The Doctrine of the Supremacy of the Supreme Court

Hugh E. Willis

Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Courts Commons, and the Judges Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol6/iss4/2
THE DOCTRINE OF THE SUPREMACY OF THE SUPREME COURT

HUGH E. WILLIS*

What is meant by the doctrine of the supremacy of the Supreme Court? The United States Constitution, partly as a result of the work of the framers of the Constitution in the Constitutional Convention, partly as a result of amendments, and partly as a result of the work of the framers of the Constitution who have sat upon the United States Supreme Court, like most state constitutions, has established the doctrines of the sovereignty of the people, the amendability of the Constitution, the separation of governmental powers, a dual form of government, the protection of certain historical forms of personal liberty against social control, universal citizenship and suffrage, and the supremacy of the Supreme Court. In other words, the sovereign people, through a constitution, have established a framework of government based upon the doctrine of a dual form of government and the separation of governmental powers within each branch of the dual form of government, have enumerated the powers therein delegated to the various agencies of government, have prescribed the limitations imposed upon those agencies of government so as to protect personal liberty against social control, have provided for a change of the Constitution itself through the process of amendment, have fixed the political status of the citizens in whom resides the sovereign power, and have selected the power to uphold the Constitution and all of its doctrines. Neither the Constitution nor any of the doctrines found in it can compel obedience to themselves. Yet each and all of these doctrines are likely to be violated. Hence, authority must be given to someone, or someone must assume the authority, to uphold the Constitution and its doctrines, or all would cease to exist from the violations and disobedience which would occur. What agency under the United States constitutional scheme has the authority to uphold the Constitution? It is the United States Supreme Court. It is a doctrine of United States constitutional law that it is the peculiar function of the Supreme Court of the United States to uphold the Constitution of the United States; and that it is supreme,

* See biographical note, p. 260.
not only over the other branches of the federal government and the lower federal courts, but also over the state courts and the other branches of the state governments.\textsuperscript{1} That means that it is the function of the Supreme Court of the United States to define and maintain the doctrine of the sovereignty of the people,\textsuperscript{2} the doctrine of the amendability of the Constitution,\textsuperscript{3} the doctrine of a dual form of government,\textsuperscript{4} the doctrine of the separation of governmental powers,\textsuperscript{5} the doctrine that certain forms of personal liberty are protected against social control by any branch of the government,\textsuperscript{6} the doctrine of universal citizenship and suffrage,\textsuperscript{7} and the doctrine of the supremacy of the Supreme Court itself; and in exercising this function it has the power to set aside an act of Congress, or of the President, if in violation of the doctrine of separation of powers; to set aside an act of Congress, or of the President and an act of the state legislature, or of a state governor, if in violation of the doctrine of a dual form of government; to set aside an act of Congress, or of the President, of a state legislature, or of the governor, and of any other officers of government, if in violation of the guaranties in the Constitution for the protection of personal liberty against social control; and in the same way to set aside acts of any of the branches of either the national or state governments if in violation of the doctrines of the sovereignty of the people as a whole, the amendability of the Constitution, universal citizenship and suffrage, and the supremacy of the Supreme Court. This is the doctrine of the supremacy of the Supreme Court.

How did the Supreme Court obtain this theocratic overlordship? The only honest answer which can be given is that the Supreme Court usurped the power. The formal Constitution is silent upon this subject. It did not provide any person, or body, to uphold the Constitution. The Supreme Court itself, however, has supplied this omission by itself assuming the authority. It

\textsuperscript{1} 43 Harv. L. Rev. 343; Hendron, The Chief Justice of the United States, 8 N. Car. L. Rev. 404.
\textsuperscript{2} United States Constitution, Preamble.
\textsuperscript{3} United States Constitution, Article V.
\textsuperscript{4} United States Constitution, Article I.
\textsuperscript{5} United States Constitution, Articles I, II, III.
\textsuperscript{6} United States Constitution, Article I, Secs. 9, 10; Art. III, Sec. 3; Art. IV, Secs. 1, 2; Art. VI; Amendments 1-16, 18, 19.
\textsuperscript{7} Amendments, 14, 15, 19.
was such an appropriate and natural thing for the Supreme Court to do, the Supreme Court has exercised its authority so wisely, and so many leaders of constitutional law have assumed this would happen, it has been argued that the Supreme Court is not a usurper but a grantee of this power. But the fact that the formal Constitution is silent upon the subject and does not confer this power upon the Supreme Court is decisive on the question of whether or not the power was given to the Supreme Court or taken by the Supreme Court.

What is the explanation for the fact that the Supreme Court both has come to exercise and has been permitted by the sovereign people to continue to exercise this power?

1. One reason for the fact that the Supreme Court finally took this power to itself was the colonial practice. The colonial courts and on appeal the Privy Council of England had the power to declare legislative acts void if in conflict with colonial charters. The colonists consequently acquired the habit of seeing colonial laws occasionally declared void by the courts. Hence, upon the adoption of state constitutions it was the natural thing for the state courts tacitly to assume the function of interpreting the new state constitutions, and judges in the states of New Jersey, New York, and Rhode Island rendered decisions declaring legislative acts unconstitutional because in violation of their constitutions, and this action was generally acquiesced in, though not without some opposition. This accustomed the people of the new country to the supremacy of the judiciary over the legislative branch of government.

2. Another reason why the Supreme Court took to itself and kept this power was the experience under the Articles of Confederation. During the Revolutionary War a real federal appellate court was established in the Court of Appeals in cases of

---

8 Beard, *The Supreme Court—Usurper or Grantee*, 27 Pol. Sc. Q. 1, 84; Hughes, *The Supreme Court of the United States*, 78.

9 Of course the people could have taken the power usurped by the Supreme Court away from it at any time, and it might now be stated that because they have not done this but have permitted the Supreme Court to continue to exercise its power, they thereby have impliedly delegated to the Supreme Court the power to uphold all the constitutional doctrines of the Constitution and to be supreme over all of the other agencies of government, both national and state.

capture, and one hundred seventeen prize cases were decided by a standing committee of Congress and by this Court of Appeals. This practice acclimated the people of the United States to a federal tribunal superior to state tribunals.11

3. Another reason for the supremacy of the United States Supreme Court is found in Coke's celebrated dictum that there are certain fundamental principles of the common law which are paramount even to an act of Parliament. This dictum of Coke, announced in Dr. Bonham's case,12 was soon repudiated in England,13 but the doctrine found in Coke's dictum found fertile soil in the United States and sprouted into such a vigorous growth that it was applied by the United States Supreme Court in the decision of cases coming before it;14 and it has been said that the doctrine of the supremacy of the Supreme Court is the logical conclusion of Coke's doctrine of control of the courts over legislation. The acceptance of this doctrine, even if for a temporary period, made it practically necessary for the Supreme Court to uphold its supremacy over all other branches of government.15

4. Still another reason which paved the way for the Supreme Court to establish its own supremacy was the attitude of the leaders of the American Bar in the early history of our country. Hamilton thought that "the want of a judiciary power" was the crowning defect of the Confederation.16 Madison wrote to Washington in April, 1787, "The national supremacy ought also to be extended, as I conceive, to the judiciary departments."17 Wilson in his lectures at Philadelphia took the same position.18 In the conventions of the several states prominent leaders made the same contention. In Massachusetts, Samuel Adams said that if any law made by the federal government should be ex-

11 Hughes, op. cit. pps. 4-7; Potter, op. cit. p. 1, 167.
12 8 Co. Rep. 118a (1610).
15 Plucknett, Bonham's Case and Judicial Review, 40 Harv. L. Rev. 33.
tended beyond the power granted by the proposed constitution it
would be adjudged by the courts to be void.\textsuperscript{19} Ellsworth made
the same contention in Connecticut,\textsuperscript{20} and George Nicholas in
Virginia.\textsuperscript{21} The judiciary act of 1789 embodied the same idea
because it gave the state courts the power to pass on the validity
of acts of Congress and provided for a review by the Supreme
Court where the state court had held against their validity.\textsuperscript{22}
This attitude on the part of such representative men not only
familiarized the country but the subsequent justices of the Su-
preme Court with this method of rationalization.

