The Historic Role of the Supreme Court

John P. Frank
Yale University

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The Historic Role of the
Supreme Court

By JOHN P. FRANK

The Supreme Court of the United States has a job to do for the
American people. My task today is to examine into what that job
is. While I shall finish with some appraisal and some estimate of
what the American community can reasonably expect from this
institution of its Government, the forepart of my remarks will be
largely descriptive.

Let me begin by borrowing a phrase from the personnel
people. What I mean to talk about here is a job description. To
put the question at a deliberately low level to make it vivid, the
American people pay out some $315,500 a year in salaries to a
total of nine men, plus the dollar expenditure for their miscel-
laneous supporting help, plus the upkeep of their building, and
so on. For all this, the taxpayer should get a certain value; he
can reasonably expect to have a job performed. What is that job?

The original outline of the task to be done was surely brief
enough. Article III of the Constitution provides concisely that
"the judicial power of the United States shall be vested in one
Supreme Court" plus such lower Courts as Congress may desire.
It then, in only one sentence broken into nine clauses, defines
what the judicial power is. The Article further provides that in
a very small number of cases the jurisdiction of the Court shall be

* Attorney, Phoenix, Arizona. Formerly Associate Professor of Law, Yale Uni-
versity. Author of Mr. Justice Black, Marble Palace, and Cases on Constitutional
Law.

1 U.S. Const. Art. III § 2 provides:
The judicial Power shall extend to all Cases, in Law and Equity,
arising under this Constitution, the Laws of the United States, and
Treaties made, or which shall be made, under their Authority;—to all
Cases affecting Ambassadors, other public Ministers and Consuls;—to
all Cases of admiralty and maritime Jurisdiction;—to Controversies to
which the United States shall be a Party;—to Controversies between
two or more States;—between a State and Citizens of another State;—
between Citizens of different States;—between Citizens of the same
State claiming Lands under Grants of different States, and between
a State, or the Citizens thereof, and foreign States, Citizens or Sub-
jects.
original, adds a detail or two about impeachment, jury trial, and treason, and is done. There are 167 words in the controlling two sentences of the Article, and it is 169 years since the Court first sat. In those years, the Court has put bulk on the simple framework of the Constitution. Fundamentally, therefore, our understanding of the work of the institution must come from that 169 years of history in which the Court has had the primary responsibility of developing its own job.

To develop a description of the job the Court does, we may compare its work in the earliest and at the most recent time. Currently the Court processes something like 1600 cases in a year. Of this number, around 750 or 800 are on the Miscellaneous Docket. These are basically applications for review of criminal cases filed by persons in Federal criminal institutions. A very small percentage of these—between three and four percent between 1954 and 1957—are granted and transferred to the Appellate Docket. These include another group of a similar sort also on the miscellaneous docket running usually 100-150 cases a year, and which the number granted is almost zero. While these 750-800 cases give a substantial administrative burden to the Court in sifting out the very few cases worth serious processing, they result in a very minor portion of the Court's written work.

Meanwhile, there are in each year about 700 Petitions for Certiorari, and about one hundred Appeals. From these come the major work of the Court: the hearing of argument and the disposition of the cases. The number of cases argued and disposed of, either by individual opinions or by per curiam opinions after argument, for 1956 and 1957 was about 125 a year. The total number of opinions for 1958-59 was 114.

For the purpose of obtaining a comparable figure, let us turn back the clock to the days of John Marshall. In 1801 that worthy gentleman mounted the Bench to become the fourth Chief Justice of the United States and the foremost moulder of its Constitution. The judicial business was still slight, so that the Justices served both as trial judges around the country and as Justices on the appellate court in Washington. There in a few months each year, they could dispose of their business; it was to be about fifty years

3 Id. at 144-145. There are also the few original cases.
before the docket was to become sufficiently crowded to make it difficult for the Court to finish its work in a year. As a result, to find a comparable number of cases with those disposed of by our Court in our own day in one year, we must group several of Marshall's years. The first seven years of his service, the years from 1801 through 1807, accumulate 107 opinions, a number roughly comparable with the single year just closed.

The chart immediately following gives a rough statistical breakdown of the job the Court was performing a little over a century and a half ago with the job it is performing now. The comparison is, of course, purely numerical and involves a certain number of arbitrary judgements by way of classification; but, nonetheless, it is enough to suggest some generalized trends.

