Prologue

First Monday 1941

The United States Supreme Court[1] annually resumes hearing arguments and motions on the first Monday in October, and has done so since 1917.[2] On First Monday 1941, the nation's capital was wilting in an unseasonable heat wave, reaching 94°F. under clear skies.[3] The nine Justices filed in at noon from the robing chamber, beginning to swelter in their black robes. The proceedings of this First Monday were mercifully brief – a mere three minutes – because the Court adjourned out of respect for the memory of Justice Louis D. Brandeis, who had died the day before. Justice Owen Roberts formally announced that Chief Justice Charles Evans Hughes had retired and that President Franklin D. Roosevelt had nominated Justice Harlan Fiske Stone to his place. The new Chief Justice then made similar announcements about the two other new members of the Court, James F. Byrnes and Robert H. Jackson. Stone read a brief eulogy for Justice Brandeis and then adjourned the Court for a week.[4] The Justices filed out.

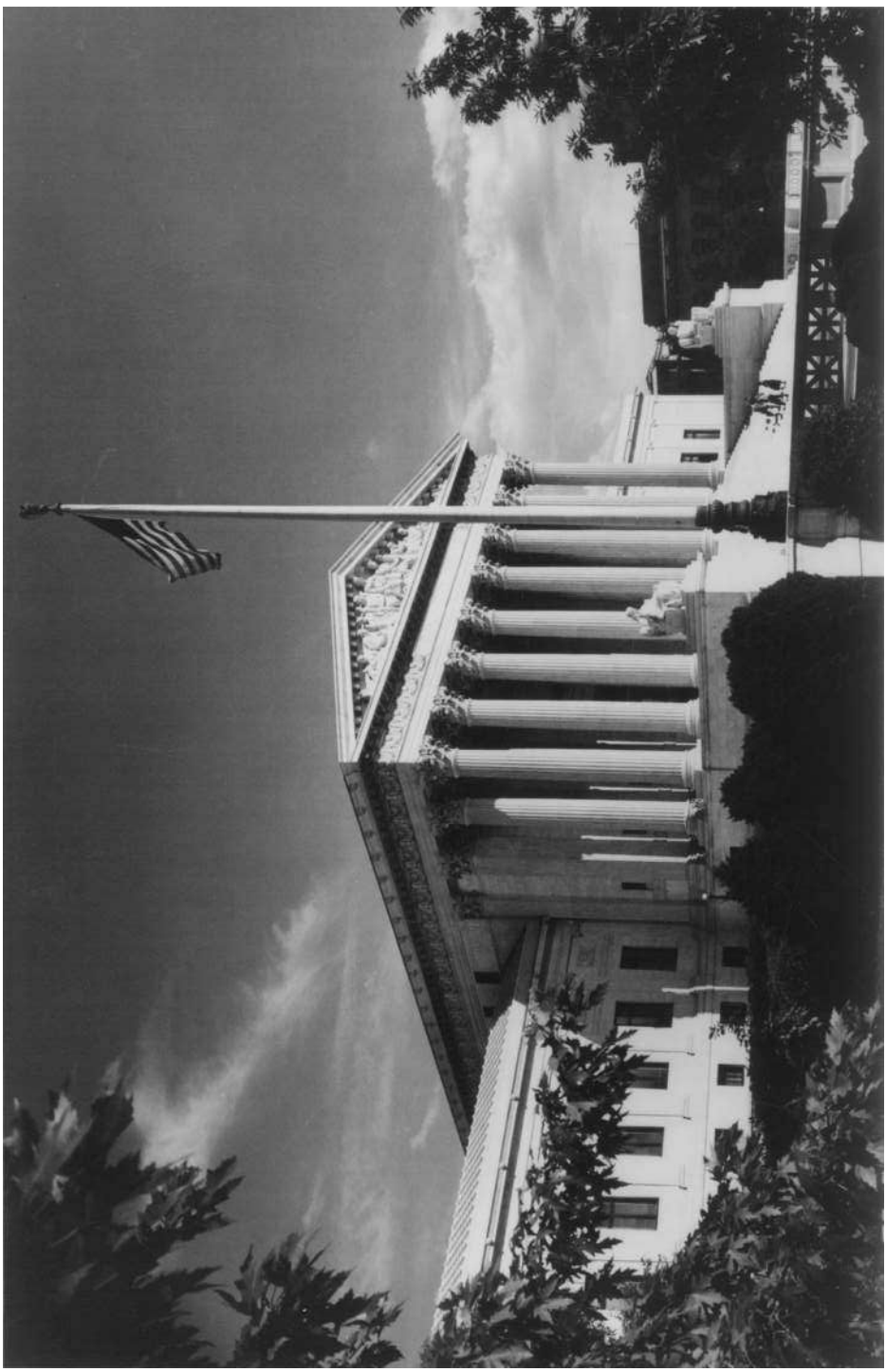
Let us enter by imagination into the mind of one of the Justices as he left those brief opening ceremonies of the 1941 Term, following him as he walked down the steps of the main entrance to the Marble Palace. If he paused reflectively in that hot afternoon, staring out toward the Capitol, the Washington Monument, and the Lincoln Memorial beyond, what might he have been thinking as he mused about the Term that had just begun?

