TOWARDS LEGAL UNDERSTANDING: I

"Constitutional grants of power and restrictions upon the exercise of power are not flexible as the doctrines of the common law are flexible."
—Sutherland, J., dissenting in the Minnesota Moratorium case.

The sentence quoted below the title was the inspiration of this article. It is not its thesis. The article has two aims: first to explain, and if possible escape, confusion about what law is and what makes and changes it; then to go on towards showing how, if at all, law may be brought nearer to possessing in all its parts what was anciently considered its essential characteristic—satisfactoriness to all socially tolerable persons.

I

THE STATUS QUO WITH RESPECT TO LEGAL TRUTH

When they learn facts which cannot be reconciled with established conceptions of the physical universe, scientists reject the conceptions, not the facts. "In the last six years, the whole plan of the constitution of atomic structure has been rewritten." The plan of the constitution or nature of law gets revised less quickly. For jurists resist awareness that one-time true enough conceptions lose their truth when clear observers find that they no longer fit the facts. Yet that certitudes are always decaying and getting superseded is obvious almost anywhere in human experience, if looked for. Gilbert Lewis in The Anatomy of Science illuminates the process through an imaginary tale which is worth re-telling here.

Once in the South Seas an island people had occasion to measure accurately their cocoanut plantations. An observer discovered Euclidean plane geometry, which got the name of Uli. Uli checked and worked perfectly when used in mapping, measuring and dividing the small flat island, and long seemed to work as well for charting the sea and laying out courses for canoe voyages. With the aid of the compass, which the islanders had stumbled upon, distant islands were located on a checkerboard Uli chart. The parallel lines of the chart were like lines of latitude and longitude on a map made on Mercator's projection. But they were believed, of course, to be equidistant, ten days'
paddling apart. And to a certain island, Ilo, due west by compass, a
course due west, straight as platted on the Uli chart, was supposed to be
straight in fact, and the shortest course possible. By the due west
course, the distance was forty days' paddling. But once a canoe cap-
tain bound for Ilo, his compass skewed by an iron amulet he was wear-
ing, found himself near another island which he knew to be far south
of the regular course for Ilo. He discarded his amulet and, steering
west by north, reached Ilo—and found to his amazement that his whole
voyage has been made in two days less than the usual forty. Thereafter,
repeated experiments established that his accidental course—a curve
bowing to south as graphed on the Uli chart—was in fact beyond doubt
two days shorter than the due west course from home to Ilo.

A queer but observing young man asserted that this de facto but
inexplicably shortest course was misrepresented as graphed on the Uli
chart,—that it was really straight, and Uli therefore was untrue. And
after he had been tried for heresy, and cooked and eaten, other observ-
ers, surreptitiously at first, checked, corrected and carried on his observ-
ations, finally achieving a spherical geometry whereby true distances and
shortest courses for long voyages could be worked out on paper. “The
new advanced geometry was soon accepted and taught to mariners under
the name Uliao, which means ‘more than Uli.’ It was found that the
old elementary Uli was still perfectly satisfactory for the home, and
thence arose the saying, ‘Uli for the minnow, Uliao for the shark.’”

A legal Uli seemed for centuries to check and work, with occasional
improvements. Its basic postulates are that Law is impersonal, impar-
tial, stable, certain, regular and benign, created, maintained, and from
time to time perfected by “common warrant of the body

Experiences inconsistent with it, as the short course to Ilo was with Euclid-
ean geometry, have long been not uncommon. But when such expe-
riences could not comfortably be ignored, experts added to legal Uli
doctrines through which inconsistent experience could, ex post facto, be
represented as consistent.

Modern scepticism as to legal Uli commenced when Bentham and
his disciples adopted and amplified the Hobbian heresy that law is a
creature of the selfish wills of dominant human powers. But the teeth
of this heresy were drawn by conception of dominant human power as
in the Sovereign, sovereignty as in The People, or Society, and Society
as a single living organism with an unselfish selfish will. Practicing
lawyers were sometimes cynical about legal Uli in private; Aaron Burr,
for instance, is said to have remarked that “law is that which is plausibly

\[\text{BRACTON, loc. cit. supra note 2.}\]
asserted and confidently maintained." But for active members of the profession, including teachers, open heresy entailed too much danger of being cooked and eaten to be much risked, and orthodoxy, often deeply sincere, was long but little shaken. As late as the time of Ames (with Gray there, too, but with views unknown to students) the air of the Harvard Law School was reverential. Bad decisions were "not law". Bad judges could not taint Law's essential purity. Whatever ravishers attacked, she always, in the tale as told, escaped them. Gilbertian irreverence could be enjoyed; for her excellence was so securely vested that it could not harm her. But eminent legal scholars—Holmes, Gray, Dicey, Pound—were already letting cats out of the bag, and getting little help from legal Ulia in their efforts to make rhyme and reason of their scampering. And since Cardozo's first book, increasing numbers (somewhat listed by Llewellyn) have carried on with some consensus, to aggregate results which are none too coherent.

Legal Ulia still works fairly well for a good many practical purposes. And users who go outside it at a pinch, taking uncharted short courses which they have stumbled on, may persuade themselves that for all purposes it still, on the whole, works well enough. While discoverers are groping not unconfusedly towards a legal Uliao, and sometimes displaying intemperateness if not bad temper (as perhaps they must if they are to get a hearing), it is natural that those who can tinker Ulia so that it still seems to work after a fashion should cling to the old familiar clearer "science".