5. But perhaps the chief reason for the Supreme Court's
establishing its own supremacy was the fact that it was the
appropriate and natural thing to do. It was not the natural and
appropriate thing because of a written constitution nor because
the judges are bound to take an oath to support the Constitu-
tion, as was suggested in the celebrated case of \textit{Marbury v.}
\textit{Madison},\textsuperscript{23} because in other countries which have written con-
stitutions the judiciary possesses no such power and because
the other officers of both the federal and state governments have
to take the same oath;\textsuperscript{24} nor because the Constitution, the laws
of the United States pursuant thereto and all treaties made
under its authority are the supreme law of the land, because
this affects the doctrine of a dual form of government, and it
might be reasoned that it is the function of Congress to uphold
the Constitution as much as it is the function of the Supreme
Court; but it is the natural and appropriate thing, because, first,
the limitations in the Constitution are mostly limitations upon
the executive and legislative branches of the government and
not upon the judiciary, and since a branch with such limitations
should not measure its own powers, it is appropriate for the ju-
diciary to do this; second, because the judiciary is the weakest
of the three departments, has no control over the sword or the
purse, and its members are less likely to be influenced by mo-
mentary passion; and third, because it is essentially a judicial
function to decide and to apply in a particular case what the
law is. The legislative branch of the government is bound by
the Constitution as much as the judicial. If the legislature

\textsuperscript{19} 2 Elliott’s Debates, 142.
\textsuperscript{20} 2 Elliott’s Debates, 198.
\textsuperscript{21} 3 Elliott’s Debates, 409.
\textsuperscript{22} Beard, The Supreme Court and the Constitution, 45.
\textsuperscript{23} 1 Cranch 137 (1803).
\textsuperscript{24} Thayer, Legal Essays, 2.
should pass a law in violation of the Constitution, as for example, a law abolishing the privilege of a jury trial, the courts in deciding what is the law and applying it in a particular case have no other alternative than to apply the law found in the Constitution rather than in the act of the legislature.\textsuperscript{25}

Because of the foregoing reasons, it was inevitable that the doctrine of the supremacy of the Supreme Court should be established. In the case of \textit{Van Horne's Lessee v. Dorrance},\textsuperscript{26} Justice Patterson at Circuit Court held a statute of Pennsylvania invalid as impairing the obligation of a contract, and in defending his position pointed out the difference between United States constitutional law and English constitutional law. In \textit{Ware v. Hylton}\textsuperscript{27} the Supreme Court of the United States decided that a statute of Virginia was invalid because of its repugnance to the provisions of the treaty of peace with Great Britain. In \textit{Martin v. Hunter's Lessee}\textsuperscript{28} the Supreme Court decided that Section 25 of the Judiciary Act was constitutional in giving the Supreme Court the power to review the judgments of state courts, and this power was even more firmly established by Chief Justice Marshall in the celebrated case of \textit{Cohens v. Virginia}.\textsuperscript{29} In the case of \textit{Fletcher v. Peck},\textsuperscript{30} Chief Justice Marshall finally and completely established the power of the Supreme Court to declare unconstitutional an act of a state legislature if in violation of the United States Constitution. In \textit{Hylton v. the United States}\textsuperscript{31} the Supreme Court upheld its power to declare an act of Congress unconstitutional if in violation of the Constitution, and this power was not at first attacked as the power of the Supreme Court over the agencies of the state governments had been attacked. Later, and especially by Jefferson, this power of the Supreme Court over the other branches of the federal government was attacked, but the question was settled for all time both so far as the legislative and so far as the executive branches of the government were concerned by Chief Justice Marshall in the case of \textit{Marbury v. Madison}\textsuperscript{32}.

\textsuperscript{25} \textit{Marbury v. Madison}, supra, note 23.
\textsuperscript{26} 2 Dall. 304 (1795).
\textsuperscript{27} 3 Dall. 199 (1796).
\textsuperscript{28} 1 Wheat. 304 (1816).
\textsuperscript{29} 6 Wheat. 264 (1821).
\textsuperscript{30} 6 Cranch 87 (1810).
\textsuperscript{31} 3 Dall. 171 (1796).
\textsuperscript{32} \textit{Supra}, note 23.
How has the doctrine, thus established, functioned in United States history? What has come to be the relation of the Supreme Court to the other branches of government? How has the Supreme Court upheld the Constitution?

To answer the above questions would require a separate law article on each one of the doctrines of constitutional law. The writer has already written such articles on some of the doctrines of constitutional law, and he hopes in the course of time to write such articles on all the rest of the doctrines. But it would not be appropriate to go into these doctrines so exhaustively in an article concerned merely with the doctrine of the supremacy of the Supreme Court. Hence, all that will be attempted in this article will be to epitomize the work of the Supreme Court so far as its work has had anything to do with the various doctrines of constitutional law. No attempt will be made to set forth all of the principles involved in each doctrine, nor to trace the historical development thereof.

Under the doctrine of the supremacy of the Supreme Court, what has the Supreme Court done in upholding the doctrine of popular sovereignty? The doctrine of popular sovereignty would seem to be established by the formal Constitution itself. Otherwise the language of the preamble in which it is said the people of the United States "establish this Constitution of the United States," the language of Articles I, II, III, and IV in which the people delegate various powers to the different agencies of government but at the same time put limitations upon the powers of these agencies of government, and the language of Article V in which provision is made for the amendment of the Constitution would all be meaningless; but many United States statesmen and philosophers, jurists, and political scientists have given and are still giving different explanations. Some have found sovereignty in the states; others in an oligarchy of the states; others in the Federal government; and others in the various organs of government. For this reason, it was necessary for the Supreme Court to decide the question for everybody. In doing this the Supreme Court defined sovereignty as the power which makes the law, or social control, and established the proposition that under the United States Constitution sovereignty resides in the people as a whole as politically organized in a dual form of government. This doctrine was first announced by the Supreme Court in the case of Chisholm v. Geor-
SUPREMACY OF THE SUPREME COURT

When Chief Justice Jay presided over that tribunal; continued to be the position of the United States Supreme Court through the time of Chief Justice Marshall; through the period after the Civil War; with the exception of certain dicta; and was finally and firmly established by the United States Supreme Court in the National Prohibition Cases, Hawke v. Smith, and Leser v. Garnett. Thus it would seem that the existence of the doctrine of the sovereignty of the people as a whole as one of the doctrines of constitutional law, as well as the meaning and application of the doctrine, are all due to the work of the United States Supreme Court.

What has been the work of the United States Supreme Court so far as concerns the doctrine of the amendability of the Constitution? A first reading of Article V of the Constitution seems to make it clear that the formal Constitution itself established the doctrine of the amendability of the Constitution. Yet the Constitution left many questions unsettled. The Constitution provides two methods for proposing amendments and two methods for adopting amendments to the Constitution; proposal of amendments by Congress or by convention and ratification by the the legislatures of or by conventions in the several states. But the Supreme Court had to decide that presidential approval and the approval of a governor were unnecessary, that Congress cannot control the method of ratification or the time of ratification, that the requirement of a referendum by a state is illegal, that ratification is a final act though rejection is not. State supreme courts have discovered and probably the United States Supreme Court would discover that there is an extra-legal method of amending the Constitution. The Con-

33 2 Dall. 419 (1793).
34 Marbury v. Madison, 1 Cranch 137 (1803); Fletcher v. Peck, 6 Cranch 87 (1810); McCullough v. Maryland, 4 Wheat. 316 (1819).
35 Lane County v. Oregon, 7 Wall. 71 (1868); White v. Hart, 13 Wall. 646 (1871).
36 253 U. S. 350 (1920).
37 253 U. S. 221 (1920).
38 258 U. S. 130 (1922).
40 Hollingsworth v. Virginia, 3 Dall. 378 (1798).
42 Hawke v. Smith, supra note 37.
43 Jamison, Constitutional Conventions (4th ed.) 624, 630.
44 Wood's Appeal, 75 Pa. 59 (1874).
stitution at the present time places only one express limitation upon the power of amendment, that against destroying the equal representation of the states; but it has been contended by eminent counsel and other authorities that there are implied limitations upon the amending power, that an amendment shall not be a new grant of power, that it shall not be in the form of legislation, that it shall not destroy the states or the nation, that it shall not destroy the police power of the states, and that it shall not modify the Bill of Rights. Those making this contention sometimes base their argument upon the Tenth Amendment, sometimes upon a natural law above the Constitution, and sometimes upon a false notion of sovereignty. The Supreme Court has held that the Fifth Article is subject to none of these implied limitations, that an amendment may contain a new grant of power, be in the form of legislation, destroy the states or the nation, abolish the police power of the states, change the Bill of Rights, and work any other change in the Constitution; because the doctrine of amendability of the Constitution is tied up with the doctrine of the sovereignty of the people, and because the doctrine of amendability of the Constitution is an absolute and independent doctrine not modified by any other provisions in the Constitution. The Tenth Amendment, the Supreme Court has held, makes no reference to Article V, and therefore does not reserve the amending power but only reserves the non-delegated powers. The agencies of the federal government are limited in power, but the amending power is unlimited except as to equality in the United States Senate, so that the provisions in the Bill of Rights and the later amendments are subject to the Fifth Article as much as the provisions in the original Constitution. Even the proviso as to equality in the United States Senate could be dispensed with by first repealing the clause or by the abolition of the Senate or by a destruction of the states. The Supreme Court destroyed forever the doctrine of a limitation on the amending power to be found in natural law when it established the doctrine of popular sovereignty. Hence, again, it is seen that while the Supreme Court is not responsible for the doctrine of the amendability of the Constitution, it has established or filled in most of the details in connection with that doctrine.

