PREFACE

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Supreme Court justice, whether salutary or ill-conceived, imposes itself on our daily lives and shapes American society. Although the movement from 1789 to 1973 may not be the awakening of a conscious sense of justice, it is still a career in time with a sense of purpose that we may rediscover. In an era when we may have temporarily lost our constitutional bearings, it may be instructive to reflect upon the history of the United States Supreme Court and find guidance in its historic decisions.

In an effort to promote mature reflection on the development of constitutional law, *Arizona Law Review* is devoting this symposium to an historical analysis of pivotal decisions of the Supreme Court. The decisions selected for commentary are pivotal in the respect that they have exerted a major influence on the growth of constitutional law. They have as well had a dramatic effect on the history of the American experience. Equally important, these decisions provide a revealing insight into Supreme Court justice, often catching in one climactic moment the progressive history of American jurisprudence. But calling a decision pivotal also has the added virtue of not enshrining the Court's judgment in eulogistic terms. Foresight ineluctably escapes the Court's grasp and results in pivotal decisions which have unrelenting consequences. This symposium, accordingly, countenances the Court's failures as well as its achievements, leaving the final analysis to the commentators.

The authors included in the symposium are among the nation's leading scholars of constitutional law. In terms of overall format, they have been asked to subject a particularly important Supreme Court decision of their choice to a three-fold inquiry. First, can the decision, on its own terms, withstand rigorous analysis? Second, seen in rela-

tion to antecedent events and prior decisions of the Court, does the decision constitute a radical departure from the past, does it articulate a doctrine which was before only a tendency in the law or does it realize an ideal embodied in prior decisions or the Constitution itself —in other words, is the decision justified by its own past, and in what respects? Finally, has the course taken by the Supreme Court in that decision been wise considering subsequent events? While there have been departures from this format where the subject matter warrants different treatment, the commentators have been concerned generally with the historical background, analysis and impact of the pivotal decisions presented in this symposium.

Many of the cases are undoubtedly well known, while others have not received the attention they merit. Topically the articles range from analysis of the exceptions clause, commerce clause, free exercise and establishment clauses, to discussion of the fourth, sixth, eighth and fourteenth amendments. Though a wide assortment of constitutional issues are evaluated, there is considerable thematic overlap from one article to another, especially in decisions explicating the due process and equal protection clauses. Accordingly, it may be useful to discuss briefly the substantive themes and variations.

The cases discussed basically illustrate the continuing task of the Court to define the scope and extent of judical and legislative authority. While the Court in *Marbury v. Madison*[1] determined that Congress had no power to confer jurisdiction upon the Court in cases other than those specified in article III, its negation of judicial and legislative authority repugnant to the Constitution resulted in the affirmation of judicial review. Yet judicial review, the power to invalidate laws violative of the Constitution, is impotent if the Court does not have jurisdiction in the first instance to decide questions arising under the Constitution. Anterior to the issue whether the Court may exercise its power of substantive constitutional review is the question whether Congress may deny, rather than affirm, the Court's appellate jurisdiction and thereby prevent the Court from engaging in judicial review. This question is authoritatively analyzed in *Ex parte McCardle*.[2]

Professor Van Alstyne reviews *McCardle* to determine the extent of Congress' power to make exceptions to the Supreme Court's appellate jurisdiction.[3] But his article is also an attempt to make explicit that this power, like the commerce power, although plenary, is still subject to constitutional limitations. *McCardle,* like *Marbury,* illus-

1. 5 U.S. (1 Cranch) 137 (1803).
2. 74 U.S. (7 Wall.) 506 (1869).
3. Van Alstyne, *A Critical Guide to Ex parte McCardle,* 15 ARIZ. L. REV. 229 (1973).

trates that the Court may deny its jurisdiction and thereby affirm its power by that act of negation. Both decisions also support the view that every increase in legislative power also results in the growth of judicial power.

Mr. Stern's article[4] dealing with the scope of the commerce power is, on its face, concerned with the increase in federal power to control intrastate criminal activity under the rubric of the commerce clause. Underlying his analysis, however, is also the significant jurisdictional question whether Congress may by legislative fact-finding create the conditions of its own rightful exercise of authority. If Congress may declare that any intrastate activity has an adverse effect on interstate commerce, and if the commerce clause confers jurisdiction on Congress to govern those activities which have an adverse effect on commerce, then this surely would result. In this instance, however, the resulting increase in federal legislative authority, though it might inure to the benefit of state authority, might also result in the diminishing role of state authority. While Mr. Stern argues that the expansive application of the commerce power in *Perez v. United States*[5] virtually reaffirms the role the commerce power enjoyed as early as *Gibbons v. Ogden*,[6] it still remains to be answered whether the resulting increase in federal power has an adverse effect on the sensitive federal-state relationship that distinguishes our commitment to federalism.