Judicial opinions still, with few exceptions, represent decisions as governed by legal Ulia. A recent case illustrates the inadequacy of that science as a science of law. In Funk v. United States the question was whether the conviction of a prohibition agent charged with conspiring with bootleggers should be reversed for error in excluding the defendant's wife from testifying in his favor. On the face of fairly recent decisions of the Supreme Court this was not error; in outward seeming it was still law that a wife may not testify for her defendant husband in a federal criminal case.

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7 The Nature of the Judicial Process (1921).

8 See Some Realism about Realism (1931) 44 Harv. L. Rev. 1232, 1257.

9 54 Sup. Ct. 212 (1933). Opinion by Sutherland, J.; Cardozo, J., concurred in result; McReynolds and Butler, J.J., dissented.

But the court, examining legal history, found that both common and statute law as to testimonial competency had changed much during the past hundred years. In 1851, by construction of federal statutes, the testimonial law for federal criminal cases comprised the common-law rules which were familiar and well understood in the thirteen original states when the federal courts were established in 1789. The common law as of the time of admission to the union of the state in which the federal court was sitting was substituted in 1891. And later cases soon substituted for that the common law as it is at the time of the trial.

The later cases reject the notion "that the courts, in the face of greatly changed conditions, are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions." Much other judicial saying supports—nay, "makes axiomatic"—the abstract proposition that the common law by its own principles adapts itself to fundamentally changed conditions; indeed, "this flexibility and capacity for growth is the peculiar boast and excellence of the common law."

Has the common law changed its ancient rule that the wife of a man on trial for crime may not testify for him? Other ancient testimonial disqualifications—the rule, for instance, that a defendant may not testify in his own behalf—have been wiped out by statutes. Though such statutes cannot change other common-law rules than those to which they specifically relate, they are evidence of changed conditions which may do so. And decisions already cited show that the common law sua sponte now, contrary to its former rule, allows testimony in a criminal case by a co-defendant not himself on trial.

The changed conditions thus reflected by modern trends of legislation and adjudication are, according to the opinion, these: The increased intelligence of an advancing society has perceived that the danger to the administration of justice upon which the whole group of ancient testimonial disqualifications rested, viz., the danger that interested witnesses would not speak the truth, "never was as great as claimed"; has perceived also that the danger, such as it was, "has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances." The basis in reason of all common-law rules of evidence—"their adaptation to the successful development of the truth"—abides. But experi-

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11 United States v. Reid, 12 How. (U. S.) 361 (1851).
12 Logan v. United States, 144 U. S. 263 (1891).
13 Benson v. United States, 146 U. S. 325 (1892); Rosen v. United States, 245 U. S. 467 (1918).
ence, which is "of all teachers the most dependable," has clearly demonstrated the fallacy of believing that the old disqualifications for interest, or some of them (the opinion cautiously refrains from going the full length to which its reasoning might carry it), are well adapted to the successful development of the truth.

Therefore, though the federal courts have no power to amend or repeal any given rule or principle of the common law—"they neither have nor claim that power"—it is their duty, since power to do so is firmly vested in them by authoritative cases, to decide the question of conjugal disqualification "in accordance with present-day standards of wisdom and justice," and to "decline to enforce the ancient rule of the common law under conditions as they now exist." The court accordingly holds that the wife of a defendant in a criminal case is a competent witness on his behalf; and its prior decisions, insofar as they are inharmonious, "are now overruled." The competency of a wife to testify against her husband "is not involved."

Thus with due ceremonial ritual was solemnized the passing of a rule long dying. The pretty picture painted in the funeral sermon is satisfying to cravings for suave harmony of form and color. And if beauty is truth, and serenity the test of beauty, it is all we need to know. But if when we look closely the picture seems rather to hide than show the work of legal engineering it veneers, aesthetic satisfaction in its contemplation is displaced by scientific curiosity.

What was the reason for disliking the old rule? Is the stated reason true—that the danger to "the successful development of the truth" from the lyings of interested witnesses "has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances?" In modern trial by battle the victorious champion is not infrequently the dirtier cross-examiner. And even relatively scrupulous cross-examiners often can and do lead judge or jury to disbelieve the true testimony of an interested witness. Whether any witness can get credence hangs more upon his clearness of head and force of personality than upon the truth of his story. No witness is in fact disinterested; even one who is neutral as between the parties is far from indifferent to the impression which his testimony will make. The most honest may suppress or stretch or color a little. Few witnesses are neutral as between the parties; for an experienced trial lawyer will rarely, unless in desperate straits, call one whom he does not know as 'friendly,' and whose intended testimony he has not previously censored, ethically, of course, in private conference. Unless a witness is of uncommon human clay, a skilful cross-examiner can usually dramatize some trifling suppression or exaggera-
tion, at the least, to the discredit of what truth he told. And parties to
causes and their wives are apt to be the easiest game for cross-examin-
ers. They are not much more likely to lie than other witnesses, and much
more likely to be deemed liars when they are not and found out when
they are. All that post-medieval wisdom and justice can confidently be
said to have discovered is that there seems to be no good reason for not
giving parties and their wives as much freedom to swear in court as
other honest folk and liars.

That was the reason for wanting the old rule to fall. What were
the conditions and forces in, through or by which it fell?