45 National Prohibition Cases, supra note 36; Leser v. Garnett, supra note 38.
Whether or not the formal Constitution of the United States established a dual form of government has been a matter of dispute. A reading of Articles One, Two, and Three, and the Tenth Amendment of the Constitution would lead to the inference that a dual form of government was thereby created. In Article One, there was expressly delegated to Congress the power to lay taxes, borrow money, regulate commerce, to establish uniform rules of naturalization, to establish uniform bankruptcy laws, coin money, punish counterfeiting, to establish post offices and post roads, to issue patents and copyrights, to constitute inferior federal courts, to punish offenses against the laws of nations, to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government of the land and naval forces, to call forth the militia, to provide for the discipline and government of the militia, to exercise exclusive jurisdiction over the District of Columbia and to make all laws necessary and proper for the carrying into execution of the powers named. In Article Two the treaty power was delegated to the President and Senate and other powers delegated to the President. In Article Three various powers were delegated to the Federal Courts. The Tenth Amendment provides that all powers not delegated to the United States nor prohibited to the states by the Constitution are reserved to the states or to the people. But many statesmen in the early history of our country did not accept the doctrine of a dual form of government. Any doubt upon the subject, however, was resolved by Chief Justice Marshall, who, in his celebrated opinions in the cases of McCullough v. Maryland and Gibbons v. Ogden, decided that our government was a dual form of government, a federation of nations, in which the sovereign people had delegated certain powers to the federal government and that any other powers were thereby still retained by the people or delegated by them to their state governments.

After the establishment of this doctrine of a dual form of government by John Marshall, the Supreme Court continued its work. In the first place, in defining and applying the express powers granted to the federal government it created most of

---


the law upon the subject. In the second place, in extending the
scope of the express powers of the federal government it en-
larged the powers of the federal government as against the
states. Thus the Supreme Court has extended the powers of the
Federal government under the interstate commerce clause until
it includes so much that it is a question whether or not the states
have any jurisdiction even over intrastate commerce so far as
concerns a number of important lines of business.\textsuperscript{49} The treaty
power has been extended so as to permit the federal govern-
ment to control many matters affecting the internal policies of
the states where Congress would have no power to so do.\textsuperscript{50}
The military power has been extended so as to make legal com-
pulsory military service\textsuperscript{51} and to give the federal government
the power almost completely to limit freedom of speech and the
press so far as concerns the government.\textsuperscript{52} In the third place,
the Supreme Court extended the power of the federal govern-
ment as against the states through the doctrine of implied
powers. The fathers of the original Constitution thought more
in terms of the abstract political theories of their day. The
justices of the Supreme Court have thought more in the terms
of economics. As a consequence, they have given more and
more powers to the federal government at the expense of the
states. In this way there has been implied the limitations that a
state cannot tax interstate commerce\textsuperscript{53} nor an instrumentality
of the federal government;\textsuperscript{54} and the power of the federal gov-
ernment to acquire and annex new territory,\textsuperscript{55} the power to
charter a national bank,\textsuperscript{56} and the power to issue legal tender
notes.\textsuperscript{57} The doctrine of the supremacy of the Supreme Court
still further increased the powers of the federal government as
against the states, and in exercising this power in questions in-

\textsuperscript{49} Minnesota Rate Cases, 230 U. S. 352 (1912); Shreveport Rate Cases,
\textsuperscript{50} Missouri v. Holland, 252 U. S. 416 (1920); Jordan v. Tashiro, 278
U. S. 123 (1928); Todok v. Union State Bank, 50 Sup. Ct. 363 (1930).
\textsuperscript{51} Selective Draft Law Cases, 245 U. S. 366; but see Black, Conscrip-
tion for Foreign Service, 60 Am. L. Rev. 206.
\textsuperscript{52} Willis, Freedom of Speech and the Press, 4 Ind. L. J. 445.
\textsuperscript{53} Philadelphia, etc., Co. v. Pennsylvania, 122 U. S. 326 (1887).
\textsuperscript{54} McCullough v. Maryland, supra note 47.
\textsuperscript{55} Downes v. Bidwell, 182 U. S. 244 (1901).
\textsuperscript{56} McCullough v. Maryland, supra note 47.
\textsuperscript{57} Legal Tender Cases, 12 Wall. 457 (1871); Juilliard v. Greenman, 110
U. S. 421 (1884).
volving our dual form of government the Supreme Court has favored the federal government instead of the states, not only in the respects heretofore referred to, but in the matter of taxation, eminent domain, and police powers. Recent amendments to the United States Constitution are still further illustrations of the taking away of powers from the states and delegating them to the federal government, but these changes in our form of government were accomplished by the sovereign people themselves instead of by the Supreme Court, except as the Supreme Court has interpreted the new amendments. As a result of the work of the Supreme Court the dual character of our form of government although formally established by Chief Justice Marshall as one of the doctrines of our constitutional law has undergone profound changes. It has not been entirely destroyed but the relative balance between the Federal government and the state governments is not now what it was at the time of the making of the original constitution.

It has been generally assumed that the formal Constitution impliedly established a separation of governmental powers, although the distribution of governmental powers to the three different departments of government was such as to create more of a doctrine of confusion of powers than a doctrine of separation of powers. But whatever the doctrine of separation of powers was at the time of the making of the original Constitution, the doctrine today is what the Supreme Court has made it, and it differs very materially from the doctrine as it was originally formulated. Today it is even more confused than it was at the time of the original Constitution. Each one of the different branches of government may delegate some of its powers to another branch. The legislature does this in the matter of local self government, the determination of conditions, the administration of standards. The executive branch of the government does this in delegating its powers to administrative heads. Each one of the branches of government has encroached upon the other. The legislative branch of the government is performing the executive function of making appointments, removals, investigating the executive, and exercising some of the

---

58 Willis, Our Dual Form of Government, 15 Ky. L. J. 175. However, it should be noted that the Supreme Court has not always favored the federal government. It has rendered at least twelve decisions which directly support the reserved powers of the state. Hughes, The Supreme Court of the U. S., pp. 91-93.
pardoning power; and is performing judicial functions in granting divorces, regulating legal procedure, the admission of attorneys to practice, the disbarment of attorneys, punishment for contempt, and impeachment. The judicial branch of the government is performing executive functions in making appointments, removals, mandamusing lower executive officers, suspending sentence, and setting aside pardons; and is performing legislative functions in enacting judicial legislation, setting aside treaties, and determining the happening of conditions. The executive branch of the government is performing judicial functions in fixing the term of imprisonment, pardoning for contempt of court, and adopting judicial procedure for the conduct of proceedings of boards and commissions; and is performing legislative functions in making treaties, deciding political questions, exercising the veto, governing new territory prior to Congressional action, fixing the rates of railroads and waging war. Yet we know now more about what the law upon the subject is than we have ever known before. It consequently may be said that so far as there is a true separation of powers and so far as the different branches of government are exercising powers which appropriately belong to other branches of the government and so far as the doctrines of separation of governmental powers has been a success, it is all due to the United States Supreme Court.\textsuperscript{59}

One of the largest and the most important doctrines established by the original Constitution was the doctrine that certain forms of personal liberty should be protected against social control. The constitutional line between personal liberty and social control is drawn in the Constitution in the following places: Article I, Sections 9 and 10; Article III, Section 3; Article IV, Sections 1 and 2; Article VI; and in all of the amendments except the seventeenth. This would seem to be enough to settle forever the boundaries of personal liberty and the boundaries of social control. But a student of constitutional law knows that this is not the case. By its interpretation of the constitutional guaranties of rights, powers, privileges and immunities to individuals, the Supreme Court has either narrowed or enlarged the protection afforded by the Constitution. It has generally narrowed the protection. Thus the guaranty of freedom of speech and the press has been narrowed so that it pro-

\textsuperscript{59} Willis, \textit{The Doctrine of the Separation of Governmental Powers} (to be published this year).
tects against very little besides censorship.\textsuperscript{60} The guaranty of religious freedom has been interpreted to give no protection against unsocial acts.\textsuperscript{61} The guaranty against self-crimination has been held to afford no protection against third degree work.\textsuperscript{62} The guaranty against unreasonable searches and seizures does not protect a person against search without a warrant after he has been legally arrested, nor the search of a place without a warrant where an arrest has been made, nor the search of an automobile without a warrant if it is on reasonable suspicion. But the courts have held that evidence illegally obtained by an unreasonable search is not legally admissible.\textsuperscript{63} The guaranty against slavery and involuntary servitude has been held not to prevent imprisonment for contempt or\textsuperscript{64} fraudulently jumping a board bill,\textsuperscript{65} compulsory work on the highways,\textsuperscript{66} imprisonment of a sailor on ship board,\textsuperscript{67} nor compulsory military training.\textsuperscript{68} The guaranty against impairing the obligation of a contract has been interpreted to be subject to the power of eminent domain\textsuperscript{69} and the police power.\textsuperscript{70} Finally the Supreme Court has extended the scope of the due process clause to matters of substance as well as procedure and thereby has made it cover not only its own ground but practically all the ground of the other guaranties; and, under this widened scope of the due process clause, has practically arrogated to itself the function of drawing the line between personal liberty and social control, because it has taken the position that whether or not any social control is due process of law depends upon whether or not it is reasonable, and whether or not it is reasonable depends upon the decision of the justices of the

\textsuperscript{60} Gitlow v. People of New York, 268 U. S. 652 (1925); Willis, Freedom of Speech and the Press, 4 Ind. L. Jour. 445.