DECISIONS, U.S. SUPREME COURT, 1801-07 and 1959-59

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<td><strong>Total</strong> .......... 114</td>
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However, one very special caution must be noted concerning the comparative figures, even for purposes of comparing raw numbers. Between 1801 and 1807, the Court was still only potentially a national institution. It had the dual task of being the Supreme Court of the United States and also the Supreme Court for the District of Columbia, then newly formed. A flood of District business, long since cut off, was just getting under way. Between 1801 and 1815, almost thirty-five percent of the business of the Court came out of the District of Columbia.\(^4\) In the year 1806,

for example, of the Court's twenty-eight cases, eleven came up from the District and five more came from the adjacent States of Maryland and Virginia, leaving a total of twelve for the whole rest of the country. In these early days practical factors of proximity obviously had considerable to do with the Supreme Court's jurisdiction, and this is a factor which has disappeared with the passage of time.

Nonetheless, for all its imperfections, the chart suggests some stimulating avenues of thought. Since, generally speaking, the business of America is business, we may note that in both periods a substantial part of the work of the Court concerns the business of making a living. And yet while this superficial comparison exists, the nature of life in the United States has changed so much in the intervening time that the nature of these economic cases is indeed radical and different. In the early 19th Century, manufacturing industry had barely begun. The cotton gin was but a few years old, and Eli Whitney was turning his attention to the first American manufacture of machine tools. Wide scale banking was just beginning, insurance was still a new industry, and the dominant American businesses were still agriculture, shipping and land speculation.

In the early 19th Century the entire American economy was feeling the effects of the Napoleonic Wars. The shipping interests vacillated in attitude as to whether the English or the French were causing more disruption. As an aftermath principally of the undeclared war with France in 1798, the Court received a substantial number of cases involving ship seizures and was called upon to make some profoundly important judgments concerning international relations. Also of the highest importance to the national economy was the speculation in the public lands, which throughout the 19th Century brought in a stream of cases, and the Court had its share during the years in question.

Yet quantitatively, the foremost relationship of the Court in this early period to the general economic life of the country was first of all in the application of the revenue laws, and second in formulating the commercial law. The nine cases classified here as taxation were of a very different sort from what we now contemplate in that area. The income, inheritance, and gift taxes which today have created one of the foremost specialties of the law and
which give a steady outpouring of decisions had not then come into existence. These revenue cases involved principally the customs laws, or the excise taxes, as, for example, the tax on sugar refining, or the determination of the amount of commission to be allowed to a collector of the revenue for his good offices.

Forty cases, the largest single block in the group, fall in the area of the general commercial law. This includes the cases on commercial paper, the cases on bankruptcy and the other cases involving enforcement of credit obligations by one remedy or another, the cases on the interpretation of miscellaneous contracts and of insurance contracts, and the other cases involving the shipping industry outside the field of salvage and prize. It is the absence of those cases and the substitution of a large number of the public regulation of business cases which represents the most radical difference in the nature of the work of the Court between the earlier and the later time. The number of bills and notes, bankruptcy, miscellaneous contracts and insurance cases of the current term of court is negligible.

Obviously the Court has abandoned that field, leaving the final decisions in those areas almost one hundred percent to the Courts of Appeal. The trend in this direction, which has existed throughout the 20th Century, reached landslide proportions after the decision in *Erie Railway v. Tompkins*, because once it was established that in these areas it is the duty of the Federal Courts to declare the local law, there is almost no function which the Supreme Court can perform any better than a Court of Appeals in divining the peculiarly local law of a particular state. In any case, without quarreling over comparative competence, clearly such disputes over local law can no longer be regarded as of national significance, and by the application of the standard that the Supreme Court should take cases only of general consequence, cases of this type no longer belong on its docket.

As has been noted in the early 19th Century there was very little general commercial business, and certainly very little regulation of it. The problems of the 1958-59 Court with a half dozen

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5 Pennington v. Coxe, 6 U.S. (2 Cranch) 33 (1804).
6 United States v. Heth, 7 U.S. (3 Cranch) 399 (1806).
7 I have lumped the one bankruptcy case at the 1958-59 term, United States v. Embassy Restaurant, Inc., 79 Sup. Ct. 554 (1959) to avoid cluttering the chart.
or more cases on the National Labor Relations Act and the Fair Labor Standards Act obviously reflect not merely a change in the flow of judicial business but a complete revolution in the entire economy from the non-manufacturing days of a century and a half ago. The principal insurance problem of 1958-1959 was whether the SEC should regulate insurance policies containing variable annuities, or insurance benefits tied to fluctuations of the Stock Market. This was a concept which could scarcely have existed earlier, any more than could the notion of the regulation of the natural gas industry, or the problem of the power of the Federal Trade Commission over the use of coal tar in giving an artificial color to oranges. What I mean to be saying here is something more fundamental than that the nature of the cases has changed: In the more than two dozen cases in this general category at the 1958-1959 term, almost every one is dependent both upon a technology which did not exist a century and a half ago, as for example the cases concerning the regulation of railroads and motor carriers, and also upon a conception of the responsibility of government to regulate, which also did not exist a century and a half ago. I have put into this miscellaneous catch-all in the current year, it is true, one bankruptcy case, but it too is certainly a world away from the problems of another age. In this bankruptcy case the issue was the priority to be given to employers' contribution to a labor union welfare fund. In the earlier period the first American labor case was decided in a trial court in Philadelphia on the premise that all unions were conspiracies. In the earlier period, the Sherman Act was still the larger part of a century in the offing and the whole phenomenon of restraint of trade among the several states (local monopoly of course being well known) had not yet come into existence.