The conditions obviously included general distaste for such rules
and, as the opinion truly shows, a fairish frequency of instances in which
similar rules have been abolished by statutes and decisions; also a fairish
sprinkling of 'authorities' for the abstract propositions that "the com-
mon law by its own principles adapts itself to changed conditions" and
that judges have power, which they are duty-bound to use, to see to it
that the common law performs its self-adaptations.

What were the forces which overthrew the rule? The conditions?
The authorities, or judicial duty under them? If so, why did the condi-
tions compel and the authorities authorize, or vice versa, in December,
1933, instead of much earlier or much later? And why did these forces
control only the seven justices who concurred in the decision and not
the two dissenters?

Certainly the conditions mattered. At any time for at least a
hundred years any and all of the old rules of testimonial disqualification
could have fallen without causing dissatisfaction anywhere in society
except among members of the legal profession. In the middle period of
the nineteenth century, when Benthamite zeal for adaptation of the rules
of evidence to the successful development of the true facts of cases was
at its highest, the fall of such a rule would have inspired enthusiastic
approvals. Approval to-day, though general among those who know
about the case, is lukewarm. Too many other things seem so much
more important. The particular rule, however, did not and perhaps
could not fall until the ways of the legal profession had changed greatly
from as they were in mid-nineteenth century. It could not have fallen
until a majority of members of the Supreme Court had come to put
other ideals and aims ahead of that of maintaining seemingly mechanical
invarableness and certainty of law with respect to the sort of question
passed on in the Funk case. It would not have fallen when it did in a
case greatly different in nature and importance from the Funk case—
which was a prohibition conviction up for affirmance or reversal after
the repeal of the Eighteenth Amendment. Would the rule have fallen
in a case in which the defendant whose wife's testimony had been excluded had been found guilty of kidnapping or counterfeiting?

The materiality of conditions was as indicia of the general states of personal wills, desires and intellectual or emotional attitudes, both in society at large and in the legal profession, with respect to the sort of question which the Funk case raised. "Conditions" seems to be a word for large or total complexes of personal forces, some fused and energetic, others counting not inconsiderably even though diffused and seemingly inert. But the direct forces, though they would not or could not have acted as they did under materially different conditions, were of personal will and choice among the members of the deciding court. And their action has changed somewhat the conditions in which forces of judicial will and choice will henceforth operate.

The point here of the Funk case is in its illumination of the present condition of legal professional ways with respect to legal truth. Form-of-words ways of the Ulitistic 'science' of automatic law pass current, not as truths, but in lieu of truths as to how and why cases are decided. Every sensible person who reads, even if not a lawyer, somewhat sees through them. But no legal Uliao is yet clear, comprehensive or coherent. And there are still many otherwise sensible persons who conceive that an 'authoritative' body of such forms of words as those used in the Funk case either is the law or constitutes the best or only evidence we can get of what law is.

By way of approach to, and before submitting, what seems to me a truer conception of law, I shall outline some changes of legal aspect in successive periods of Anglo-American history, seeking light from the past on truth as well as illusion about law as it seems today.

II

CHANGING ASPECTS OF LAW BEFORE THE NINETEENTH CENTURY

Probably the members of primitive societies knew no such thing as law in distinction from customary folkways. While no distinction was perceivable, there was no such thing. But even if no such collective object of thought as folkways had yet arisen, everyone saw the difference between conduct according to the ways and irregular conduct. And if everyone occasionally deviated from the ways, the pressures of his fellows, and also (if not rather) his own desires for comfort, respectability and prestige, assured that he would on the whole pretty scrupulously conform, or kill himself rather than endure the shame attached to conspicuous deviation. Whatever differences in degree of rigor might

\[\text{MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926); SUMNER, FOLKWAYS (1906).}\]
develop between, say, customs of reciprocal gifts and services, of matrilineal inheritance, incest taboos, and ways of making fishing implements, there was no sharp differentiation of ways of dealing with deviations.

It seems unlikely that there was occasion to set up such an object of thought as *law*, or have a word for communication about it, until invasions and conquests had weakened customary ways (especially by mingling tribes) and friction-breeding irregularities of conduct had become frequent. With that, folk courts—*genuths*—arose to regularize adjustments of disputes; and their customary ways of proceeding (barely at first, more and more sharply with time, distinguishable from general folkways) and the customs whose violations gave rise to frictions troublesome enough to seem worth their attention, became, as law, differentiated from out-of-court procedural ways and "substantive" behavior patterns from which deviations made less trouble or were dealt with without recourse to courts.

More or less concurrently, men of might with armed retainers—ultimately kings or feudal lords—were violating with impunity customs of their own folk as well as those of conquered peoples. No law could control them. But in time, relations between rulers and subjects got relatively stabilized. Rulers craved order in their own domains. A sort of social quasi-contract arose everywhere, somewhat analogous to primitive reciprocities, but different insofar as wretched but tolerable instead of positively satisfactory existence was the inducement on one side. By this quasi-contract the ruler gave his people their law, somewhat backing it with his power, and more or less, though unevenly, restraining himself and his retainers from violations; his people in return owed him loyalty and various irregularly regularized fiscal and military services, and acknowledged in him an undefined, if never unlimited, legislative power. And, in addition to folk-court procedural ways and the folk-standards of conduct with deviations from which the folk-courts dealt, law came to include incidents of property and status founded in force and regularized by quasi-contractual acquiescence, and also such commands of the plainly determinate sovereign as were distinguished as laws from his special occasional commands.