\textsuperscript{61} Reynolds v. the United States, 98 U. S. 145 (1878).

\textsuperscript{62} Irvine, The Third Degree and the Privilege Against Self-Crimination, 13 Cornell L. Q. 211.

\textsuperscript{63} Willis, Unreasonable Searches and Seizures, 4 Ind. L. Jour. 311.

\textsuperscript{64} Martin v. Blattner, 68 Iowa 286 (1885).

\textsuperscript{65} In re Dassler, 35 Kans. 678 (1886); Clark v. State of Indiana, 171 Ind 104 (1908).

\textsuperscript{66} Butler v. Perry, 240 U. S. 328 (1916).

\textsuperscript{67} Robertson v. Baldwin, 165 U. S. 275 (1897).

\textsuperscript{68} Selective Draft Law Cases, 245 U. S. 306 (1918).

\textsuperscript{69} Long Island Water Supply Company v. Brooklyn, 166 U. S. 685 (1897).

Supreme Court. In drawing the line between personal liberty and social control under this last power the Supreme Court has seemed to favor personal liberty more than social control. Thus, it has held that a state cannot pass an eight-hour day law for men;\(^7^2\) that a state cannot require the English language in schools;\(^7^3\) that a state cannot abolish the remedy of injunction in labor disputes;\(^7^4\) that a business cannot be made a public calling by legislative declaration;\(^7^5\) that a state's powers over foreign corporations is limited;\(^7^6\) that Congress cannot pass a minimum wage law;\(^7^7\) and that Congress cannot pass a child labor law.\(^7^8\) What we have said sufficiently shows that the doctrine that personal liberty of many kinds should be protected against social control has been almost entirely made over by the Supreme Court, and is now just what the Supreme Court has made it.

The doctrine of universal citizenship and suffrage was so thoroughly established as a doctrine of United States constitutional law by the 14th, 15th and 19th amendments that it would seem very little was left for the Supreme Court to do towards the development of this doctrine. Yet it was not until the decision of the United States Supreme Court in the case of United States v. Wong Kim Ark\(^7^9\) that it was known that the basis of citizenship in the United States was the English rule of birth within the allegiance rather than the Roman law rule that the citizenship of the child followed that of the parent; and that it included the citizenship of free negroes;\(^8^0\) and it was not until the case of Weedin v. Chin Bow\(^8^1\) that it was known a child born out of the United States of citizens who had never resided

\(^7^1\) Willis, Due Process of Law Under the United States Constitution, 74 U. of Pa. L. Rev. 331.
\(^7^3\) Meyer v. Nebraska, 262 U. S. 390 (1923).
\(^7^4\) Truax v. Corrigan, 257 U. S. 312 (1921).
\(^7^5\) Frost Trucking Co. v. R. R. Commission of Cal., 271 U. S. 583 (1926).
\(^7^6\) Kentucky Finance Corp. v. Paramount Auto Corp., 262 U. S. 544 (1923).
\(^7^7\) Adkins v. Children's Hospital, 261 U. S. 525 (1923).
\(^7^8\) Hammer v. Dagenhart, 247 U. S. 251 (1918); Bailey v. Drexel Furn.
\(^7^9\) 169 U. S. 649 (1898).
\(^8^0\) The effect of this holding was to overrule the decision in the case of
Dred Scott v. Sandford, 19 How. 393 (1857).
\(^8^1\) 274 U. S. 667 (1927); 6 Tex. L. Rev. 218.
in the United States was not a citizen; and it was not until the case of *In re Lam Mow*\(^8\) that it was known a child born of foreign parents on a United States steamship was not a United States citizen. While the 14th Amendment did not make suffrage a privilege of United States citizenship, of course the 15th and 19th Amendments gave the colored people and women an immunity against the denial of their privilege of voting on account of race or sex. Yet the Supreme Court has held that these provisions of the Constitution do not prohibit educational and other qualifications for voting, provided they are not discriminatory,\(^8\) nor the disfranchisement of a class by political parties.\(^8\) At first the Supreme Court held that the United States had no jurisdiction over primary elections,\(^8\) but later the Supreme Court reversed itself on this point.\(^8\) While citizenship by naturalization seems to be a power given to Congress, yet it remained for the United States Supreme Court to decide that a pacifist could not enter the door of citizenship through naturalization.\(^8\)

Finally, of course, the Supreme Court has performed an important function in connection with the doctrine of its own supremacy. This is a doctrine entirely originated and created by the Supreme Court, and in upholding and applying this doctrine the Supreme Court has done all of the things with reference to the other doctrines of constitutional law which have been heretofore set forth, and has established its supremacy over the other departments of the federal government and all the departments of the state governments. In exercising this supra authority the Supreme Court does not, except sometimes in applying the due process clause to matters of substance and very indirectly in connection with other clauses of the Constitution, defeat the real will of the people, because when legislation is held void it is because it is indirectly forbidden by the Constitution which expresses the will of the people perhaps even more than does a legislative act.\(^8\)

\(^8\) 19 Fed. (2nd) 951 (1927); 28 Col. L. Rev. 499.


\(^8\) *Newberry v. United States*, 256 U. S. 232 (1921).

\(^8\) *Barry v. United States*, 279 U. S. 597 (1929).


A judicial declaration of the unconstitutionality of a statute does not annul or repeal the statute but has the effect of ignoring or disregarding it so far as the determination of the rights of private parties is concerned. The courts generally say that the effect of an unconstitutional statute is nothing. It is as though it had never been passed. Yet this statement needs many qualifications. There are some situations where the courts are in substantial agreement that an unconstitutional statute is void ab initio. These are cases of repealing a statute and unconstitutional amendments to a statute, criminal conviction under an unconstitutional statute which is later reversed, judgment in a civil suit rendered under an unconstitutional statute, or by a court established by an unconstitutional statute (except as limited by the de facto officer doctrine), the incorporation or disincorporation of a city (except as affected by the de facto doctrine), the payment of taxes under an unconstitutional statute (except as modified by the voluntary payment doctrine), the stripping doctrine under the 11th Amendment, and individual criminal liability for acts committed under unconstitutional statutes. There is a second class of situations in which the courts are in conflict as to whether the rule should be the rule of void ab initio, or the rule of void from date of declaration of unconstitutionality. These are cases of creation of moral obligations on the part of the government, creation of a public office, the civil liability of officers for acts done under unconstitutional statutes, the defense of an officer to an action of mandamus brought to compel him to act under an unconstitutional statute, the curing of the defect of unconstitutionality by statutory amendment, and the curing of the defects of unconstitutionality by change in the Constitution. There is a third class of situations where the courts generally refuse to apply the void ab initio rule but instead apply the rule of void from the time of declaration. These are cases of criminal liability of an officer who has acted under an unconstitutional statute, the reversal of a decision of unconstitutionality, the reversal of a decision of constitutionality where rights have been acquired in reliance on the first decision, and a criminal con-

89 Shephard v. Wheeling, 30 W. Va. 479 (1887).
90 "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Norton v. Shelby County, 118 U. S. 425 (1886).
viction under an unconstitutional statute, double jeopardy, and the commitment of an insane person.\textsuperscript{91} An unconstitutional statute may not be void at all but only inapplicable to a particular situation while applicable to other situations, and a part of an act may be unconstitutional and the rest of the act constitutional.\textsuperscript{92}