Both eras involved determination of a fair number of points of criminal law, and yet with a difference of some general significance. The five criminal cases in the first period involved: first,
the source of the criminal law to be applied in the District of Columbia; second, a determination of the authority of justices of the peace to make commitments; third, the famous case of Ex parte Bollman involving the laws as to treason; fourth, a counterfeiting case; and a fifth case on the scope of the power of a court martial. The 1958-59 cases are much more suggestive of the concern of the contemporary Court with the problems of personal liberty in relation to the operation of the criminal law, and this even though I have included the right to counsel cases with the miscellaneous civil rights decisions because of their general implications. There are still substantive cases, as for example whether a Congressman has taken a bribe when he accepts a campaign contribution in return for a favor, but the modern cases also include much more frequent concern with review of such matters as the application of search and seizure principles to the Federal government or to the states, as in the well-known 1959 case involving the power of the State of Maryland to permit a rat inspector to enter a home without a search warrant.

This entry of the Supreme Court in modern times into the review of infringements of civil liberties, which began about 1925, represents the most radical alteration of the work of the Court in the 20th Century. Along with the Judiciary Act of that year, giving the Court power to determine which cases it would hear, the new development gave the Court a markedly different task and powers than it had ever had before.

Both courts had numerous decisions to make on matters of jurisdiction and procedure. Numerically these would be more similar in number but for the fact that for the 1958-59 Court I have classified some of the jurisdiction cases in the new category of Federal-State Relations for reasons which will be developed in a moment. Clearly at all times any appellate court has a duty to make rules for the operation of the judicial system which it heads, and this has been the task of the Supreme Court from the earliest

13 United States v. Simmons, 5 U.S. (1 Cranch) 252 (1803).
14 Ex parte Burford, 7 U.S. (3 Cranch) 448 (1806).
15 8 U.S. (4 Cranch) 75 (1807).
16 United States v. Cantrill, 8 U.S. (4 Cranch) 167 (1807).
17 Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806).
19 See, for example, Draper v. United States, 79 Sup. Ct. 329 (1959).
to the most recent times. Nonetheless there are again some very great differences. There were important jurisdictional and procedural decisions at the beginning of course—the two most famous for the earlier era are *Marbury v. Madison,*22 and *Strawbridge v. Curtiss,*23 the case settling the fundamental principle of diversity jurisdiction that all parties on the defendants’ side of the lawsuit must be of different states from all parties on plaintiffs’ side. For the very reason that Marshall was laying down the fundamental ground rules for the operation of the federal system, it is unlikely that many later cases could possibly come close to approaching in broad gauge significance some of his pronouncements unless they were to be overruled entirely. However, in Marshall’s time there was also a procession of what we would regard as trifling jurisdictional points, particularly in cases arising from the District of Columbia.24 Nonetheless a good half dozen of the Marshall jurisdictional decisions for the period under analysis clearly outrank in long-range significance anything decided in 1958-59.

Today the Court largely handles its responsibility in relation to procedure (as distinct from jurisdiction) through the rules of procedure for which it has final responsibility, although in more recent times it has acquiesced in the transfer of the primary responsibility in this regard to the Conference of Circuit Judges. The principal group of procedural matters at the 1958 term related to the Seventh Amendment and the operations of the civil jury system, case after case involving the function of juries in cases of railroad accidents, insurance problems, or auto accidents.25

This deep interest in the operation of the jury system is a renewed modern phenomenon, and yet would not have seemed odd to Chief Justice Marshall, who also paid hearty respect to juries. In the period under analysis, Marshall twice declared that a judge must give his opinion on the law to a jury,26 but he held that it was

22 5 U.S. (1 Cranch) 137 (1803).
23 7 U.S. (3 Cranch) 267 (1806).
24 See for example Knox & Crawford v. Summers & Thomas, 7 U. S. (3 Cranch) 496 (1806), on whether the appearance of an attorney cures a defect for irregularity of process; and see Thompson v. Jameson, 5 U.S. (1 Cranch) 282 (1803), on a detail of variance in the Virginia Chancery practice.
26 Douglass & Mandeville v. M'Allister, 7 U.S. (3 Cranch) 298 (1806); Smith v. Carrington, 8 U.S. (4 Cranch) 62 (1807).
the duty of the judge to steer clear of the facts. "The Court cannot be required," he said, "to give to the jury an opinion on the truth of testimony in any case." If in the long intervening years the federal courts had steered as clear a course as did Marshall in leaving factual questions to juries, it would not be necessary now for the Supreme Court so often to recur to that subject.