Law was not backed by power enough to deal with inter-group

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15 Occasion for a word and thing *right* would have arisen earlier. The establishment in other languages, of *jus*, *droit*, *recht* as words for *law* may be evidence of the gradualness with which perception and distinction of the thing *law* came about.

16 OPPENHEIMER, THE STATE (1908); JENKS, LAW AND POLITICS IN THE MIDDLE AGES (2d ed. 1913); FOUNT AND FLUCKNETT, READINGS (1927). Early law, though its substantive norms were considerably taken for granted, was a little more than "just procedure."
conflicts or oppressions by "overmighty" subjects. Such things took place outside of law, scarcely affecting it. Since little came into law which was not approved by usage or responsive to almost universal desires, legal ways seemed right and excellent as of course. Law was regular and certain. It seemed to exist independently of human wills and choices. When conditions changed, and new ways were instituted, it was in fact very much as if they had been found in the common consciousness of the homogeneous community or class. The conception of law which became orthodox arose spontaneously; there seemed no evidence for any other. It probably came very close to fitting facts as they were before society and law became national and complex.

Courts multiplied in the Middle Ages. And in each sort, if not each court, there were differences in the particular groupways and commands of superior powers which constituted its law. The ideal was that each place, class, status and relation—men of the manor, men of the hundred, gildsmen, men of the chartered borough, merchants at the fair, Jews, Christians, ecclesiastics, feudal barons, and land-holding gentry—should have a law on the whole satisfactory to its members generally so long as they did not kick against the pricks implicit in their status. And perhaps this ideal came nearer to realization than is often the lot of ideals. I suspect that the popular courts, at any rate, kept their respective laws flexibly harmonious with almost imperceptibly ever-changing ways and mores of the fairly homogeneous groups that used them.

The main changes in what in England, as the popular courts declined, law came to seem to be, were through the professional judges and lawyers of the King's courts of so-called common law. These courts were created and expanded as much in the interests of their royal proprietor and his bench and bar (increase in royal as against baronial power; revenue from fees for writs and inquests, amercements, and confiscations) as in the interests of groups in which dissatisfaction with other courts, especially for their dealings with disputes about feudal lands, had become widespread. They not inconsiderably satisfied demands or desires of their suitor class (1) for amplitude and convenience of remedies and (2) for definiteness and certainty of law. Mediaeval thoughtways retained the abhorrence of primitive folk for deviation from the well-known usual ways. Definiteness was so universally desired that technical rigor would have seemed, at least in the earlier period, a cheap price to pay for it. Only if strict and definite could law seem a haven in the rough sea of mediaeval violence and chicane.

17 Pollock & Maitland, History of English Law (1899); Memorials of London in the 13th, 14th and 15th Centuries (ed. H. Riley, 1866); Hamilton, The Ancient Maxim Caveat Emptor (1931) 40 Yale L. J. 1133; Woodbine, Cases in Medieval English Legal History (unpublished).
Vinogradoff paints as quaintly curious the mediaeval "custom of Bologna": if an owner so much as barely touched his casks or bales after they had been bound upon the carrier’s donkey, the carrier was relieved of his responsibility for safe carriage. Such a rule, at least in its inception, would have seemed completely sensible. How could the insuring carrier fairly bear the risk of loss from loosened straps or damaged containers or substitution of goods if those whose meddling he would be least apt to oppose—the owners—could touch the goods at all save at their peril? Strict rigors “flattered the longing for certainty and for repose which is in every human mind”; and that “certainty generally is illusion and repose is not the destiny of man” was not as yet much recognized. Yet then, as always, technical certainty bred uncertainty and dissatisfaction. Desires for certainty and for amplitude and convenience of common-law remedies conflicted. A writ would become available for a sort of grievance which was becoming frequent. Judges, under pressure of hairsplitting lawyers, would define more and more strictly the pattern case for which that writ could be used. If a plaintiff’s case fitted to a T the pattern for the writ he bought, he might get his remedy. But if it missed the pattern by a hair’s breadth, he lost and was amerced. In time a new writ would become available for cases of the hair’s breadth different pattern; and more and more new writs for other hair’s breadth differences, until the ideal “for every wrong a remedy” seemed abstractly almost achieved. But by then, unhappily, the concrete merely human plaintiff would often be unable to know his own case well enough to be sure which pattern it fitted, and his adversary’s chances of showing that he had mistaken his writ were multiplied. When dissatisfaction with the uncertainty of over-certainty waxed loud and strong enough, a new looser fitting writ (or later, a fiction), would be made available. And the process of drawing and tightening distinctions to the point of intolerably certain uncertainty would be repeated.