The supremacy of the Supreme Court is also shown in its exercise of the power to punish for contempt of court; in its making of a true federal common law in cases of diversity of citizenship and in suits between different states as well as under the due process clause and the obligation of contracts clause;\textsuperscript{93} in its supervision of the work of the lower federal courts; in the admission and disbarment of attorneys, and the development of a real federal police power in connection with the interstate commerce clause, suits involving diversity of citizenship and administrative activities of the federal government.\textsuperscript{94}

What has been the nature of the judicial process of the United States Supreme Court on constitutional questions? Has it been analytical, historical or philosophical? A study of the decisions of the United States Supreme Court shows an overwhelming amount of conflict. The justices of the Supreme Bench have not adhered to precedents on the rule of stare decisis, but have treated precedents as mere hypothetical conclusions to be abandoned whenever proven false by the test of experience. In exercising its functions, the Supreme Court has sometimes been influenced by historical considerations, at other times by analytical considerations, and at other times by philosophical considerations. Sometimes one consideration and sometimes the other has predominated. Sometimes a change in the position of the United States Supreme Court has been due to a change in the views of the justices, sometimes to a change in social conditions, but more frequently to a change in the personnel of the Bench.\textsuperscript{95} Such conflicting decisions and reversals of positions as are found in the original package cases,\textsuperscript{96} the legal tender

\textsuperscript{91} Field, Effect of an Unconstitutional Statute, 1 Ind. L. Jour. 1.
\textsuperscript{93} Kansas v. Colorado, 206 U. S. 46 (1907).
\textsuperscript{94} Hughes, The Supreme Court of the United States, 154.
\textsuperscript{95} Willis, Some Conflicting Decisions of the United States Supreme Court, 13 Va. L. Rev. 155, 278.
\textsuperscript{96} License Cases, 5 How. 504 (1847); Leisy v. Hardin, 135 U. S. 100 (1890); Plumley v. Massachusetts, 155 U. S. 461 (1894).
cases,\textsuperscript{97} the hours of labor decisions,\textsuperscript{98} interpretations of the Sherman Anti-Trust Act, \textsuperscript{99} and the insular cases\textsuperscript{100} can be explained only on the theory of a change in the personnel of the bench, although different justices have been influenced by different considerations,—now philosophical, now historical, and now analytical.\textsuperscript{101} In the gradual modification of the doctrine of the Dartmouth College Case, in the development of the doctrine of a dual form of government, in the change in the framework of our government in the direction of centralization, and in the development of the doctrines of freedom of speech, unreasonable searches and seizures, waiver of jury trial, and privileges and immunities of citizens of the state and citizens of the United States, the justices have generally emphasized the philosophical process. In the development of the privilege of jury trial, the immunity against slavery and the right of citizenship, the justices have emphasized the historical process. In many of the decisions developing the law as to what is intra-state and what is inter-state commerce, the original package decisions and the rate of return, as well as the rate base, for the regulation of public callings, the justices have emphasized the analytical process.\textsuperscript{102}

What has been said with reference to the work of the United States Supreme Court is true also with reference to the work of the supreme courts of the various states. State constitutions are as silent as is the United States Constitution upon the subject of what branch of government shall be supreme, but the highest courts of the states have settled the question in favor of their own supremacy as to state governments, as the United States Supreme Court has as to the federal government. Yet,

\textsuperscript{97} Hepburn v. Griswold, 8 Wall. 603 (1870); Legal Tender Cases, 12 Wall. 457 (1871); J uilliard v. Greenman, 110 U. S. 421 (1884).


\textsuperscript{99} United States v. Trans-Missouri Freight Assoc., 166 U. S. 290 (1897); United States v. Joint Traffic Assoc., 171 U. S. 505 (1898); Standard Oil Company v. United States, 221 U. S. 106 (1911); United States v. United States Steel Corporation, 251 U. S. 417 (1920).

\textsuperscript{100} De Lima v. Bidwell, 182 U. S. 1 (1909); Downes v. Bidwell, 182 U. S. 244 (1900).

\textsuperscript{101} Willis, Some Conflicting Decisions of the United States Supreme Court, supra note 95.

\textsuperscript{102} Willis, ibid., note 95.
of course, as between state courts and the United States Supreme Court the latter has made the former subject to the greater general supremacy of the United States Supreme Court.

Enough has been said to show that the real Constitution of the United States is the work of the United States Supreme Court. The original written Constitution contains what is usually thought of as the United States Constitution; but in addition to this there probably is an unwritten constitution, including the cabinet system, a rule against the third term for the president, and other like matters: and there is a real constitution found in the three hundred volumes of officially reported decisions of the United States Supreme Court. The original Constitution created only the foundation of our constitutional law. The Supreme Court has built the super-structure. The original Constitution, to use another figure, was a somewhat meager blue-print; the present constitution, a completed blue-print and plans and specifications. The original drafters of our Constitution worked out some of the framework of our federal government, the powers delegated to the various agencies of government, the limitations upon the exercise of such powers, and the amendability of the Constitution; but this work is trifling in comparison with the work of the Supreme Court. For example, the framers of the Constitution only impliedly established the doctrine of popular sovereignty, if at all. The Supreme Court not only finally settled this question, but established all of the principles involved in the doctrine. The fathers established the doctrine of amendability of the Constitution, but left most of the problems in connection therewith for the final decision of the Supreme Court. The fathers apparently worked on the theory that they were establishing a dual form of government, but the doctrine was really written into our Constitution by the Supreme Court, and the Supreme Court has done most of the work of delimiting the powers, both of the states and of the federal government; and has on many occasions actually changed the line between the spheres of the states and the sphere of the federal government. The fathers worked out a hybrid doctrine of separation of powers, but the Supreme Court has taken hold of this doctrine and very largely recasted it. The fathers somewhat elaborately worked out a doctrine of the protection of personal liberty against social control, but the Supreme Court has seized hold of this doctrine and made it over so that it is an entirely new doctrine. The sons of the
fathers established a doctrine of universal citizenship and suffrage, but even this had to be interpreted and amplified by the Supreme Court. The doctrine of the supremacy of the Supreme Court was one entirely omitted by the fathers and is the sole work of the Supreme Court. Hence, the conclusion is forced upon us that the United States Constitution is the result of the "judicial carpentry" of the few quiet men who throughout the course of our history have sat upon the Supreme Bench. They are the ones who have made the supernal postulates and the immortal discoveries found in United States constitutional law. The United States Constitution is their unique handiwork.

In thus making the Constitution the justices have not always been consistent, nor always followed the doctrines of their predecessors. Overruled cases and present conflicting decisions of the Supreme Court abound. The doctrine of the Dartmouth College Case103 that a charter of a corporation was a contract inviolate against the police power,104 the power of taxation,105 and possibly even the power of eminent domain has gradually been modified so as to make it subject to the power of eminent domain106 and all forms of police power107 except one.108 The kind of a dual form of government found in the decisions of John Marshall is not the kind of a dual form of government found in the recent decisions of the Supreme Court. For example, where once the Court made the powers of the states and the nation concurrent109 under the interstate commerce clause it now makes the power of the nation exclusive110 and gives to the states only an incidental police power.111 An income tax was at first held by the Court not to be a direct tax112 but it was later held by the Court to be a direct tax.113 At first the Court

103 4 Wheat. 518 (1819).
104 Bridge Proprietors v. Hoboken Co., 1 Wall. 116 (1864).
108 Columbus, etc., Co. v. Columbus, 249 U. S. 399 (1919).
110 Cooley v. Board of Port Wardens, 12 How. 299 (1851).
SUPREMACY OF THE SUPREME COURT

held that taxation could be for the purpose of regulation,114 but recently it has held to the contrary.115 When the constitutionality of legal tender notes first came before the Court it held them unconstitutional,116 but it later reversed itself.117 The protection of the due process clause of the Fourteenth Amendment was at first confined by the Court to legal procedure118 and negroes119 but little by little this doctrine was changed until the protection was extended to matters of substance,120 white people,120 and the property rights of corporations.121 Even when thus extended the decisions under the due process clause did not remain unchanged. It is enough for purposes of illustration to refer to the fact that the regulation of hours of labor, which at one time was illegal122 is now perfectly legal.123. Such decisions as Wilson v. New124 and Wolff v. Court of Industrial Relations125 on the subject of continuity of service; Plessy v. Ferguson,126 L'Hote v. New Orleans127 and Buchanan v. Warley128 on segregation; Schenck v. United States129 and Gilbert v. Minnesota130 on sedition; and decisions giving a strict construction to guaranties of jury trial,131 searches and seizures,132 and elections133 and decisions giving a liberal construc-

114 Veazie Bank v. Fenno, 8 Wall. 533 (1869); Head Money Cases, 112 U. S. 580 (1884); McCray v. United States, 195 U. S. 27 (1904).
116 Hepburn v. Griswold, 8 Wall. 603 (1870).
117 Legal Tender Cases, 12 Wall. 457 (1871); Juilliard v. Greenman, 110 U. S. 421 (1884).
118 Munn v. Illinois, 94 U. S. 113 (1876).
119 Slaughter House Cases, 16 Wall. 36 (1873).
121 Covington etc. Co. v. Sandford, 164 U. S. 578 (1896).
124 243 U. S. 332 (1917).
125 262 U. S. 522 (1923).
126 163 U. S. 537 (1896).
127 177 U. S. 587 (1900).
128 245 U. S. 60 (1917).
130 254 U. S. 325 (1920).
131 Thompson v. Utah, 170 U. S. 343 (1898).
tion to due process\textsuperscript{134} and the implied powers\textsuperscript{135} of the federal government cannot be harmonized.