[1] A note on usage: henceforth, the phrases "the Supreme Court," or more simply, "the Court," will refer only to the United States Supreme Court. References to state supreme courts will always indicate the state; e.g.: "New Hampshire Supreme Court."

[2] Congress in 1916 established the first Monday in October as the day when the Supreme Court convenes at the commencement of October Term: Act of 6 Sept. 1916, ch. 448, 39 Stat. 726.

[3] *Washington Post*, 7 Oct. 1941, p. 1: "Humid Heat Reaches 94; No Respite Is in Sight."

[4] "Supreme Court Honors Brandeis," *New York Times*, 7 Oct. 1941, p. 24.



1. The "Marble Palace": building of the Supreme Court of the United States, west facade *c.* 1940. Photographer unknown.

First Monday 1941

He might have thought first about the nation stretching westward beyond his gaze, its people and its prospects in the troubled autumn of 1941. Remarkable changes had occurred, even in the brief decade that had elapsed since the investiture of the previous Chief. What impact might he and his Brethren – for they still referred to themselves that way in 1941 – expect to have on that sprawling, blessed land and its 133 million citizens? What impact would it have on them?

The Supreme Court resumed its work in October 1941 at a transitional point in American experience. Technological change was the most obvious signpost to a radically different future. Agriculture and heavy industry were beginning to yield to a changing economic base, one that would feature service industries and high technology. The traditional producer-oriented society, which treated individuals as production units like farmers or factory workers, was shifting to a consumer orientation, which emphasized the role of consumption. Plastics, light metals, electricity and electronics, even power derived from atomic fission, promised a dazzling, but problematic, future. Communications – radio, telephone, television – were creating the "information society" that was to emerge in the late twentieth century. The American people were enthusiastically embracing the automobile culture that dominated space and society by decade's end, with immeasurable implications for foreign policy, urban planning, and industrial growth. The auto provided a vehicle for massive internal migration, as millions of Americans deserted the farm, as blacks moved to the cities of the Northeast and the upper Midwest, and as urban dwellers moved to the suburbs. Race, religion, and ethnicity were becoming more important than ever in identifying social groups.

And what of the nation's law? The changes the previous decade had witnessed were, if anything, even more far-reaching in the domain of public law than in the altered economic and technological landscape. Since 1937, constitutional law had diverged in new and unpredictable directions. The Justice might have recalled an editorial in the *New York Herald Tribune* on the occasion of Chief Justice Charles Evans Hughes's resignation the previous June that called on his successor to create a unity of doctrine "based on a clearer philosophy of government than has yet been expressed in the swift succession of decisions rendered by a court standing in the shadow of political change."[5] Would such unity be possible? How would the United States Supreme Court shape the evolving substance of that law?

And finally, what of the Court itself? Nine intellectually diverse individuals, most of them having strongly held opinions about the law, had to discern the meaning of the Constitution's inscrutable phrases. Pundits were predicting that they would be a monolith, the New Deal in black robes, rubber-stamping

[5] "The New Supreme Court," *New York Herald Tribune*, 13 June 1941, p. 20.

the program of the man who had nominated seven of them to the Court in the past four years. Was that likely, given the personalities and experiences of the individual Justices?

Only twice before 1941 did the United States Supreme Court have an opportunity to interpret a new constitutional order. The Courts of 1790 to 1825, and then the Reconstruction Court, and finally the Stone/Vinson Court, took up their work in the immediate aftermath of what Bruce Ackerman has called America's three constitutional moments, times of fundamental change in the public order. Each "moment" marked a "self-conscious act of constitutional creation," which produced "constitutional regime[s], the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life."[6] Ackerman identifies these moments as the Founding, Reconstruction, and the New Deal.