The resolution of the extent of judicial and legislative power under the Constitution is made more urgent when potential abuses of authority result in the deprivation of rights guaranteed by the Constitution, especially the first amendment. Professors Davis and Kauper pursue the question of the extent of legislative authority under the free exercise and extablishment clauses. Professor Davis traces the demise of polygamy as precipitated by *Reynolds v. United States*[7] and discusses the governmental limitations on the free exercise of religious practices since *Reynolds*.[8] Professor Kauper, on the other hand, examines the boundaries between church and state as delineated by Justice Black in *Everson v. Board of Education*[9] and illustrates that metaphorical dividing lines are improper substitutes for concrete limitations on governmental activities that become imbued with religious overtones.[10]

4. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973).
5. 402 U.S. 146 (1971).
6. 22 U.S. (9 Wheat.) 1 (1824).
7. 98 U.S. 145 (1879).
8. Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 ARIZ. L. REV. 287 (1973).
9. 330 U.S. 1 (1947).
10. Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 ARIZ. L. REV. 307 (1973).

Turning to those decisions which have become the bulwark of our criminal jurisprudence, Dean McKay's analysis of *Mapp v. Ohio*[11] and the development of the fourth amendment's exclusionary rule thematically addresses the question whether the Court may tolerate unreasonable police activity repugnant to the Constitution.[12] Justice Clark, who spoke for the majority in *Mapp*, turns his attention in this symposium to the significance of *Gideon v. Wainwright*[13] and the sixth amendment's right to counsel.[14] And Justice Goldberg reviews his dissent in *Rupert v. Alabama*[15] and finds the standards of *Weems v. United States*[16] of pivotal importance in the recent discussions concerning the abolition of the death penalty.[17] All three articles emphasize the protections afforded and defined by the Constitution to prevent abuses in the administration of justice.

Variations on themes provided by provisions of the fourteenth amendment constitute the underlying consistency of the final group of articles. Professor Bickel in dispelling the view that citizenship defines the relationship between the individual and his government places the *Dred Scott* decision[18] and the *Slaughter-House Cases*[19] in a new perspective.[20] His thesis is that the Constitution holds out its protections to persons, not "citizens," and that the concept of citizenship has played only a minor role in constitutional history.

The lengths to which the Court accepted segregation in fact and refused to invoke fourteenth amendment protections to prevent the discriminatory use of state power forms the subject matter of Professor Oberst's article[21] on *Plessy v. Ferguson*.[22] Professor Oberst argues that *Plessy* marks the point in history when racial prejudice became ensconced in the law.

Efforts to prevent the growth of federal and state authority with respect to life, liberty and property characterize the litigation discussed by Professor Strong.[23] *Lochner v. New York*[24] is more than repre-

11. 367 U.S. 643 (1961).
12. McKay, *Mapp v. Ohio, the Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327 (1973).
13. 372 U.S. 339 (1963).
14. Clark, *Gideon Revisited*, 15 ARIZ. L. REV. 343 (1973).
15. 375 U.S. 889 (1962).
16. 217 U.S. 349 (1910).
17. Goldberg, *The Death Penalty and The Supreme Court*, 15 ARIZ. L. REV. 355 (1973).
18. 60 U.S. (19 How.) 393 (1857).
19. 83 U.S. (16 Wall.) 36 (1873).
20. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973).
21. Oberst, *The Strange Career of Plessy v. Ferguson*, 15 ARIZ. L. REV. 389 (1973).
22. 163 U.S. 537 (1896).
23. Strong, *The Economic Philosophy of Lochner: Emergence, Embraśure and Emasculation*, 15 ARIZ. L. REV. 419 (1973).
24. 198 U.S. 45 (1905).

sentative of the Court's former concern with perpetuating the fundamental notions of competitive capitalism. It symbolizes to many the conversion of the Court into a superlegislature by reading its own notions of the substantive limits on the proper exercise of governmental power. Dean Lee pursues the condemnation of the Court's continuing appropriation of legislative power in his analysis of *Kramer v. Union Free School District No. 15*.[25] In the context of the demanding strict scrutiny-equal protection test applied to infringements of voting rights, he asserts that the Court's enforced egalitarianism is misplaced and that the protection and definition of fundamental rights is left appropriately with the legislature.[26] In contrast, Professor Goodpaster, while conceding that previous fundamental rights analyses under the equal protection clause have been less than coherent, formulates a general theory of fundamental rights which restores the integrity of the judicial process.[27] Discussing his theory and applying it to the important decisions[28] in the development of the compelling interest standard, he maintains that there are basal fundamental rights which cannot be impaired except in cases of dire necessity and that otherwise, the Court must perform a reasonable review function when important, but not necessarily fundamental, rights are subjected to majoritarian will.

The symposium closes with Professor Countryman's study of developments in the concept of due process as applied to creditor's and consumer rights.[29] Tracing the various ramifications of *Sniadach v. Family Finance Corp.*,[30] Professor Countryman finds that various creditors' remedies have been modified to include the basic protections of notice and a fair hearing before the Constitution permits the taking of private property.

25. 395 U.S. 621 (1969).
26. Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School District No. 15*, 15 ARIZ. L. REV. 457 (1973).
27. Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973).
28. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973); Dandrige v. Williams, 397 U.S. 471 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).
29. Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521 (1973).
30. 395 U.S. 337 (1969).