To wind up the work of the earlier Court, there is no longer any equivalent in the Supreme Court’s jurisdiction to its decisions on the questions of the laws of inheritance or the laws of real property. The Court then and the Court now had problems over the status of aliens and the rights of citizenship; and the Court then had problems of slavery. Today, these are replaced by the post-civil war problems of racial relations. The existence of the Negro race within the boundaries of the United States has given to every Court a fair number of problems from the earliest until the most recent times. As I observed in *Marble Palace*, with some detail of materials, “the Court has been habituated to dealing with problems of Negro rights from the very beginning.” Once again, however, there has been a marked change in orientation. In the beginning, the primary function of the law was to hold the race in a subordinate position, while now the task is to raise it to equality.

The really big changes in the nature of the work before the Court came in the two categories under the 1958-59 decisions which have no really substantial counterpart in the earlier years. The first of these are the civil rights cases. I speak now not of the race relations cases nor predominantly of the cases in the administration of criminal justice. This includes to a considerable extent the cases involving freedom of speech and press, problems of such modern phenomena as loyalty programs, and the general difficulties of the contemporary adjustments with Communists, as well as a few miscellaneous matters. Here again,

28 I have, perhaps arbitrarily, lumped into this same jurisdiction and procedure category the cases involving the maritime torts, many of which also involve jurisdictional and procedural problems and of which there were the astonishing number of seven at the 1958-59 term. See for example Hahn v. Ross Island Sand & Gravel Co., 79 Sup. Ct. 266 (1959), on the relation of state and federal jurisdiction in respect to harbor workers; Karmarec v. Compagnie Generale Transatlantique, 79 Sup. Ct. 406 (1959); Romero v. International Terminal Operating Co., 79 Sup. Ct. 468 (1959); and others.
there is some similarity between the eras. For example, for purpose of passing upon the jurisdiction of a court martial, the court in 1959 had to determine that June 10, 1949 was "in time of peace" even though the war with Germany was not officially terminated until two years later. In 1801, the Supreme Court, in a very different context, had to determine that the year 1799 was a year of "partial war" with France.

The differences with respect to this phase of the Courts work are perhaps half accounted for by the circumstances already developed above that not until 1925 did the court take general jurisdiction over state infringements of civil liberties. But how about the other half? How about claimed invasions by Congress of the rights of individuals? The milieu which has given rise to the repressionist activities of recent years has given the court in 1958-59 what is probably the most significant portion of its total business, being both high in quantity and also in general consequence. The only real analogy in our history to much of the anti-Communist legislation of modern times is the Alien and Sedition Acts of the late 18th Century; indeed the Smith Act is the first peacetime Sedition Act the country has had since John Adams' administration.

And so we come to remarkable phenomenon that fundamentally, matters of freedom of speech did not come to the Court until the 20th Century. The restriction on aliens did, as has been noted; times of international tension lead to a xenophobia which had its earliest manifestation in the alien act and its most recent in the McCarran Act, and legislation of this type has given rise to some litigation over the centuries. But the sedition legislation of the late 18th Century, though it was enforced in numerous cases and although it came before some of the Justices in their trial capacity, was washed out by the election of 1800. That election was in its own way one of the great ultimate constitutional judgments of American history, a judgment which cast its shadow for the entire remainder of its century, so that Congress never attempted legislation of that kind again until fairly recent times. The result is that Marshall's court was saved the necessity of considering types of restriction which in the 20th Century have raised frequent problems.

Finally to be mentioned are those relating to the problems of federalism, or, essentially, problems of the relations of states to states or of states to the Federal government. Here there is a foreshadowing of these problems in the Marshall era; but quantitatively the number is so much less that the relationship is almost token. Nevertheless, as to these things, there are direct antecedents most of the time in Marshall's days, although they are dramatized by the increase in quantity.

Thus, for example, on the problems of the restrictions by the states on the flow of interstate commerce or on restrictions of international trade, Marshall in his thirty-five years on the bench had essentially three cases—*Gibbons v. Ogden*, *Brown v. Maryland*, and *Wilson v. The Blackbird Creek Marsh Company*, all cases so famous that any indentification beyond citations is superfluous. In the entire seven year period here under analysis, he had none of them. With the passage of time these cases have become frequent. A remarkable feature of the 1958-59 term was the unanimous invalidation by the court of an Illinois statute with particularly burdensome restrictions concerning mud guards on trucks. This was even more remarkable because with the exception of *Morgan v. Virginia*, which involved segregation on buses (a very special form of restriction of interstate commerce), this was the first unanimous invalidation of a state statute on this ground in more than twenty years. A case tracing directly to the great Chief Justice's opinion in *Brown v. Maryland* on a taxation of imports and which thoroughly considers and applies the teaching of that case was a 1959 decision on the rights of Ohio and Wisconsin to tax certain imports.

