board were provided to level off some of the inequalities in bargain-

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\(^{97}\) Letter to Mr. Wu, March 14, 1932, printed in SHRIVER, HOLMES, HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 206 (1936). (Italics the writer's.)

\(^{98}\) 4 Wall. (71 U.S.) 2, at 212 (1866).

\(^{99}\) VAN DOREN, BENJAMIN FRANKLIN 649 (1938).
ing between "capital" and "labor." Soon, however, labor, in some instances, became a more virulent opponent of these laws than management. Indeed, it looked for a while as if these acts for the amelioration of the condition of workingmen might be considered by "capital" as its bulwark of liberty. What happened is that these legal devices dealt with prohibitions and the mechanisms for settlement of disputes but the tensions of management and labor, greatly augmented by war conditions, were not taken into account. It is true that the law has, in the past, ignored "the inner man" because it knew little about him. But to state the law's failure as its final aim and function is, indeed, to slam the door shut on a troubled world.

When international peace is achieved the human mind will still remain and so will its tendencies. How to maintain peace, to prevent explosive upheavals, yet maintain individual liberty will require much training in the art of cooperative living and understanding of the effects which, if only repressed, will erupt again.

C. Application of The Common Incidents to Act of Congress

In his opinion in Osborn v. Bank of United States, Johnson resorted again to empirical illustration. Here he drew from the common incidents of life particular instances to support the necessary implication indicated, in order to permit of a proper scope for the exercise of some discretion by the Congress of the United States, just as he had recognized a similar need in the case of state legislatures in his opinion in Fletcher v. Peck:

"I will not undertake to define the limits within which the discretion of the legislature of the Union may range, in the adoption of measures for executing their constitutional powers. It is very possible, that in the choice of means as 'proper and necessary' to carry their powers into effect, they may have assumed a latitude not foreseen at the adoption of the constitution. For example, in order to collect a stamp duty, they have exercised a power over the general law of contracts; in order to secure a debt due the United States, they have controlled the state laws of estates of deceased persons and of insolvents' estates; in the distributions and the powers of individuals themselves, when insolvent, in the assignment of their own estates; in the exercise of various powers, they have taken jurisdiction over crimes which the state laws took cognizance of; and all this, being within the range of their discretion, is aloof from judicial control, while unaffectedly exercised for the purposes of the constitution. Nor, indeed, is there much to be alarmed at in it, while the same people who govern the states, can, where they will, control the legislature.
of the United States. Yet, certainly, there is one limit to this chain of implied powers, which must lie beyond the reach of legislative discretion. No one branch of the general government can new-model the constitutional structure of the other.”

VI

The Dynamics of Interpretation and Application

A. Ogden v. Saunders and the Opinion and Practice of Mankind

A few years later, in 1827, the Supreme Court was confronted with the difficult question of deciding on the validity of state insolvency laws, as well as the effect of a discharge under such laws on a debt due to a citizen of another state. In the case of Ogden v. Saunders, as Santvoord has pointed out, for the first time a majority differed with Chief Justice Marshall on a great constitutional question. Johnson and three other justices delivered separate opinions

In calling attention in Fletcher v. Peck to laws "affecting existing contracts" Johnson foretold by almost a century and a half the recent congressional legislation under the commerce clause. The legal basis for these laws is that Congress may enact laws which affect commerce as distinguished from the previous holdings and legislation which restricted laws to those only "directly" related to commerce. The distinction is made by the Court in Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982 (1939).


George Van Santvoord, Sketches of the Lives and Judicial Services of the Chief Justices 400-401 (1854): "The case differed from that of Sturges v. Crowninshield in two important particulars, namely, 1st, that in the former case the law acted on a contract which was made before its passage, and in the latter case the contract was entered into after the passage of the law; and, 2d, that the debt claimed to be discharged under the State law was due to a citizen of another State. The first question involved the consideration of the constitutionality of a State bankrupt law applied to contracts made after its passage; the second the very grave question whether the discharge, under such law, of a contract made with a citizen of another State, and where the certificate was actually pleaded in the courts of another State, was a valid discharge of the debt.