In each of these three periods of its history (1790–1825, 1865–80, 1941–53), the Court repudiated the theretofore dominant mode of understanding the public legal order, and replaced it with a reconfigured view of law. The pre-Marshall and Marshall Courts had interred the pre-Revolutionary constitutional system that accommodated monarchy, aristocracy, the imperial constitution, and the legal order limned in Blackstone's *Commentaries*, replacing it with a thoroughly republican constitution. The Chase and Waite Courts abjured the compact theory that underlay the state-power constitutional understanding of antebellum Democrats and that provided the mainstay for slavery's dominance of the political order, in favor of a nationalist and Republican understanding of the constitutional order that vindicated the vision of Alexander Hamilton, John Marshall, Joseph Story, and Daniel Webster.[7] The Stone and Vinson Courts in turn buried what had been in its day legal orthodoxy. Unlike those earlier Courts, however, they failed to provide a replacement of comparable authority.

Thus, to understand the work of the Stone and Vinson Courts, it is necessary first to review the legal order that they rejected. In 1941, the American Constitution was part of what Karl Polanyi called, in his 1944 classic, "the Great Transformation."[8] The supposedly self-regulated market of the nineteenth century was giving way to legislative and administrative regulation. Human freedom, liberated from the bondage of a market that commodified labor, land, and capital alike, now enjoyed a potential for growth that had previously been impeded. This opportunity was deferred after 1940 due to the

[6] Bruce Ackerman, *We the People: Foundations* (1991), 44, 59. Ackerman, *We the People: Transformations* (1998). See the discussion of Ackerman's enterprise in "Symposium: Moments of Change: Transformation in American Constitutionalism," 108 *Yale L. J.* 1917 (1999).

[7] Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (1982).

[8] Karl Polanyi, *The Great Transformation* (1944), esp. 249–255.

necessary regimentation of an entire society engaged in total war, but it was reappearing vigorously as Polanyi wrote.

For the previous half century, beginning around 1885, American public law had developed within an ideology that scholars have called "classical legal thought" or "legal orthodoxy."[9] This judicial outlook pervaded both public law and private law. It explained the place of law in the American republic, and the role of courts in expounding that law. Comprehensive in its reach, confident in its authority, classical legal thought constituted nothing less than a field theory of law in American society.[10] It dominated Supreme Court adjudication from 1890 until the constitutional crisis of the 1930s.

But classical legal thought never lacked for critics, and the results it produced came under recurrent attack from the academy, the bench, and the political arena. It withstood these challenges until the 1930s, when it disintegrated. Its loss left an intellectual void that the 1940s Court failed to fill.

The period 1930 through 1950 witnessed social and economic transitions so profound that they amounted to transformations of American society. Lawrence Lessig has suggested a theory that explains the dynamic of constitutional interpretation in those circumstances. He refers to this "two-step" originalism in constitutional interpretation as "translation."[11] Simply put, translation posits that constitutional meaning is a function of both text and the context in which that text is applied. Inevitably, social and economic contexts change whereas constitutional text does not (except by formal amendment). When contexts change, a changed reading – what Lessig calls a translation – of the (unchanged) text is sometimes necessary if we are to remain faithful to the original meaning of the text. This is particularly true of times marked by thoroughgoing change, such as that under way in 1941.

The Stone and Vinson Courts were unable to come up with a persuasive translation that adapted static text to dynamic reality, however. Not that individual Justices did not try; this book is in large part a chronicle of their efforts. Felix Frankfurter sought to mediate constitutional conflict by relying on tradition and judicial self-restraint. Hugo Black also tried his hand at it, by conjuring up a quasi-mythical moment of the exercise of popular sovereignty in 1787, 1791, or 1868. Their other colleagues did not bother to provide a systematic answer, relying instead on case-by-case resolutions (Robert H. Jackson and William O. Douglas) or a results-oriented libertarian approach (Frank Murphy and Wiley B. Rutledge). Outside the Marble Palace, academics and practitioners

[9] The phrases are from Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940," *Research in Law & Sociology* 3 (1980), 3, and Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (1992).

[10] I have described that body of thought in Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937* (1998), and review it summarily in ch. 1 below.

[11] Lawrence Lessig, "Fidelity in Translation," 71 *Tex. L. Rev.* 1165 (1993).

also contributed to the project. But at the time of Chief Justice Fred Vinson's death in 1953, no translation had been accepted as authoritative or legitimate.