The common law seemed stable in spite of what at times was liberality of innovation. Gradualness made some innovations imperceptible. That relaxing changes were satisfying on the whole to the class which patronized the courts helped make them inconspicuous. To any observer at any time changes bulked small in the total mass of judicial doings. More obvious and more important to observers was the fact that judges followed their own decisions as precedents, though

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18 "Custom and Right" (1925).
19 Holmes, The Path of the Law, Collected Legal Papers (1921) 181.
20 See the account of the origin of assumpsit in Holmes, The Common Law (1881) Lect. VI.
21 The inconspicuousness of satisfactory innovation is a favorite idea of Llewellyn’s; see his contribution to the Symposium on Frank’s Law and the Modern Mind, in (1931) 31 Columbia Law Rev. 82.
sometimes drawing fine distinctions and analogies. The ways of professional judges and lawyers got more and more distinctly different from the ways of ordinary folk. Lay customs (e.g., custom of merchants), though sometimes resorted to pursuant to rule of law, got sharply differentiated from law in speech and thought. Law seemed to, and for most practical purposes did, consist only, except for statutes (now subject to judges’ ways of dealing with them), of hard and fast clear-cut rules fixed by precedents, with a womb from which slightly varying clear-cut rules could be drawn, after long enough gestation, with forceps of analogy and distinction.

The next major accretion to law was of “principles.” “Principles” became obvious constituents of the common law through, though at a long distance from, its prerogative law rivals of the Tudor-Jacobean period, which conquered pro tanto from their graves.

Whatever the vagueness of justice, natural law, “common right and reason,” or whatever it be called, there is always, at every time and place, a considerable body of valuations of particular sorts of conduct in which respectable people approach unanimity. This body of feelings was incessantly outraged by the common law of Coke’s time and the century preceding. And the Chancery, with a flock of other prerogative courts claiming to administer the law of God, Nature or Reason, shook and threatened to overthrow the common law.\(^2\) A vast amount of what every ordinarily benevolent person would call good justice was done by these courts. A vast amount of what, by the same standard, was injustice was done at common law. Yet the flexibility of prerogative law was intensely objectionable to the classes which, through the seventeenth century revolutions, won through to ultimate predominance in English society.

In the war of Coke and his professional brethren to maintain themselves and the common law and subject the Crown to it, the Puritan middle class was with them. The Crown won more power of supporters by its grants of Church lands or monopolies to favorite courtiers than by its endeavors to prevent oppressions of the weak and humble and make all classes in society at least tolerably well off in the condition in which they were. The members of the growing middle class were not content to be secure in the condition in which they were. They were pressing eagerly to better their condition. They felt thwarted or endangered not only when the Crown persecuted for schism or sedition, but also when it restrained acquisitive wool-growers from expropriating copyholders, or Puritan merchants from cutting pounds of flesh to

\(^2\) Tawney, Religion and the Rise of Capitalism (1926); Holdsworth, History of English Law (1924) v. I, IV & V.
which they were entitled by strict rule of common law, or crooks from enforcing judgments. "Equity is a roguish thing. For law we have a measure, and know what to look to; but equity is the measure of the Chancellor's foot; as that is longer or shorter, so too is equity." Bacon, the greatest of the prerogative lawyers and one of the intellectual giants of all time, could write about law with penetrating insight, and devise intelligent plans for adapting it to harmonizing pursuits of the twin objects which he saw as goals of effort: *bonum suitatis, bonum communionis*. The greatest common lawyer, Coke, for all his erudition, shrewdness and personal might, had no vision except for effective ways and means to whatever ends his childish spirit for the moment reached at. Bacon, however, would sell judgments. Coke would stretch or twist his sacred common law to suit his ends. But he was not for sale.

For better or worse—I can see no clear weight of evidence for either value judgment—the middle class and common lawyers prevailed. Coke and Locke defeated Bacon and Hobbes in competition for influence upon common thoughtways. The mediaeval conviction that only "known, settled, established" rules can be "received and allowed by common consent to be the standard of right and wrong," was confirmed in most thoughtways in a position at least equal to that of the conviction that law should be just. All the prerogative courts except the Chancery were abolished. Chancery kept going by shortening its sails and trimming them to the prevailing wind, hardening its equity into a body of rules as definite, ultimately, as those of common law. Chancellors, though they still from time to time educed new rules to satisfy demands exigent and respectable enough to move them, and still on occasion used language of Tudor-Jacobean prerogative justice, became sedulous to maintain the appearance, and to a considerable extent the fact, of responding only to impersonal and unchanging law. Their ways became almost indistinguishable from those of common-law judges except for slight surface differences.

It was not until the latter part of the eighteenth century that the conception of law as a body of known, certain, stable, established, settled rules was deeply disturbed. The Tudor-Stuart prerogative version of the Law of Nature (flexible equity) had temporarily ousted the Puritan version (inflexible natural rights, approaching identity with usual rights at common law) in most people's thoughtways. Even such common lawyers as Blackstone, though it made little difference in their legal doing, politely doffed their caps to it. And Lord Mansfield used it to support flagrant departures from usual ways at common law. The com-

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23 *Selden, Table Talk* (c. 1654) tit. Equity.
mon lawyers on the whole were outraged. But since Lord Mansfield
used "natural justice" for instead of against the still rising commercial
middle class, the legal ways opened to receive as rules most of his legis-
labative enactments. And though at his death they promptly closed to shut
out his undefined vague higher-than-legal principles, more definite
"legal principles," differing only in degree from rules, but more compre-
hensive and therefore less restrictive, were thenceforth increasingly
conspicuous in law.

As the nineteenth century wore on, precedents more and more freely
spawned principles as well as rules, and principles new precedents to
spawn new rules and principles. But the beginning of the century was
a period of conservative reaction and "strict law." In the United States
in their beginning judges and lawyers usually conceived law much as it
had been conceived in the Middle Ages, and took its rules from Coke
and Blackstone.