Finally, there has been a vast proliferation from Marshall's decision in *Gibbons v. Ogden* insofar as that great case held that the New York regulation was incompatible with the federal licensing act in the same area as shipping. From this developed the doctrine of federal pre-emption of a field, and the pre-emption cases have grown greatly in number, particularly in labor relations. Problems of the taxability of income of foreign corpora-

33 328 U.S. 373 (1946).
tions which present more contemporaneous difficulty are of course problems which Marshall could not have known both for absence of the taxes and, indeed, absence of the interstate corporations during the early period here under consideration.36

A problem which Marshall did have occasion to deal with and which has been absolutely endless in its complexity ever since has been the whole area of the power of federal courts in relation either to state courts or state law. Thus, Marshall in 1807 was the first to observe that a federal court could not enjoin a suit in the state court.37 With this may be compared the more recent cases on reference of certain problems to state courts for adjudication even though the suits were originally brought in the federal courts, a practice which I may perhaps be indulged to observe I have elsewhere described as an unspeakably bad one from the standpoint of the litigants.38

We can perhaps approach the basic comparison being made between the early and the latest Courts if we come at it not in terms of classification and numbers but in terms of significant cases. Enough time has gone past since the decisions of Marshall's days so that we can fairly easily assess which are the most generally influential decisions of the time; if we wish to approach it quantitatively, perhaps the number of columns of citations in Shepherd's Citator is something of an indication of the continued vitality of an authority and I shall proceed to mention those of the cases which are most often cited there. For the 1958-59 term, we do not have the benefit of the long view, and so must make the best judgments available to us; but for purposes of comparison, these must stand and so will be made.

The first seven years of Marshall, the most important decisions of profoundly general consequence over the long course of time have been, of course, Marbury v. Madison; three cases in the field of international relations and ship seizures, including very serious problems of the interpretation of treaties;39 two other

37 Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch) 179 (1807).
39 Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); United States v. The Peggy, 5 U.S. (1 Cranch) 103 (1801); and Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).
important jurisdictional decisions already mentioned; *Ex parte Bollman*, supra, on treason; and of considerable importance, though not quite in the same range, *Little v. Barreme*, holding that an officer of the United States who exceeds his jurisdiction may be personally liable. With these cases must be placed, though at a lower level of highly important and practical workaday affairs, the cases on the priority of debts to the Government, upon limitations on corporations as expressed in their charters, and on the priority of Government claims in bankruptcy. Marshall personally was the author of all of these opinions.

Against this list may be contrasted what I think are likely to be the most important opinions of the Court at the 1958-59 term. All of the cases decided in 1958-59 are of some importance, or else the Court would not have taken them within its now discretionary jurisdiction. Nonetheless, the number likely profoundly to affect the future of the country for better or for worse is, as usual, comparatively small; the number of really major cases is commonly somewhere between five and twenty percent of all of them. In terms of really long-range significance, I think that a decision further confining the powers of the executive agencies to dismiss employees because of guilt by association may well prove important. So may a decision upholding a conviction for contempt of the House Un-American Activities Committee which, I confess I fear, may give a new lease on life to that body. The decision upholding the right of police to enter a home without a search warrant has such an enormous potentiality for evil as to be downright frightening. At the lesser, but nonetheless important level of things, the decision on variable annuities mentioned above, the decision on the pre-emptive effect of the National Labor Relations Act in relation to state actions for damages; and perhaps a case on the powers of

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40 *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) and *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).
the district courts to enjoin the Labor Board representatives\(^{48}\) may have rather substantial long-range significance.\(^{49}\) The large
group of cases on June 22nd dealing with the requirement to dis-
close certain government reports are also important.\(^{50}\) However,
what might well have been the most important case of the term,
the determination as to whether membership in the Communist
Party violates the Smith Act without any other overt act, was
postponed for reargument in November of 1959.\(^{51}\)

While the Court did put over the Smith Act case just men-
tioned, it certainly finished its term with a burst of substantial
business. On the last day, June 29, 1959, it held that state libel
laws are inapplicable to a radio or television station which permits
a political candidate to use its facilities since the candidate is not
subject to censorship by the station, and therefore the station
cannot be responsible for what he says.\(^{52}\) It again invalidated an
operation of the New York motion picture censorship law, this
time in connection with the film “Lady Chatterley’s Lover.” The
decision is likely to give considerably greater leeway to motion
picture distribution.\(^{53}\) Finally, in what may be the major decision
of the year, the Court declared illegal the entire system of job
security for persons in private employment.\(^{54}\)