The United States Supreme Court was not unique or out of step in confronting this transition. William E. Nelson's groundbreaking study of New York common-law developments in the twentieth century identifies a comparable movement from an early-twentieth-century legal order that exalted property rights, the extant distribution of wealth, and Victorian moral norms to a midcentury climate altogether different.[12] In the 1940s, as a reaction to Nazism, the New York legal system and its judges promoted a constellation of new values: human dignity, equality under the law, genuine opportunity for all, protection of freedom by courts, liberty of thought, and limits on governmental power over individuals. The Supreme Court was contemporaneously moving in roughly the same direction.

The older legal order had known some of those values, but had applied them to different ends and different classes of beneficiaries. The new order unabashedly promoted them to succor minorities and the poor. The state's regulatory power expanded. Judges overtly undertook to promote social policies. The breathtaking growth of judicial power is suggested by dicta in a 1951 New York tort decision: "while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law in accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.' "[13] Nelson concludes that "law after mid-century became the process by which [New York] judges decided how to balance the majority's vision of social justice against the liberty, dignity, and rights of minorities." That was true pari passu of the federal judges as well.

The dissolution of classical ideology after 1937 provided both background and agenda for the Supreme Court. Although the Court was irreversibly committed to abandoning classical judicial activism after that, it did not retreat to a position of inconsequence or passivity in American life. But in the new activist initiatives it undertook, the Court was no longer shielded in its work by the aegis that orthodoxy had furnished. Its quest for a substitute proved futile through 1953;[14] a half century later we still have not managed to articulate a vision of the legal order that has been able to replace classical orthodoxy.

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[12] William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980* (2001); see pp. 27–62 on the conservative values of the earlier time, and pp. 128–147 on their midcentury replacement.

[13] Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951). Ironically, the New York judges were quoting from an opinion by none other than Justice George Sutherland abolishing the old common-law disability of a wife from testifying against her husband: Funk v. United States, 290 U.S. 371, 382 (1933).

[14] The eminent constitutional authority Alpheus T. Mason glimpsed this insight, but he never really developed or exploited it in his many important studies. See his *The Supreme Court from Taft to Warren*, rev'd ed. (1968), ch. 4, "Stone: The Court in Search of Its Role."

First Monday 1941

The Court of the 1940s was transitional between two profoundly different conceptions of the judicial function. In the late afternoon of classicism, the majority of the Taft Court of the 1920s saw their role as preserving individual liberty by reining in state regulatory power. Their mantra derived from Justice Sutherland's dictum in *Adkins v. Children's Hospital* (1923)[15] that "freedom of contract is, nevertheless, the general rule and restraint the exception." Freedom is the norm; restraint by governmental regulatory authority is the exception, and the burden was on those who supported governmental power to justify making that exception. Judges protect freedom by subduing the power of the state.

That vision of the constitutional order was in an advanced state of decay even as Sutherland wrote. By the time of the Warren Court (1953–69), it had been supplanted by the assumptions of "legal liberalism," the belief that courts could promote progressive social melioration.[16] A blend of political liberalism and judicial activism, the legal liberalism of the Warren era saw law as "an autonomous force for progressive social change," "an effective instrument for advancing the personal freedoms and human dignities of the American people."[17] The second Justice John M. Harlan, one of liberalism's most stringent critics, described (and condemned) this "current mistaken view of the Constitution" (he was writing in 1964) "that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act."[18]

The Stone and Vinson Courts took up their work at the midpoint in the transition from the classical to the liberal view. While discarding nearly all the tenets of classicism, the Justices of the 1940s only spottily anticipated fragments of the liberal vision. This was in part because the Roosevelt appointees diverged among themselves after a crucial juncture, the *Carolene Products* case of 1938 (discussed in chapter 3). One group, led by Frankfurter, regarded judicial activism as inherently suspect. The other, speaking at first through Stone, did not, but sought instead to redirect activism's energies. Out of this divide emerged both legal liberalism (from the Stone view) and its sharpest critics on the Court (from Frankfurter's). A major theme that emerges from the story of the Court in the 1940s and 1950s thus seems paradoxical: it anticipated both Warren Court activism on behalf of minorities and society's marginalized members, and yet included the sharpest critics of that new form of activism.

Another major transition that marked the midcentury Court was from the static constitutionalism of the classical era to more dynamic approaches. In

[15] 261 U.S. 525, 546 (1923).

[16] Laura Kalman, *The Strange Career of Legal Liberalism* (1996).

[17] Mark Tushnet, "Critical Legal Studies: A Political History," 100 *Yale L. J.* 1515, 1535 (1991); Anon., "An Editorial Statement," 5 *Harv. C.R.- C.L. L. Rev*. 206 (1970) (quoting Mark De Wolfe Howe).