III

THE DIVERSIFICATION OF AMERICAN JUDICIAL WAYS BEFORE 1860

Never, probably, in the whole of human history, has what Bentham
called "Decision without Thought; or Mechanical Judicature" prevailed
without exception in the legal ways, or even in the pre-legal ways
of primitive societies. For legal and all other folk and group ways are
always in process of diversification and change.

This, roughly, is the process: Some bold and wilful person is
gripped by strong desire—perhaps for sexual intercourse with his
thirteenth cousin; perhaps to achieve some end which he frames as
noble. He deviates from the usual; and, through secrecy or subtlety
or might, avoids the usual unhappy consequences of deviation. Others,
similarly motivated, imitate his deviation under somewhat similar cir-
cumstances. Each successful instance of deviation weakens the power
of faith that the one way for this or that is so and so to hold even
orthodox believers strictly in act and deed to the one way. In time,
with enough frequency of successful deviation, a way of deviation be-
comes established. Its precedents, including even precedents for follow-
ing it somewhat surreptitiously, become as respectable authorities for
conduct as the contrary mandates of precedents for older ways. Thus
the ways of the society or class or professional or other group become in
fact a tangle of inconsistencies. Assumption of their unchanging in-
variably and harmony persists, however, in common thought, ob-
structing perception of diversities and deterring perceivers from telling
what they see.

25 RATIONALE OF JUDICIAL EVIDENCE (1826) Bk. i., c. 12; 7 WORKS OF JEREMY
BENTHAM (1843) 246.
American legal ways have always contained inconsistencies: competing assumptions as to what law and the scope of judicial power ought to be; competing general ways of deciding how to decide, pursued privately in the seeming obscurity of judicial breasts whose walls are not, however, untransparent; competing ways of dressing decisions for public inspection; innumerable particular tricks and patterns for making or dressing decisions of particular sorts of questions. A cinematic photograph showing every flickering detail in the huge kaleidoscope of ways for over a century, if it could be made, would carry little meaning. I shall here attempt only a broad outline, with particular attention to the spread of the practice of deciding according to views of reasonableness under circumstances.


In the United States before 1840, in a very large unascertainable proportion of instances, decision was without thought except for what usual habits made the obvious construction of precedent or statutory provision, and judicature was in fact mechanical. In another large proportion of instances decisions, though similarly dressed, were, if those are right who believe that all human conduct is mechanically determined, resultants of very different mechanical forces from those which control when judges follow precedents or provisions as if no alternative were open to them. For the sake of having single words with which to distinguish such decisions from the other sort, I shall call them unmechanical, or free.

All the important constitutional decisions of the period seem to me to have been unmechanical. Also unmechanical were decisions “adapting to American conditions” doctrines of English common law,—including equity, so far as tolerated in the United States. So were those in countless obscure cases in which evasion of old rules or choice between them was determined by judges’ views of justice or reasonableness. So also were many, if not most, decisions in cases important to important and political and economic personages. The biggest personages were land speculators and bankers. Decisions in great land cases were often favorable to large speculators, even though black with fraud. As to leading banks, it is said that in many places no lawyer would take cases against them. When local personages took to incorporating their business enterprises, old technicalities as to corporations were explained away.

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27 As to land speculators, see, e.g., Fletcher v. Peck, 6 Cranch (U.S.) 87 (1810); 3 Beveridge, Life of John Marshall (1919) c. 10; Nelles & King.
Since unmechanical decisions are more interesting than the other sort, there is danger of magnified impressions of their relative number and importance. I suspect that they were greatly outnumbered by mechanical decisions; and that, in spite of the importance of exceptions, mechanical judicature had become more usual at the end of the early period than it had been at the outset. The initial hostility to English common law had probably on the whole intensified the common law orthodoxy of the lawyers who withstood it. The authority of Blackstone was rarely challenged. Lord Mansfield was respected and his decisions followed. But his way of resort to natural justice for authority had no open vogue. It was felt that ancient rigors could properly be tempered only by legislation. Some of them were. But reform statutes and procedural codes were not unlikely to be construed as consistent with the survival of rules which their framers had intended to abolish.

The influence of Kent, the most attractive personally of the early judges, and surely the most eminent in non-constitutional fields, was strongly towards orthodoxy. He said that when he went on the bench in 1799, “we had no law of our own, and nobody knew what it was.” His personal way was to look where justice lay; “the moral sense,” he said, “decided the cause half the time.” In his moral sense, however, there was seldom much conflict between justice and English legal usals. If justice sometimes defeated authority in his private forum, he rarely if ever said so in published opinions. In those he set himself “to bear down opposition, or flame it, by exhausting research and overwhelming authority.” And it was in respect for authority that he was mainly imitated by lesser judges who added their stones to his in the erection of the “temple of our jurisprudence.” The creed taught in that temple was that Impersonal Law flows through judges who “have no will of their own in any case.” And while faith was strong, judicature was on the whole mechanical, in spite of the multiplication of exceptions made more or less inconspicuous by the ostrich method of hiding their heads in sand.

The least inconspicuous exceptions in the early period were Marshall’s great decisions. They established unmechanical ways of deciding in actual preeminence in the constitutional field. And the suggestive power of their obvious though covert actuality there, though curbed by


As to bank influence, 4 Beveridge, op. cit. supra, c. 4.