And now let us turn to the business of drawing some con-
clusions. The most significant factor about the list of the major
cases of 1958-59 is that Marshall had nothing like them in the
first seven years of his administration and, what is more, scarcely
could have. No “loyalty program” existed; no state abuses of civil
liberties were under Supreme Court review; there were no
Congressional committees or similar state bodies making inquiries
into the political affiliations of the witnesses before them; and
at the lesser level, the economic problems of labor relations or
economic organization which gave rise to the opinions just men-

\(^{49}\) I would be less than human not to acknowledge the provincial point of
view that the decision that a civil action on a contract made on the reservation may
not be brought against an Indian in the State trial courts will cause a great deal
269 (1959).
\(^{50}\) See Palermo v. United States. 79 Sup. Ct. 2361 (1959).
\(^{52}\) Farmers Educational & Coop. Union v. WDAY, Inc., 79 Sup. Ct. 1302
(1959).
tioned had not yet come into existence. What is more, the most important single area of its work in recent years has been the Supreme Court's function in the race relations field, although that area was comparatively quiet during 1958-59. A world of slavery could scarcely have had an equivalent to the challenge of equal protection, and Marshall thus had no such problems.

On the other hand, some but not all of the Marshall problems were carried over with varying degrees of intensity to modern times. Perhaps Marshall's greatest work in this period was jurisdictional; his solution of the great problems by the sheer happenstance of coming first left largely lesser problems to his successors. A greater difference is in the extent to which Marshall was seriously occupied with problems of international relations. With the passage of time these problems have been pre-empted almost entirely by the President and the Department of State or, to a lesser extent, the Congress. Whereas the original establishment of the Supreme Court was probably fundamentally for the purpose of providing legal determinations of serious issues of international relations, this duty is largely gone, and is has today only a secondary line of problems in that field.55

Using these polar points for comparison, to find a real continuity of function in the Court from 1801 until now, one must necessarily reach extremely abstract levels of generalization. However, these observations, I think, will stand:

1. The Court at any given time reflects some, but not all, of the basic problems of the country. As the country grows and changes, so necessarily do the problems confronting the Court.

2. In its relation to the economic life of the country, the Court in its beginnings and today has been most intimately involved. Nonetheless there has been an enormous change. The primary function of the Court in this regard in the early Nineteenth Century was in the formation of the common law. This function has been abandoned substantially altogether and its place has been taken with the duty of interpreting and applying the regulatory statutes.66 However, there is a striking reverse twist; the Court

55 For some discussion of the relation of international affairs to the establishment of the Federal juridicial system, see Frank, op. cit. supra note 4; and for discussion of the limited responsibilities of the court in international affairs, see Frank, op. cit. supra note 29, at chapter 13.
66 The first documentation of this now familiar shift is Frankfurter & Landis, The Business of the Supreme Court (1927).
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in the beginning played a much more significant role in relation to the federal revenue than it does today. The sheer mass of modern tax law is moving beyond the effective control of the Court; all six of this year's tax cases put together will have only a comparative modest effect on the Government's revenue.

3. Both early and late, the enforcement and operation of the criminal law has received a considerable degree of attention from the Court; but in modern times there is a much heavier weight on the constitutional aspects of the operation of that law than in the beginning, and a lesser attention to the detail of particular crimes.

4. The Court has at all times had a substantial duty to lead the Federal system in matters of jurisdiction and procedure. This it continues to do, but in declining scale.

5. An everlasting duty of the Court is that of serving, as George Braden once put it, as umpire to the Federal system. This function continues to present problems of undiminished intensity.

6. The Court currently takes as a primary duty, the superintendence of the preservation of civil rights. Both in relation to the states and the Federal government, what is probably the most important contemporary work of the Court is what it does in the fields of race relations, of freedom of speech, press and religion, and in the maintenance of the procedural guarantees of individual liberty. This effort, as compared with the early Nineteenth Century, is a vast departure; but it is deeply grounded in the Twentieth Century.

If from this maze of detail we attempt to reduce the analysis of the function of the Court today to a few major headings, it may be said that the duties of the Court now are first, to apply and interpret the regulatory statutes of government; second, to superintend at least to some degree, federal civil and criminal procedure and jurisdiction; third, to achieve harmonious and efficient inter-relations among the states themselves, or between the states and the federal government; and fourth, to interpret the demands of the Constitution in relation to the individual liberties of each citizen. This multiple function is the role to which history has brought the Supreme Court today.

It remains to observe a little concerning the efficiency of
these operations and to note some of the problems in connection with them. The most noticeable difference between the early and the most recent Court is the quantitative difference in the number of problems to be solved. It took seven years at the beginning of the Nineteenth Century to produce approximately as many opinions of the court as in one year today, but the population between 1800 and 1810, averaged six million. If the annual volume of opinions may be said to have increased sevenfold, the population has increased almost thirtyfold.\textsuperscript{57} Put crudely, in the early years the Court averaged about four times as many opinions per million of population as it does today.