Yet, through all this welter of conflicting, reversed and inharmonious decisions the Supreme Court has been making the Constitution of the United States. Yes, the making of the United States Constitution has become the peculiar prerogative of the Supreme Court, and it has been truly said that (so far as concerns the agents of government) "the real rulers of this country are the justices of the United States Supreme Court." This does not mean that our Constitution is not what it ought to be. Looking at the entire period of our constitutional history, the Supreme Court has functioned well. Its handiwork is a noble piece of work. In spite of the fact that the personnel of the Bench has influenced specific decisions and there have been opposing views between men of such different schools of thought as Federalists and Localists, as believers in property and believers in personal rights, and as Conservatives and Progressives, yet throughout its entire history no particular faction has controlled the Bench, and throughout the history of the Constitution it has been characterized by growth and development more than change. So far as there has been a trend towards centralization it has on the whole only kept pace with the development of national social interests and the development of business national in scope. So far as there has been a trend toward socialization it has only been in line with what has been occurring in the social life of the Anglo-American world. On the whole, our Constitution has been a progressive document. It can be likened to a living, growing organism, or to a modern skyscraper arising on the site of a modest ancient building. The work of the United States Supreme Court has been a success. Speaking generally, those doctrines of constitutional law which it has made ought to have been made and those doctrines of constitutional law which it has changed and modified ought to have been changed and modified.\textsuperscript{136}

The result is that the Court has both been respected\textsuperscript{137} and

\textsuperscript{134} Hurtado v. California, 110 U. S. 516 (1884).
\textsuperscript{135} McCulloch v. Maryland, 4 Wheat. 316 (1819); Downes v. Bidwell, 182 U. S. 244 (1901); Selective Draft Law Cases, 245 U. S. 366 (1918).
\textsuperscript{136} Willis, op. cit. note 95; Albertsworth, The Federal Supreme Court and the Superstructure of the Constitution, 16 A. B. A. 565; notes 96-100.
\textsuperscript{137} Warren, Congress, the Constitution and the Supreme Court; Haines,
its business has grown. In the year of Marshall's appointment only ten cases were brought before the Court. During the next five years only 120 cases were brought before the Court. Between 1826 and 1830 the number of cases rose to an annual average of fifty-eight. By 1850 the average was seventy-one. In 1860 it had reached 278. In 1880 the number of cases set for argument had reached 1069. The establishment of the Circuit Court of Appeals under the act of 1891 and the judiciary act of 1925 relieved the Supreme Court of most of its work except on constitutional questions, so that in 1926 there were only 667 cases on the docket, and the court is now able to keep fairly abreast of its work. Whereas in 1923 the source of 136 cases decided by the United States Supreme Court was the lower federal courts; in 1929 the lower federal courts were the source of only seventy-seven. In 1924 the due process clause competed on fairly even terms with the interstate commerce clause for the attention of the United States Supreme Court, but in 1929 the due process clause had no competitor. Since 1923 the Supreme Court has declared six acts of Congress unconstitutional, fifty seven state statutes unconstitutional, and seventeen orders of state commissions or officers, besides nine state statutes because in conflict with acts of Congress, two orders of state commissions because conflicting with acts of Congress and two territorial acts because conflicting with acts of Congress. Since 1923 the Supreme Court has rendered 1131 unanimous decisions; fifty eight-to-one decisions; thirty-nine seven-to-two decisions; forty-seven six-to-three; and fourteen five-to-four; with one four-to-four opinion.\(^{138}\)

So great has grown the respect for the United States Supreme Court in the United States, and perhaps in the world, that it is now regarded as the most outstanding achievement in our form of government. At different times different members of the Bench and different decisions of the Court have been subject to criticism. In the early history of the country Jefferson and others with his political viewpoint criticised the Court for its establishment of the doctrine of its own supremacy. In

\(^{138}\) Hughes, op. cit. p. 55; Frankfurter and Landis, *The Business of the Supreme Court*; Unpublished statistics compiled by Professor J. P. Richardson of Dartmouth College.
more recent times Roosevelt and La Follette criticized the Court for its position on matters of police power under the doctrine of the protection of personal liberty against social control. Yet when the entire period of the Court's activities; the thousands of its determinations, the difficulty of the questions with which it has dealt, the way with which it has come out of its conflicts, and its general ability are taken into consideration, there is no institution of government which today stands higher in public confidence. It is probably regarded as the crowning marvel of the wonders wrought by American statesmanship and the greatest conception of the Constitution. While its prototype existed in the superior courts of the states, it is American in conception and function, and its majestic proportions have been carried to a height which is almost sublime. The people of the United States believe that no product of government here or elsewhere has ever approached it in grandeur. In spite of the fact that it is absolute in authority; that from its mandates there is no appeal; that its decree is law; that it possesses higher prerogatives than any other court, ancient or modern, ever possessed; that its jurisdiction extends over powerful states as well as over the humblest individual; that it is armed with a right and power to annul the statutes of states, and to restrict congressional action within constitutional bounds; and that it is secure in a life tenure, yet the American people are not afraid of its power nor jealous of its prerogatives, but instead look to it as a guardian and protector, and respect the justices of the Supreme Court as the ministers of the Constitution and the high priests of the law. The United States Supreme Court has come to inspire both awe and veneration.\textsuperscript{139}

What are the reasons for this respect of the Supreme Court and for its success in reading the doctrine of the supremacy of the Supreme Court into our constitutional law?

1. One reason is the independence, integrity and ability which has characterized the Supreme Court throughout its history. Justices appointed by Jefferson and Madison joined with Marshall in developing a strong nationalistic interpretation of the Constitution, obnoxious to them. Judges appointed by Jackson joined with Marshall and Story in supporting the Cherokee commissioners against Georgia, in flat opposition to

\textsuperscript{139} Hughes, The Supreme Court of the United States, 55; Carson, History of the Supreme Court, 6.
Jackson. And the whole Bench appointed by Jackson decided against his policy in relation to the Spanish land claims. Justices appointed by Jackson and Van Buren threw down the gauntlet to the former by issuing a mandamus against his postmaster general. In cases of slavery, anti-slavery justices joined with pro-slavery justices. The obnoxious fugitive slave law was unanimously upheld by anti-slavery Whigs and pro-slavery Democrats. A northern Democrat joined with a northern Whig in the dissent in the Dred Scott case. Lincoln's legal tender policy was held unconstitutional by his own appointees. Republican reconstruction policies were held unconstitutional by a Republican bench. A Democratic chief justice joined with Republican associates to establish constitutional views opposed by the Democratic party with reference to our insular possessions. Justice Holmes, an appointee of President Roosevelt, dissented in the Northern Securities Case, a case in which President Roosevelt was deeply interested. In the postmaster removal case of President Wilson, associate justices appointed by him dissented but a Republican chief justice upheld his power. From the time of John Jay, of whom it has been said that "when the judicial ermine touched his shoulders it touched nothing not as white as itself" to the present venerable open-minded Justice Holmes, not a breath of scandal or corruption has ever touched any justice of the United States Supreme Court. Marshall's pre-eminent intellectual ability is everywhere recognized, but there have been other great chief-justices and associate justices. Everyone of the chief-justices has been a lawyer of first rate ability. The associate justices of unusual ability were Story, Miller, and Field, and the great Justice Holmes recalls us to the traditions of Marshall. 140

2. Another reason is the fact that the Supreme Court has created or modified or upheld those other doctrines of constitutional law which the exigencies of our federal government require. This is especially true insofar as the Supreme Court has refrained from extending its own powers at the expense of the doctrine of the separation of powers and the subversion of the sovereignty of the people. The Supreme Court has maintained the doctrine of separation of powers so far as it concerns itself by refusing to mandamus Congress and state legislature and