"It may be here remarked, that this is the only great constitutional question in which the majority of the court are known to have differed from the Chief Justice. Upon the question of the constitutionality of the insolvent act of New York four of the judges—Mr. Justice Washington, Mr. Justice Johnson, Mr. Justice Trimble, and Mr. Justice Thompson—delivered separate opinions in favor of the validity of the law, and the Chief Justice—with whom Justices Story and Duval concurred—delivered a dissenting opinion. Upon the second question, Mr. Justice Johnson united with the minority, holding that though a State might constitutionally pass a bankrupt insolvent act to operate upon future contracts and the rights of its own citizens, yet, that a discharge under such act was not a discharge of a debt due a citizen of another State. To the latter part of this proposition Justices Washington, Trimble, and Thompson dissented."
holding the act constitutional—Marshall dissented. In the second opinion delivered in the same case there was a realignment of the justices on the effect of the discharge in other states. Johnson voted with Marshall and the other dissenters to hold such discharge ineffective. Justices Washington, Trimble and Thompson who had voted with Johnson in favor of validity of the state law now held for giving the discharge universal effect. In both opinions Johnson maintained that the exclusive power of Congress over the relief of insolvent debtors was untenable. In this case, as in several others, Johnson contended strongly that the *ex post facto* provision of the Constitution be applied to civil contracts. For reasons which will appear as we proceed, we are unable to go as far as does Hale who concludes that if Johnson had prevailed “the *ex post facto* clause would have functioned much as the Fourteenth Amendment does in our time.” Johnson’s strong aversion to retroactive legislation would hardly sustain the view, however, that he believed in the absolute right of the state to impair contracts and would have probably called forth a strong dissent against the reasoning in some recent decisions in this direction.

Retroactivity as a psychological problem deals with the very origins of all mental processes. One could include in the study such seemingly diverse and opposing subjects as the impairment of contracts, vested

103 In a footnote, id. 400, Santvoord says as to Johnson’s opinion on the effect of the discharge:

“The published opinion of Judge Johnson has been since regarded as settling the law in respect to this question. In the case of Boyle vs. Zacharie and Turner, at the January term, 1832, Mr. Wirt inquired if the opinion of Mr. Justice Johnson had been adopted by the other judges, when Chief Justice Marshall said, ‘The Judges of this court, who were in a minority of the court upon the general question as to the constitutionality of State insolvent laws, concur in the opinion of Mr. Justice Johnson in the case of Ogden v. Saunders. That opinion is, therefore, to be deemed the opinion of the other judges who assented to that judgment, Whatever principles are established in that opinion, are to be considered no longer open for controversy, but the settled law of the court.’” 6 Peters’ Reports, 348.

“The same doctrine, as I have observed in a previous note, was recognized in the late case of Cook vs. Moffat, as a principle too well settled to be shaken, the present Chief-Justice, however, intimating his concurrence, if the question had been still open, in the views expressed by Justices Washington, Thompson, and Trimble.”

104 Johnson appended a note supporting this position in the case of Satterlee v. Mathewson, 2 Pet. (27 U.S.) 380 (1829). Whether or not he knew of the medieval practice of exhuming dead bodies and retrying them decades later for the purpose of *ex post facto* punishment and confiscation of property, there can be no question that he was conversant with the evil and saw neither legal, psychological or real basis of distinction. See also p. 92, supra. Voltaire’s brave struggle against such evils in France has been recorded in Hendrick W. Van Loon, TOLERANCE (1925).

rights, ancestor-worship amongst primitives and moderns, precedents, classicism, culpability or non-culpability for acts committed prior to the enactment of a law, provisions against evasion of taxes and numerous others. It also includes the whole question of the backward effect of legal decisions in ordinary litigation where it is assumed that the law is known in advance by the parties. It also touches the much discussed problem of “certainty,” which is another word for “precedent,” and many other mental phenomena. There is need to study the emotional need and effects of certainty with an objectivity which will deal with such data on non-partisan lines. It is already known that the effect is ambivalent. On the one hand it creates a condition of emotional security but on the other a fear and anxiety—often enormously excessive—almost equivalent to an astrological dependency upon direction from the outside. Thus, we may easily defeat the exercise of that very individuality which is the worthiest aim of democracy. These are but suggestions as to what may be considered if the psychodynamic aspects of such a question were considered.

Just as in *Houston v. Moore* he looked for guidance to the “actual exercise” of a right and “every day’s practice,” so here we find him replying in the same style to the argument that the prohibition upon the states, though not express, was to be inferred “from the grant to Congress to establish uniform laws on the subject of bankruptcies throughout the United States; and that this grant, standing in connection with the grant to establish a uniform rule of naturalization, which is, in its nature, exclusive, must receive a similar construction.”