Some such decline in ratio is clearly imperative, there being a limit to how much nine men can do in a year, no matter how hard they try. With the increase in population continuing, therefore, it may reasonably be expected that the diminishing quantitative relationship of the Supreme Court to the general run of problems of the population will continue. In these circumstances the percentage of the actual disputes of America which the Court can hope to effect directly is almost infinitesimal; and the limit of its power is essentially educational. It has the capacity to show the way for those who wish to learn it.

Nonetheless, there is a very real danger that the country may simply pass the Court by and outgrow the institution, which may not in turn be able to dispose of enough business greatly to effect the general affairs of life progressively more complicated. This is why the Court must, if it is to survive, make every blow count.

In these circumstances, clearly the retreat of the Court from the common law field was a wise one. Granted that in Marshall's time the court could and did make a real dent on the general law, to attempt to do so now would be an utter waste of shot. In other economic affairs of life, its contemporary significance varies from the fairly remote or almost trifling at the one end of the scale to the dominant at the other. In such important matters as the development of atomic energy, the field of patents, or even the

\textsuperscript{57} This type of comparison omits two factors, the first that the volume of opinions was rapidly increasing by 1807. A volume comparison of 1808 with 1958 would show not seven times as many opinions in the latter year, but about three and one-half times as many. This type of comparison also leaves out of account the enormous administrative task of the court in reviewing and excluding the 1500 cases more or less which it chooses not to hear in modern times.
law of taxation, the Court plays a minor role. On the other hand in the fields of labor relations, securities regulation, anti-trust law enforcement (apart from patents), and a portion of the regulation of transportation, the Court is a truly dominant institution of government.

In the fields of jurisdiction and procedure, the Court is continuing to do an important job although particularly in the area of procedure (as distinguished from jurisdiction), the lead has probably passed to the lower courts. The number of actual interpretations of the rules, either civil or criminal, is small in relation to the incredibly large volume of decisions in those fields. While I do not think it regrettable that the Court does not spend its time on comparatively minor matters of rules interpretations, I do think that it is extremely regrettable that it has allowed the transfer of a great deal of the rule-making function to the Judicial Conference. For the very reason that rule-making is capable of disposing of hundreds of cases with the sweep of a pen, I would suppose that this legislative function is the very type of thing which the Court ought to hold firmly in its own hands.

In its contribution to the orderly and reasonably efficient maintenance of the federal system, the Court does its best and most effective work. Its effort to maintain the country as a large free-trade area has resulted in substantial accomplishment. The older issues of the relation of the states to the federal government have become minor now because the federal government has assumed so much power that what is left to the states, whether one likes it or not, is of greatly diminished importance. Perhaps the largest accomplishment of the Court has been in relation to purely interstate controversies. The absence of border wars among the states is in itself an accomplishment which has existed in no similar land mass of any substantial population for anything like a comparable period of time; with the gigantic exception of the Civil War, this record is virtually unblemished. For this, the Court may not deserve all of the credit, but it certainly has earned some of it.

We come finally to the record of the Court in relation to human liberty, a record which has filled an increasingly large portion of its annals since World War I. Here we trace a sadly
waving line. In the field of race relations, much has been done. The Court has maintained a fairly consistent stand since its invalidation of the Louisville segregated housing ordinance in 1917.\(^{58}\) From that day to this, through the firm stand of Chief Justice Hughes in the Thirties, to the invalidation of the white primary, restrictive covenants, segregation of transportation, segregation in higher education, and finally, segregation in the lower schools, the court has maintained a firm and, happily, a substantially unanimous leadership. There are limits here of effectiveness. It is obviously too much for any group of five or nine men to reverse the folkways of determined people overnight. But anyone coming to Kentucky to speak on this subject must do so with respectful deference to those citizens here who have a record of a job well begun and against great odds. With regard for what I cheerfully assume is the substantially superior knowledge of this audience, on this topic, I can do no more than respectfully take off my hat and salute you for your part in collaborating with the Supreme Court in the effort to make the American dreams of equality more nearly a reality.