As to corporations, Angell & Ames, Corporations (1832); Henderson, Position of Foreign Corporations in American Constitutional Law (1918); Bank v. Dandridge, 12 Wheat. (U. S.) 64 (1827).

28 Letter to Thomas Washington (1828) in 1 Select Essays in Anglo-American Legal History (1907) 843-5. The letter was not published till 1897.

assumption that they are rarely proper elsewhere, has been a tremendous
factor in their covert spread into other legal fields. It will be worth
while therefore to dwell somewhat upon constitutional ways in their
beginnings.

The original popular view of the Constitution, always so widely
and so deeply held that open inconsistency and explicit contradiction are
still taboo in the judicial ways, was restated with grave sincerity in a
judicial opinion rendered only a few weeks ago.\textsuperscript{30} The substance of the
passage follows. Though the contrasting matter as to the flexibility of
the common law would not have been orthodox or even possible in the
early period, it seems material to include it.

"Constitutional grants of power and restrictions upon the exercise of
power are not flexible as the doctrines of the common law are flexible."
The doctrines of the common law, "upon the principles of the common law
itself, modify or abrogate themselves whenever they are or wherever they
become plainly unsuited to different or changed conditions."\textsuperscript{31} Constitutional
provisions, on the other hand, are unbending. Authoritative voices have
said clearly that this is so. Among them, Justice Brewer's:\textsuperscript{32} "The Con-
stitution is a written instrument. As such its meaning does not alter.
That which it meant when adopted it means now." Also Taney's:\textsuperscript{33} "As
long as it continues to exist in its present form, 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 its framers and was voted on and adopted
by the people of the United States." Also Judge Cooley's:\textsuperscript{34} "What a
court is to do, therefore, is to declare the law as written, leaving it to the
people themselves to make such changes as new circumstances may re-
quire." Since great jurists speak thus, what they say is true. "The whole
aim of construction, as applied to a provision of the Constitution, is to dis-
cover the meaning, to ascertain and give effect to the intent of its framers
and the people who adopted it."

This, from the beginning, has been orthodox. It has never been
true. The flexibility of the Constitution has been much more obvious
than that of the common law.\textsuperscript{35} And the aim of construction has been
to adapt it to consistency with policies deemed expedient by the con-
struers.

The conditions, or complexes of demands, to which the Constitu-
tion bends have always included competing demands that it be construed

\textsuperscript{29} The Minnesota Moratorium Case, \textit{supra} note 1.
\textsuperscript{30} Citing the Funk case, \textit{supra} note 9.
\textsuperscript{31} In \textit{South Carolina v. United States}, 199 U. S. 437, 448-9 (1905).
\textsuperscript{32} In \textit{Dred Scott v. Sandford}, 19 How. (U. S.) 393, 426 (1856).
\textsuperscript{33} In \textit{1 Constitutional Limitations} (8th ed. 1927) 124.
\textsuperscript{35} This conclusion is confirmed and documented by Corwin in his Storrs Lec-
tures at Yale, 1934 (title for publication not yet determined).

The nature of the \textit{de facto} Constitution is vividly explained by Llewellyn, \textit{The
Constitution as an Institution} (1934) \textit{34 Columbia Law Rev.} 1.
consistently with rival suppositions as to its original intent or meaning. And it is part of the technique of constitutional adaptation to present changes as consistent with one or another such supposition. Evidence of original intent and meaning is therefore studied for use in argument of the authenticity of suppositions. But even if, for all constitutional questions, original intents or meanings, authentic beyond reasonable doubt, were always discoverable, they could not prevail by reason of their authenticity alone. If they meant to bind the future by a written instrument, the founders were attempting the impossible.

With respect to many constitutional questions determination of true original intent is forever impossible. For there was much disagreement among the people who adopted the written instrument. The intent of the framers, or at least what they would probably have desired had the question occurred to them, is usually ascertainable. For most of them agreed in desire for advancement of monied interests and protection against popular majorities. The people who adopted the Constitution, however, were an heterogeneous and inharmonious body. What proportion were in agreement with the framers is unascertainable. A very large, though also unascertainable, number of persons regarded the proposed Constitution with misgivings if not aversion. Their common fear was that under it popular interests would have little weight. Adoption was secured with difficulty, and barely. It could not have happened without the consent or acquiescence of many persons in whom this fear was strong. To propitiate them the proponents of the Constitution reiterated assurances that the fear was groundless; that the powers of the federal government would be few and narrow; that they would be strictly construed; that popular interests, usually referred to as "natural rights," would be safe in the keeping of the undiminished popular governments of the states.