This was his customary resort to reason and experience for aid in the solution of a constitutional problem:

“... the inference proposed to be deduced from this grant to congress, will be found much broader than the principle in which the deduction is claimed. For, in this, as in many other instances in the constitution, the grant implies only the right to assume and exercise a power over the subject. Why, then, should the state powers cease, before congress shall have acted upon the subject? or why should that be converted into a present and absolute relinquishment of power, which is, in its nature, merely potential, and dependent on the discretion of congress whether, and when, to enter on the exercise of a power that may supersede it?

“Let any one turn his eye back to the time when this grant was made, and say, if the situation of the people admitted of an abandonment of a power so familiar to the jurisprudence of every state; so universally sustained in its reasonable exercise, by the

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opinion and practice of mankind, and so vitally important to a people overwhelmed in debt, and urged to enterprise by the activity of mind that is generated by revolutions and free governments." 107

How reconcile his views, in this instance, as to the non-exclusive nature of federal power until exercised by Congress, and his insistence that as to commerce and navigation the power of Congress was exclusive? We defer the explanation of this seeming contrast until we have further dwelt upon Johnson's legal method. To the more anxious reader we may say at this point that the answer lies in seeing what Johnson understood to be vital and what he understood as incidental under our federal system.

B. Analogies from Private Law

Johnson's attention to the opinion and practice of mankind as a source of legal origins not only led him to consider private and public law as related but enabled him to understand dynamic similarities in what others considered seemingly unrelated spheres. Stewart, a contemporary, had ventured to predict that "they are to be the most successful statesmen, who, paying all due regard to past experience, search for rules of their conduct chiefly in the peculiar circumstances of their own times and in an enlightened anticipation of the future history of mankind." 108 Principles of construction, which had always given some effect to circumstances, and which were born out of the hard won experiences of the private aggressions of individuals, were available in the corpus juris of the common law—if they would only be applied with the same insight which led to their original declaration. Practical construction and contemporaneous construction were known to private law long before the adoption of the Constitution; therefore, to support the function of the states, he sought guidance in principles which had been long accepted in the field of private law. "With regard to the universal understanding of the American people on this subject, there cannot be two opinions. If ever contemporaneous exposition, and the clear understanding of the contracting parties, or of the legislating power (it is no matter in which light it be considered),

107 Id. at 276. Johnson, on another earlier occasion, expressed hope for a calm, candid discussion when "the tendency of opinions and measures shall be examined by the test of reason and experience; in minds resolved on deciding with impartial justice." He was speaking of Thomas Jefferson at the time, August 3, 1826. See Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 Mich. L. Rev. 497 at 512, note 115 (1944).

could be resorted to, as a means of expounding an instrument, the con­tinuing and unimpaired existence of this power in the states ought never to have been controverted.”

Johnson's learning was an active tool for an enlightened juris­prudence. There was little of the pedantic in it. While he recognized the departments of jurisprudence, he was less bound by them as un­communicating logical compartments. Practical considerations, con­veniences, objects, motives, context and even “universal” principles all had their part to play in his thinking processes. The words of the Con­stitution did not deal with “an evil in the abstract.” History was exam­ined by him not for the purpose of freezing the Constitution but to relate it to life and generally to support an active rather than a strangu­lated power. Short of any effort to “new-model” the Constitution every avenue of meaning was to be kept open. The following passage from *Ogden v. Saunders* is typical:

“When considering the first question in this cause, I took occasion to remark on the evidence of contemporaneous exposition *deducible from well-known facts*. Every candid mind will admit, that this is a very different thing from contending that the fre­quent repetition of wrong will create a right. It proceeds upon the presumption, that the contemporaries of the constitution have claims to our deference, on the question of right, because they had the best opportunities of informing themselves of the under­standing of the framers of the constitution, and of the sense put upon it by the people, when it was adopted by them; and in this point of view, it is obvious, that the consideration bears as strongly upon the second point in the cause as on the first. For, had there been any possible ground to think otherwise, who could suppose that such men, and so many of them, acting under the most solemn oath and generally acting rather under a feeling of jealousy of the power of the general government than otherwise, would universally have acted upon the conviction, that the power to revive insolvents by a discharge from the debt, had not been taken from the states, by the article prohibiting the violation of contracts? The whole history of the times up to a time subsequent to the repeal of the bankrupt law, indicates a settled knowledge of the contrary.”

109 12 Wheat. 213 at 277 (1827). But see ante where, in Green v. Biddle, Johnson spoke of the intrinsic difficulty on which two minds may differ.