In the remaining area of civil rights, it sometimes seems to me that the Court walks a line filled with corkscrew turns. On the one hand, every man is entitled to counsel, but not if he is in a state court and charged with less than a capital offense.\(^{59}\) No person shall be put twice in jeopardy for the same offense, but by reiteration as recently as this year, this does not apply if the two prosecutors are respectively state and federal.\(^{60}\) The people shall be safe in their homes from unlawful searches and seizures, but if a Health Officer says, "I smell a rat," and walks into a house looking for it, he does not need a warrant.\(^{61}\)

I do not mean to be either glib or captious about cases which present hard points; particularly in relation to purely Federal procedure, the Court has particularly in recent years done much to assure fair trials.\(^{62}\) When a storm of criticism rose up because of misunderstanding of the *Jencks* decision, which held that a witness purporting to give an eye-witness account of particular

\(^{58}\) Buchanan v. Warley, 245 U.S. 16 (1917).
\(^{59}\) Spano v. People of the State of New York, 79 Sup. Ct. 1202 (1959), is the most recent word on this topic.
\(^{60}\) Bartkus v. Illinois, 79 Sup. Ct. 676 (1959) (five to four decision).
\(^{61}\) Frank v. Maryland, 79 Sup. Ct. 804 (1959) (also five to four decision).
\(^{62}\) See, for example, *Jencks* v. United States, 353 U.S. 657 (1957).
activities could be cross-examined on the basis of reports earlier made by him concerning the same subject matter, it may be noted greatly to his credit that Senator Cooper of this state was one of those who advised the Senate that the rule was for the protection of all. Nonetheless, I fear that the barrage of opinions this year, mentioned above, on this point will set back this wholesome reform.

It is probably true that the Court has contributed a good deal to maintaining a Federal system of criminal law enforcement which I think the bulk of the population regards as both effective and civilized. Part of this is due to the efficiency of the F.B.I., of course, but certainly the Court has helped to keep standards high. On the other hand, in the field of the State administration of criminal justice, the on-again, off-again quality of the Supreme Court's review leaves me, at least, in doubt as to just how effective it is. In this part of the Court's self-assigned task, I have real doubts as to whether it is accomplishing much more than tinkering with the result in an occasional case.

Nowhere has the trial been more uncertain, the light of leadership more flickering, than in relation to the most fundamental right of the American citizen, his right to freedom of speech. It will be recalled that this is an area which the Court entered late in its life, coming into the field as recently as World War I; and in the intervening forty years no clear pattern has emerged. In World War I and in the twenties, while the Court began frequently to turn to the topic of freedom of speech, it was almost always to declare that in any given instance the freedom had been rightly abridged; and while the trumpeting dissents of Holmes and Brandeis gave a call to succeeding decades, theirs was nonetheless the voice of dissent. In consequence when the country was gripped by that vast and fearsome spirit of repression which has so occupied our minds and spirits during the period of tension with Russia known as the Cold War, the Court

63 The matter, including the Cooper observations, is discussed in Frank, op. cit. supra note 29, at 194. Whether the Jencks rule has survived the barrage of interpretation it received on June 22, 1959, in several cases, I do not yet know. See, e.g., Palermo v. United States, 79 Sup. Ct. 236 (1959).

64 For a banner illustration of what seems to be the precious abstractness of some of the work in this field, see Wolf v. Colorado, 338 U.S. 25 (1949), a decision which held that the States are governed by the search and seizure requirement of the Fourth Amendment—but that the product of an unlawful search is nonetheless admissible as evidence.
did little but review the various methods of the repression and find them good. That phenomenon generally known as "McCarthyism" rose, exploded, and flickered down on the American scene without the Supreme Court having done much of anything to hasten its demise. Under the leadership of our current great Chief Justice Warren there has been some tendency toward a more moderate approach, although as this term comes to an end I share the wonder of some others as to whether what might be described as the Warren Reform Movement may have spent itself. Yet the resounding accomplishment this year in the termination of surveillance and review of miscellaneous industrial employees shows that there is at least some great effectiveness remaining in the Warren leadership.

At least this much is painfully clear. The American citizen owes such liberty of freedom of speech, press and association, considerably more to Jefferson and Madison than to any majority decisions of the United States Supreme Court in the past fifteen years. The diligence of the Court to maintain civil rights has been through its dissenters from Holmes and Brandeis of an earlier day to Warren, Black, Douglas, and Brennan today. These men have not had the power to declare the law. They have given intellectual leadership and stimulus to those of our citizens who do believe, at a minimum, that when the Constitution of the United States provides that Congress shall make no law abridging the freedom of speech or of the press, very few abridgments are to be tolerated.

Above all else, the historic role of the Supreme Court has been this: It has been a place in which men, usually able and almost always dedicated, could gather to deliberate on fundamental problems of the American people. One may not always be satisfied with the result, whatever it may be, and still be grateful for the existence of the process itself. The fundamental glory of the Court has been the integrity of that process and the patriotism of its members. Anyone of independent point of view is certain to find what he regards as error in some portions of the Court's work, but he will find little that is ignoble. It is for this reason that while the Court may often be subject to purely partisan attack, it is always regrettable when this is so. This is the most
consistent thread in the history of the Court: From Jay and Marshall to Vinson and Warren, those who have mounted the Bench have given their best to the service of their country.