[18] Reynolds v. Sims, 377 U.S. 533, 624–625 (1964) (Harlan dissenting). Harlan countered: "The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements."

the constitutional ancien régime, the foundations of public law were supposed to be unchanging. As Chief Justice Roger B. Taney put it in the *Dred Scott Case* of 1857, the Constitution "is not only the same in words, but the same in meaning [as in 1787–91], and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen . . . it speaks not only in the same words but with the same meaning and intent with which it spoke when it came from the hands of the framers. . . . ."[19] Justice George Sutherland reaffirmed the point more pithily eighty years later: "the meaning of the Constitution does not change with the ebb and flow of economic events."[20]

That indeed was classicism's goal: in the division between state and society, the potential coercive power of the state was to be tightly constricted in order that society (or at least its economic sector) could change dynamically. The constitutional revolution of the 1930s made it possible to think of a dynamic constitutional order in which *both* state and society were open to change. That transition was in itself momentous, which is why we speak of a constitutional "revolution" in that decade.[21] But that opened up a more difficult question: in what direction was constitutional dynamism to go? This in turn generated further questions: Are there limits to dynamic constitutional change? If there are, what are they, and where are they found? What theory explains and justifies those limits on constitutional change?

To anticipate summarily some answers to those questions, and to outline the major jurisprudential divisions described in this book, consider a continuum of thought among the Justices of the Stone and Vinson Courts:

Frankfurter → Black → Stone → Murphy and Rutledge.

All these jurists conceded – indeed, embraced – constitutional dynamism. But Frankfurter believed that the legislature was responsible for that change. He allowed little judicial discretion to control the legislature's management of change, almost abdicating the judicial function in favor of deference and self-restraint. Black believed that courts must play a more active oversight role in supervising legislatures, but he too was troubled by Juvenal's challenge, "Who will guard the guardians themselves?"[22] He found his answer in a rudimentary form of originalism and textualism that required that constitutional text and the Framers' intent imputed from it control judicial discretion. Stone allowed

[19] Dred Scott v. Sandford, 19 How. (60 U.S.) 393, 426 (1857).

[20] West Coast Hotel v. Parrish, 300 U.S. 379, 402 (1937).

[21] On the question of whether there was a "constitutional revolution of 1937," cp. William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995), 213–236 (the traditional account, asserting that there was), with Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998) (who argues that a revolution did occur after 1930, but that it was not driven by external political forces, and that its pivotal dates were 1930, Hoover's appointment of Hughes and Roberts, and 1934, Nebbia v. New York).

[22] Juvenal, *Satires*, book VI, line 347: *Quis custodiet custodes ipsos?*

freer rein to judicial discretion through the doctrine of the "preferred position" (discussed in chapter 3 and elsewhere). Finally, Murphy and Rutledge together evolved a position of rights absolutism that invited courts to override all legislative incursions on civil liberties and civil rights.

None of these approaches emerged as dominant; none succeeded classical thought as the conventional way of thinking about law, courts, and judicial review. In this sense, the Courts of 1941–53 failed to meet their major challenge, and that failure contributes to the aura of futility that imbues conventional treatments of them. But more than disappointed expectations account for the conventionally scornful treatment accorded the wartime and postwar Courts. Between the high drama of the death throes of classical thought in the mid- to late-1930s, on the one hand, and the dramatic debut of the Warren Court in 1954 on the other, the Stone and Vinson Courts seem to be a tiresome entr'acte, a tedious interlude where the audience distracts itself by gossiping or dozing.

Dismissing the 1941–53 Court that way not only discounts the real significance of its midcentury accomplishments, positive as well as negative. Worse, it fails to understand the emergence of the late-twentieth-century Constitution. For it was in the 1940s and 1950s that the modern constitutional order was born. Church and state, civil liberties, civil rights, executive power – all those issues took on their modern forms then. Understanding the achievements of the Stone and Vinson Courts is a prerequisite to understanding the modern Constitution itself.

Once we break free of the limits imposed by conventional ways of thinking about the Stone and Vinson Courts, we can see the remarkable significance of their achievements. The Justices of this era laid the foundations of all our religion-clause law; continued (and sometimes ignored) the expansion of the First Amendment speech and press liberties achieved by the Hughes Court; created the infrastructure of civil liberties law that appeared in *Brown v. Board of Education*; and produced mixed results, from a libertarian point of view, in cases spawned by World War II and the Cold War. How ironic that a Court that came to be dominated by conservative judges after 1949 should have produced so many important precedents in the areas of the First Amendment, civil liberties, and civil rights.