110 Id. at 280.

111 12 Wheat. (25 U.S.) 213 at 290 (1827). (Italics the writer's.)

Mr. Justice Louis D. Brandeis, in our day, has with greater determination than any other justice stressed the significance of fact in every case. In his dissent in *Adams v. Tanner*, 244 U.S. 590 at 600, 37 S.Ct. 622 (1917), he said: “Whether
In *Craig v. Missouri*\(^{112}\) Johnson declared that the end and object would furnish the definition. And a reason is suggested in *Littlepage v. Fowler* where he revealed his sensitivity to "the chaos of rights in which political relations may involve people." Language to educated men was one thing, and to the unwary and illiterate, yet another. In construing an entry upon land he also did not lose sight of the dynamic: "We have examined those cases, and are satisfied, that neither party is supported in his doctrine, as a universal principle; but that the courts of Kentucky, with that good sense which uniformly distinguishes their efforts to extricate themselves from that chaos of rights, in which political relations, and inveterate practice, had involved them, have left each case to be governed by its own merits, wherever distance has been resorted to as the means of identifying a locative call. And certainly, the sense in which the enterer uses the reference to distance, is the only general rule that can govern a court in construing an entry. That sense may be gathered from his language, or inferred from the habits of men, and the state of the country; but, as he is responsible for the sufficiency of his entry, it would be unfair to impose an arbitrary and unusual meaning upon the language of unlettered men, exploring a country covered with thickets, and replete with dangers."\(^{113}\)

**C. Right of Litigant to Challenge Finality of Private Contract**

None of the mental productions of man are self-executing and they may not entirely shut out all considerations of past, contemporaneous and subsequent events; and this had long been recognized in the common law. Every defense to a contract, whether it be to its contemporaneous meaning or to its effect, is a challenge to its finality as a functional agreement. Every effort to introduce oral testimony to explain a contract is a questioning of the contention of one party by the other. Every effect given to an agreement may differ with the differing facts. Every effort to identify what horse is sold in a simple contract of sale of a horse is an effort to give effect to a contract, where

a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law... The sole purpose of the enquiries is to enable this court to decide, whether, in view of the facts, actual or possible, the action of the state of Washington was so clearly arbitrary or so unreasonable, that it could not be taken 'by a free government without a violation of fundamental rights.'"

\(^{112}\) 4 Pet. (29 U.S.) 410 (1830).

\(^{113}\) *Littlepage v. Fowler*, 11 Wheat. (24 U.S.) 215 at 218 (1827). (Italics the writer's.)
finality is out of the question without identification. Yet, as simple as these conclusions may seem, they do not find so willing an ear when the same conceptions are attempted to be applied to a constitution or statute. But Johnson saw no real difference in dynamic origins, and time has borne him out. Today, relativity in the physical sciences is accepted as an inevitable scientific fact; but some students of jurisprudence decry an effort by anyone to assert that man's own creations in the form of communications could be anything but final and absolute. In private relationships between man and man the right to challenge the finality of a contract made with another, to breach it and defend against it, and thus to maintain its relative and functional effect, is considered by the most unchangeable members of society the essence of constitutional right. But when this all-pervading practice is recognized in the exercise of the governmental function the doctrine of *stare decisis* seems to these very same persons as an infallible guide to conduct and a magical token of security. Accordingly, not only Johnson's insight but his intellectual courage must be recognized in a passage such as this one taken from *Ogden v. Saunders*:

"Right and obligation are considered by all ethical writers as correlative terms. Whatever I, by my contract, give another a right to require of me, I, by that act, lay myself under an obligation to yield or bestow. The obligations of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society, and an advanced state of society, in which I will undertake to say, that all the contracts of men receive a relative, and not a positive interpretation: for the rights of all must be held and enjoyed in subserviency to the good of the whole." 114

(To be concluded in the October issue)

114 12 Wheat. (25 U.S.) 213 at 282 (1827). (Italics the writer's.) Some writers on jurisprudence have recently written with much sharpness as if the Constitution of the United States forbid all progress in the study of human behavior and as if the fact of relativity had been invented by Dr. Albert Einstein. Elsewhere, we have suggested that at the time the Constitution was adopted there were well-known schools of thought which were attempting to demonstrate the relativity of our thinking in an effort to break down the walls of the isolated fortresses of pure metaphysics and mental refinement. See Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 Mich. L. Rev. 497 at 538 (1944).