140 Hughes, op. cit. 47, 58; Willis, Introduction to Anglo-American Law, 165-174.
the President and governors. The courts also have upheld the doctrine of separation of powers by refusing to decide political questions, like reapportionment and a Republican form of government, and by leaving them to the executive and legislative branches of the government. The Supreme Court likewise has upheld the doctrine of separation of powers against itself in declining to set aside acts of state legislatures, except when the unconstitutionality is clear. It has refused to decide questions of constitutionality unless necessarily presented. It has also tried not to review questions of legislative policy and to inquire into the motives of Congress. Except in cases involving the due process clause as to matters of substance the Supreme Court has generally succeeded in observing this voluntary limitation on itself, but where the Supreme Court by a five to four vote has declared all sorts of economic and social legislation unconstitutional because in violation of the due process clause, it would seem that it had only given lip service to the rule, and that if the Supreme Court was really going to live up to it, it should impose another voluntary limitation on itself not to declare such legislation unconstitutional except by at least a seven to two vote. The Supreme Court has observed the sovereignty of the sovereign people by recognizing a new revolutionary constitution and by upholding the power of the people to amend the Constitution in the manner attempted in the recent amendments to the Constitution. The doctrines of a dual form of government, the protection of personal liberty against social control, the amendability of the Constitution, and universal citizenship and suffrage have also been interpreted and enlarged or modified so as to give the Constitution elasticity and make it adaptable to new times and conditions and a new social order. Very few amendments to the Constitution have been adopted or could be adopted but the Supreme Court has by its work done what could never have been done by the process of amendment. It has saved the Con-

---

141 State of Mississippi v. Johnson, 4 Wall. 475 (1867); Turnbull v. Giddings, 95 Mich. 514 (1893).
142 Luther v. Borden, 7 How, 1 (1849); Pac. Sts. Tel. and Tel. Co. v. Oregon, 223 U. S. 118 (1912); 42 Harv. L. Rev. 1015; 34 Dickinson L. Rev. 193.
144 Hamilton v. Kentucky Distilleries and Ware House Co., 251 U. S. 146 (1919).
stitution and made it a document for all time instead of the time of the thirteen colonies.

3. Another reason is the fact that the federal courts have been given judicial power only over "cases" and "controversies." This is not a limitation put upon the Supreme and other federal courts by the Supreme Court itself, but a limitation which has been put upon them by the Constitution. This means that the courts will not declare laws unconstitutional in moot cases, or in the case of advisory opinions, but only in the course of actual litigation. Probably a "controversy" would have to be civil in nature. A "case" would have to be some suit instituted according to the regular course of legal procedure. It is therefore the privilege of any litigant, that is, any legal entity, to institute such a case or controversy, but in order to do so such person must show that his own substantial interests will be or have been adversely affected. Tax-payers are held to have such interest where any law affecting them would involve taxation. As to whether a public official charged with the execution of a law or administrative officials in actions to enforce the performance of statutory ministerial duties can question the constitutionality of a law by refusing to act, is a matter on which the decisions are in conflict.

Do the federal, as well as the state courts, have the power constitutionally to make declaratory judgments? Apparently the United States Supreme Court has decided that the federal courts have not been given this judicial power. But most of the state courts have decided that declaratory judgments are a part of the judicial power of the courts. A declaratory judgment is clearly not an advisory opinion or an opinion on a moot question. But is it a case or controversy? It would seem that

---

146 Williams v. Riley, 50 S. Ct. 63 (1929). The constitutions of some states require the courts to give advisory opinions: Green v. Commonwealth, 12 Allen 155; 13 Ia. L. Rev. 188.
149 Willoughby, Constitution of the United States, Sec. 12; 42 Harv. L. Rev. 1071.
the words "cases" and "controversies" do not narrow the jurisdiction of the federal courts to anything less than the jurisdiction of the state courts; and that if a declaratory judgment is constitutional under state constitutions, because an exercise of the judicial power, they should be constitutional under the United States Constitution, because cases or controversies. If such is the correct view, is the weight of authority among the state decisions or the position of the United States Supreme Court correct? The judicial power is the power to make decisions in actual cases involving the rights, powers, privileges and immunities, or the duties and other liabilities of litigating parties. The actual invasion of legal capacities or violations of legal duties is not necessary, nor is an execution required. This is proven by the fact that the federal courts as well as the state courts entertain suits to quiet title, to remove a cloud on title, for the construction of wills, for the construction of the Torrens' Act, for the determination of heirs, as to the validity of bonds, as to the validity of marriage, to enjoin the payment of an invalid tax, and in the case of appeals by the state in criminal cases. All of these suits are declaratory judgments, as much as those which are strictly so-called. A declaratory judgment is simply an extension to new cases of a principle well established in the law. By refusing to exercise this power, the United States Supreme Court evidently thinks that it is both upholding the doctrine of separation of powers and applying a constitutional limitation which will tend to bring the Court into respect. But it is submitted that the Court is mistaken on both of these points.\(^{151}\)

4. Another reason is the method according to which the Court performs its work. Oral arguments are encouraged. The Socratic method is applied. Every matter is considered. Cases are discussed and decided before they are assigned by the Chief Justice for opinion-writing. Draft opinions in print are distributed for consideration by the individual justices in advance of subsequent conferences. Rehearings are discouraged.\(^{152}\) In coming to their decisions and in writing their opinions, the jus-

---


\(^{152}\) Willoughby, op. cit. 42-75; Frankfurter and Landis, op. cit. VII; Hughes, op. cit. 57-63.
tices of the Supreme Court apply as principles of constitutional construction a presumption in favor of the constitutionality, both of an act of Congress and of an act of a state legislature; give force to contemporaneous or long-continued legislative interpretation; resort to extrinsic evidence as to the meaning of ambiguities or words which require definition, like the debates in the Constitutional Convention and legislature, reports of committees, the "Federalist," and the history of the times; and construe the Constitution as a whole.

5. Still another reason is the long tenure of the judges. Marshall presided as Chief Justice thirty-four years. Story sat as an associate justice thirty-four years. The present Associate Justice Holmes has already served twenty-eight years. The result of this long judicial tenure has been a tendency toward continuity and coordinated consistency in the development of the principles of constitutional law.

6. A final reason that will be given is the help and support of the Bar. The United States Supreme Court in its early history was fortunate in having argue constitutional questions before it such legal giants as William Pinkney, Daniel Webster, Alexander Hamilton, Luther Martin, William Wirt, and Joseph Hopkinson, and throughout the entire course of our constitutional history the Supreme Bench has more or less had the benefit of the help of the greatest lawyers in the United States. To mention only a few, there have been Rufus Choate Joseph H. Choate, William M. Evarts, Jeremiah Black, John F. Dillon, Elihu Root, John W. Davis, and Charles Evans Hughes. These men have not only helped the court to come to the right decisions and to write exalted opinions, but they and lawyers generally throughout the United States have loyally supported the courts. The inferior federal courts and the appellate jurisdiction of the United States Supreme Court were established by Congress.153

Should the Supreme Court be supreme? At different times many prominent United States statesmen have criticized and attacked the Supreme Court for its making and exercising the doctrine of its own supremacy. As already noted, the Supreme Court was thus attacked in our early history by President Jefferson and in our later history by President Roosevelt and Senator La Follette. Were these criticisms and attacks well founded?

As we have seen, there must be someone under our form of government to exercise supreme power. So far as the doctrines of sovereignty of the people, the amendability of the Constitution, separation of powers, dual form of government, and the supremacy of the Supreme Court are concerned, our Constitution and our form of government would cease to exist, if the Supreme Court did not have the supremacy which it has assumed. The state courts could not be entrusted with this power because of the danger of their destroying our dual form of government. The executive of the United States could not be entrusted with this power because of the danger of his destroying the doctrine of the separation of powers. Neither Congress nor state legislatures could be entrusted with this power because of the danger of the destruction of all of the doctrines. For the reasons heretofore given, the Supreme Court is the one tribunal which can with the greatest safety be entrusted with the power of supremacy. It is true that in exercising this power the Supreme Court has gradually changed the balance between the state governments and the federal government so that the federal government now exercises many more powers comparatively than it did in the beginning of our history. But these changes have come about gradually and only as progress and social interest have required them and the main doctrine of a dual form of government still stands as it probably would not have stood if it had not been for the Supreme Court. It is true also that our doctrine of sovereignty of the people and the amendability of the Constitution have been clarified and perhaps enlarged by the Supreme Court, but it cannot be contended that they have been destroyed. The Supreme Court has been a faithful bulwark for both of these doctrines. It is true that the doctrine of separataion of powers has gone through a great many changes and development under the egis of the Supreme Court. This development has proceeded so far that it seems at first as though the doctrine had been entirely broken down. It has become a doctrine of confusion of powers, but the confusion has been caused by the Supreme Court no more than by the original founders of the Constitution who started the work of confusion. In spite of all the confusion, under the regime of the Supreme Court, the three different branches of government have continued to exist, and each one has continued to exercise certain definite powers even though such powers have not been those which appropriately belong to it. This is a very different
result than would have followed if any other branch of the fed-
eral or state governments had exercised the powers which the
Supreme Court has been exercising. There is no disputing the
fact that the Supreme Court has upheld the doctrine of its own
supremacy. This is probably no more than any other depart-
ment would have done if it had been supreme. Enough has been
said to vindicate the doctrine of the supremacy of the Supreme
Court so far as these five doctrines are concerned.

