Supplementary Material

Chapter 7: The Republican Era—Foundations/Principles/Judicial Power to Protect Rights

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Stephen Field, **The Centenary of the Supreme Court of the United States** (1890)[1]

As social reformers gained influence in the political arena, conservatives called on the courts to stop the menace. In the preface to his influential post-bellum treatise on constitutional authority in the states, Christopher Tiedeman called for "a full appreciation of the power of constitutional limitations to protect private rights against the radical experiments of social reformers."[2] This view was echoed across the country by the increasingly organized and vocal legal profession, which found strong support in the national legislature and executive.

In 1890, the New York Bar Association sponsored a centennial celebration of the U.S. Supreme Court. Republican President Benjamin Harrison suggested the public celebration and former President Grover Cleveland, a Democrat, presided over the festivities. Associate Justice Stephen Field was selected by his brethren to represent the court at the event, and this reading is excerpted from his speech on that occasion. Field was at that point the senior-most justice, aside from the ailing Samuel Miller. A conservative Democrat, Field was appointed by the Republican Abraham Lincoln. He distinguished himself on the bench by interpreting the Fourteenth Amendment to protect the "right to pursue an ordinary vocation" and voting to strike down the legal tender acts Congress passed during the Civil War. . In New York, Field joined other speakers in emphasizing the importance of an "independent judiciary [as] the true and final custodian of the liberty of the subject."[3]

In 1901, the American Bar Association organized another celebration, this time of the centennial of the appointment of John Marshall to the Supreme Court. The festivities became another occasion to emphasize the value of judicial review and John Marshall's contribution to throwing off "the doctrines and theories engendered by the French Revolution – the supreme and uncontrollable right of the people to govern."[4] As John F. Dillon, former state and federal judge, previously declared in his presidential address to the American Bar Association, "It is the loftiest function and most sacred duty of the judiciary" to act as "the only breakwater against the haste and passions of the people – against the tumultuous ocean of democracy. It must, at all costs, be maintained."[5] Field, Brewer, and other elite jurists regarded public education and political mobilization as essential for maintaining an activist judiciary.

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No government is suited to a free people where a judicial department does not exist with power to decide all judicial questions arising under its constitution and laws.

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The power of the court to pass upon the conformity with the constitution of an act of Congress, or of a State, and thus to declare its validity or invalidity, or limit its application, follows from the nature of the Constitution itself, as the supreme law of the land. . . .

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[1] Excerpt taken from Stephen Field, "The Centenary of the Supreme Court of the United States," *American Law Review* 24 (1890): 351, 358–68.

[2] Christopher G. Tiedeman, *A Treatise on the Limitations of Police Powers in the United States* (St. Louis: F.H. Thomas Law Book Co., 1886), viii.

[3] Former American Bar Association president Edward J. Phelps, quoted in Arnold M. Paul, *Conservative Crisis and the Rule of Law* (New York: Harper & Row, 1969), 63.

[4] John F. Dillon, "Introduction," in *John Marshall*, ed. John F. Dillon, vol. 1 (Chicago: Callaghan & Company, 1903), xvii.

[5] John F. Dillon, "Address of the President," in *Report of the Fifteenth Annual Meeting of the American Bar Association* (Chicago: American Bar Association, 1892), 211.

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The limitations upon legislative power, arising from the nature of the constitution and its specific restraints in favor of private rights, cannot be disregarded without conceding that the legislature can change at will the form of our government from one of limited to one of unlimited powers. Whenever, therefore, any court, called upon to construe an enactment of Congress or of a State, the validity of which is assailed, finds its provisions inconsistent with the constitution, it must give effect to the latter, because it is the fundamental law of the whole people, and, as such, superior to any law of Congress or any law of a State. Otherwise the limitations upon legislative power expressed in the constitution or implied by it must be considered as vain attempts to control a power which is in its nature uncontrollable.

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. . . I hardly need say, that, to retain the respect and confidence conceded in the past, the court, whilst cautiously abstaining from assuming powers granted by the constitution to other departments of the government, must unhesitatingly and to the best of its ability enforce, as heretofore, not only all the limitations of the constitution upon the Federal and State governments, but also all the guarantees it contains of the private rights of the citizen, both of person and of property. As population and wealth increase—as the inequalities in the conditions of men become more and more marked and disturbing—as the enormous aggregation of wealth possessed by some corporations excites uneasiness lest their power should become dominating in the legislation of the country, and thus encroach upon the rights or crush out the business of individuals of small means—as population in some quarters presses upon the means of subsistence, and angry menaces against order find vent in loud denunciations—it becomes more and more the imperative duty of the court to enforce with a firm hand every guarantee of the constitution. Every decision weakening their restraining power is a blow to the peace of society and to its progress and improvement. It should never be forgotten that protection to property and persons cannot be separated. Where property is insecure the rights of persons are unsafe. Protection to the one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain.

. . . [I]t is not sufficient for the performance of his judicial duty that a judge should act honestly in all that he does. He must be ready to act in all cases presented for his judicial determination with absolute fearlessness. Timidity, hesitation, and cowardice in any public officer excite and deserve only contempt, but infinitely more in a judge than in any other, because he is appointed to discharge a public trust of the most sacred character. . . . If he is influenced by apprehensions that his character will be attacked, or his motives impugned, or that his judgment will be attributed to the influence of particular classes, cliques or associations, rather than to his own convictions of the law, he will fail lamentably in his high office.

To the intelligent and learned Bar of the country the judges must look for their most effective and substantial support. . . . Sustained by this professional and public confidence, the Supreme Court may hope to still further strengthen the hearts of all in love, admiration and reverence for the constitution of the United States, the noblest inheritance ever possessed by a free people.