So far as concerns the other doctrines of constitutional law,
that is, the doctrine of universal citizenship and suffrage and
the doctrine that many forms of personal liberty must be pro-
tected against social control, other considerations enter. Prob-
ably there would not have been so much danger of the overthrow
of these doctrines by other branches of government as there
would have been of the first five discussed. Yet even here with
the exception of the protection of personal liberty as a matter
of substantive law by the due process clause, probably the work
of the Supreme Court has been superior to what that of any
other branch of government would have been. It is true that
the Supreme Court has not always protected personal liberty as
many think it ought to have done. It has failed to protect the
privilege against self-crimination against third degree work. It
has failed, especially in war time, to give that protection to
freedom of speech and the press and peaceable assemblage that
perhaps ought to have been given. Perhaps some criticism
could be made of its work in connection with other constitu-
tional guaranties. Yet, on the whole, it must be admitted that
the Supreme Court has been a guardian of personal liberty. It
has also, of course, been a guardian of social control. On the
whole, this has meant that it has tried to exercise as wise a
judgment as it could in drawing the line between personal lib-
erty and social control.

So far as concerns the protection of personal liberty against
social control as a matter of substance under the due process
clause it is harder to evaluate the work of the Supreme Court.
This is a power which the Supreme Court has been exercising
for only thirty or forty years. It did not have this power until
it read this principle of constitutional law, as another judge-
made principle, into our United States Constitution. Our Con-
stitution and our form of government would not have been de-
stroyed if the Supreme Court had never done this, as they prob-
ably would not have been destroyed if the Supreme Court had
not exercised its supremacy over either the doctrine of universal citizenship and suffrage or the doctrine of protection of personal liberty against social control. Many think that when it comes to questions of economic interests and social interests in general that the greater number of representatives of the people chosen at frequent intervals who sit in the halls of legislation can better be trusted than the few representatives appointed for life who sit upon the Supreme Court. Apparently President Roosevelt and Senator La Follette did not confine their attacks upon the Supreme Court to this proposition. If they had done so there would have been a great deal more to their contention. Their apparent proposition to take the power away from the Supreme Court to declare legislation unconstitutional if in violation of other doctrines of constitutional law, like the separation of powers, dual form of government, etc., was utter nonsense. To have done any such thing as that would only have resulted in the overthrow of our form of government, and given us a parliamentary centralized form of government, or some other form of government as different from our present form of government. Perhaps such a form of government would be as good or better than our own, but the writer for one desires a while longer to try the experiment of our kind of government. But none of these things are true so far as concerns the protection of personal liberty by due process of law as a matter of substance. However, even here the writer is not so sure that the plan of having the Supreme Court rather than any other branch of government exercise this power would not work well, if the one other principle was introduced of a voluntary limitation of the Supreme Court upon itself that in a case of this sort it would not set aside legislation except by at least a 7 to 2 vote. The Supreme Court has already, theoretically at least, put a voluntary limitation upon itself that it will not set aside legislation except when its constitutionality is clear. How can it be said that any act of Congress or of a state legislature upon a matter of police power, or taxation, or eminent domain is unconstitutional beyond a reasonable doubt, when the Supreme Court itself divides upon the subject by a 5 to 4 vote,—and perhaps the four justices voting “no” are the most learned members of the Bench? If the vote were 7 to 2, or 8 to 1, or unanimous it might be a different matter. The whole matter of determining whether the exercise of police power or the power of taxation or the power of eminent domain is constitutional
depends upon the question of reasonableness. It would seem to be very unreasonable to set aside a solemn act of legislation upon any of these subjects after the legislative body has come to the conclusion that it is reasonable by such a narrow margin as a majority of 5 to 4. If the Supreme Court would put on itself the voluntary limitation herein referred to, practically all the criticisms of the Supreme Court in its exercise of its powers under the doctrine of its own supremacy would stop. This limitation is one which the Court must put upon itself. If Congress, as has been suggested by Senator Borah and some others, should undertake to accomplish this reform by means of an act of Congress it would seem to have no further effect than to give the Supreme Court another act of Congress to declare unconstitutional.

This article has undertaken to show the meaning of the doctrine of the supremacy of the Supreme Court, to trace its origin to give the reasons for its existence, to show the results of its operation, to give the reasons for its success and to point out any places where it ought to be changed. Probably the greatest result of such study is the gradual and continuing growth, or emergence, of the Supreme Court as one of the greatest institutions in the American theory of government. After such a study, it becomes apparent that not only the people and prosperity but the very existence of the Union is placed in its hands. Without the active cooperation of justices of the Supreme Court, the constitution would be a dead-letter. They protect alike their own powers, executive powers, and legislative powers against encroachments and designs of the other departments. They defend the Union against the exuberant aspirations of the states and the states against the exaggerated claims of the Union. They protect the public interests against the interests of private individuals and the interests of private individuals against the public interest. They conserve the spirit of order against the innovations of excited democracy. They maintain the power of the people as against the ambitions of any of their agents. The Supreme Court more than any other branch of the government stands for the whole country and is truly “of the people, by the people, and for the people.”

It does not have the positive power over the purse or the sword, or any other powers which could actually overthrow our government, but the negative power of declaring the law—which has kept our whole mighty fabric of government from rushing
to destruction. The Court has not been infallible. It has made mistakes. It sometimes has run counter to the deliberate and better judgment of the community. But the final judgment of the American people will unquestionably be that their constitutional rights are safe in the hands of the federal judiciary. Throughout the whole history of the United States, it furnishes the highest example of adequate results of any branch of our government. It has averted many a storm which was threatening our peace and has lent its powerful aid in uniting the whole country in the bonds of justice. To paraphrase the language of William Wirt, “if the judiciary were struck from our system” there would be little of value that would remain. The government cannot exist without it. “It would be as rational to talk of a solar system without a sun” as to talk of a government in the United States without the doctrine of the supremacy of the Supreme Court.
The complete management of the Indiana Law Journal is exercised by The Indiana State Bar Association through its officers. The Editor, Editorial Boards and other officers of The Journal are appointed by the President of The Indiana State Bar Association with the advice and approval of the Board of Managers. The Indiana State Bar Association founded the Indiana Law Journal and retains full responsibility and control in its publication. The participation of Indiana University School of Law is editorial.

OFFICERS AND BOARD OF DIRECTORS OF THE INDIANA STATE BAR ASSOCIATION

WILLIAM W. MILLER, President ......................................................... Gary
FRANK N. RICHMAN, Vice-President .............................................. Columbus
THOMAS C. BATCHELOR, Secretary-Treasurer ..................................... Indianapolis

BOARD OF DIRECTORS

1st District ................................................. 7th District
Frank H. Hatfield, Evansville ....................................................... James M. Ogden, Indianapolis
2nd District ................................................. 8th District
William H. Hill, Vincennes ......................................................... Alonzo L. Nichols, Winchester
3rd District ................................................. 9th District
Wilmer T. Fox, Jeffersonville ....................................................... W. H. Parr, Lebanon
4th District ................................................. 10th District
Harry Meloy, North Vernon ......................................................... Joseph Brown, Crown Point
5th District ................................................. 11th District
John M. Fitzgerald, Terre Haute ................................................... Milo N. Feightner, Huntington
6th District ................................................. 12th District
Wm. A. Yarling, Shelbyville ......................................................... W. P. Endicott, Auburn
13th District ................................................. Eli P. Seebirt, South Bend

FOWLER V. HARPER, Editor
THOMAS C. BATCHELOR, Business Manager

Faculty Board of Editors
PAUL V. McNUTT, Chairman

Robert C. Brown ......................................................... James J. Robinson
Alfred Evens ......................................................... Walter E. Treanor
Bernard C. Gavit ......................................................... Hugh E. Willis
Fowler V. Harper ......................................................... Milo E. Bowman

Student Board of Editors
JOHN S. GRIMES, Chairman

Charles F. Brewer ......................................................... Harold W. Jones
Robert R. David ......................................................... Earl Mann, Jr.
Paul J. DeVault ......................................................... Sidney J. Seligman
Jesse B. Ewer ......................................................... James W. Sutton
Harold N. Fields

The Indiana State Bar Association does not assume collective responsibility for matter signed or unsigned in this issue.