In spite of the resulting discrepancies between what its proposers 34COLUMBIA LAW REVIEW

\[1\] BEVERIDGE, op. cit. supra note 27, at 288-480; 1 PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT (1926) 267 ff.; BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913).

\[2\] The following was a typical crude expression: "These lawyers, and men of learning, and moneyed men, that talk so finely and gloss over matters so smoothly, to make us poor illiterate people swallow the pill ... expect to be the managers of this Constitution, and get all the power and all the money into their own hands, and then they will swallow up all us little folks, like the great Leviathan, Mr. President; yes, just as the whale swallowed up Jonah." Amos Singletary, in the Massachusetts ratifying convention, 2 ELLIOTT'S DEBATES (1866) 100-103.

\[3\] One of the most amusing (in the light of history) of these assurances was by Alexander Hamilton in the New York ratifying convention: "The people have an obvious and powerful protection in their state governments. Should anything dangerous be attempted, these bodies of perpetual observation will be capable of forming and conducting plans of regular opposition. Can we suppose the people's love of liberty will not, under the incitement of their legislative leaders, be roused into resistance, and the madness of tyranny extinguished at a blow?" Id. at 246 ff.
intended or desired and what a good many of the offeres naturally understood the Constitution to mean, its original meaning was in many respects indisputable. And clearness was not confined to such provisions as that no one below the age of thirty-five could become President; the contract clause, for instance, had meanings which even adopters who did not like them would have conceded as intended. But as to questions of the limits of broadly stated powers and limitations, or of the policy or ideals which should inform their construction, it is impossible to find a common intent, desire or understanding among the framers of the Constitution and the people who adopted it.

Of Marshall's great decisions, none was principally determined by supposed obligation to give effect to the original intent of the people who adopted it. And only two—Marbury v. Madison and Sturges v. Crowũngistle—involve constructions which dubious acquiescers in adoption might have conceded as intended.

In Marbury v. Madison<sup>30</sup> Marshall wanted to discredit the administration of Jefferson without exposing his court to the humiliation of making a decree which it would have been impotent to enforce. Having said, with judicial immoderation, that Marbury was entitled to a mandamus requiring the Secretary of State to issue his judicial commission, he avoided granting it by holding unconstitutional the statute by which Congress had tried to give the Supreme Court jurisdiction in inandamnius. Whatever their objections to assertion and exercise of judicial power of life and death over statutes with such an object, dubious acquiescers in adoption of the Constitution might, if cool and candid, have conceded that such power had been intended in 1787. For expectation that such power would be wielded had been stated without contradiction by leaders of both sides.<sup>40</sup>

To allay fears of so enormous a political innovation, advocates of adoption had represented that its use would be to prevent federal expansions and encroachments. In no conspicuous instance did Marshall use it with that object. He used it oppositely in M'Conloch v. Maryland.<sup>41</sup> The War of 1812 was over when the second Bank of the United States was chartered. "Necessity" for the execution of federal powers of sword and purse, in the sense of convenience to that end, was rather a pretext than a reason for the creation of this mighty interstate convenience to the private pecuniary profit of its managers and their business friends. The emergency conditions of "commercial and finan-

<sup>30</sup>Cranch (U. S.) 137 (1803). See 1 Warren, THE SUPREME COURT IN UNITED STATES HISTORY (1926) c. 5; Corwin, THE DOCTRINE OF JUDICIAL REVIEW (1914); 3 Beveridge, op. cit. supra note 27, c. 1-3.

<sup>40</sup>Beard, THE SUPREME COURT AND THE CONSTITUTION (1912).

<sup>41</sup>4 Wheat. (U. S.) 316 (1819). See 4 Beveridge, op. cit. supra note 27, c. 4-7.
cial chaos” in the post-war depression afforded more substantial reasons. The main object of the first Bank had been somewhat similar—stabilization of currency and credit in the speculative orgy stimulated by the inflation resulting from Hamilton’s Funding Plan. Both Banks were socially desirable if a Hamiltonian federal policy of paternal solicitude for the increase of commerce, manufactures and concentrated private wealth was socially desirable. Every intelligent person’s opinion on such a question depends upon how he wants to live himself and what sorts of people and ways of living he likes to have about him. When the Constitution was adopted there were some who feared as disease the small beginnings which were within a century to make most Americans dependents or parasites upon concentrations of wealth, and who considerably desired the United States to be forever a nation of ruggedly self-reliant economic small fry. And though there were never many Jeffersonians besides Jefferson himself—who, moreover, being in politics, was inconsistent—there were originally great numbers of such small fry. Had it been generally understood in 1787 that the federal powers enumerated in the instrument could stretch to include power to promote the Hamiltonian policy, there would have been small chance for the Constitution’s adoption. This had little if any bearing, however, upon the question of the constitutionality of the second Bank. The opposing forces were complex. There were intelligently convinced Hamiltonians on one side and Jeffersonians on the other who were “disinterested” in the sense of being unconcerned for personal pecuniary advantage. On each side also were numbers of similarly “disinterested” persons dominated by sentimental loyalties or prejudices. And at the back or front of each side were energetic persons more directly and virulently interested: the Bank and its business and political satellites and their dependents; its state bank rivals and their satellites and dependents. The decision purported to weigh the soundness of each side’s earnest claims as to original intent or meaning of the Constitution, and to find and rest on truth with respect thereto. But it was induced by Hamiltonian convictions of social value, and settled nothing as to the constitutionality of a Bank before 1792 or in the time of Jackson.

_M’Culloch v. Maryland_ and its tailpiece, _Osborn v. The Bank_, were the most unpopular of Marshall’s decisions. But they were no remoter from original intent and meaning of the written instrument than his one popular decision, _Gibbons v. Ogden_. That was objectionable only to the negligible few who deplored its demotion from sanctity of a

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42 10 _JEFFERSON’S WRITINGS_ (Ford, 1892-9) 34-5; _BOWERS, JEFFERSON AND HAMILTON_ (1925); _JOHN TAYLOR, CONSTRUCTION CONSTRUED_ (1820).

43 9 Wheat. (U. S.) 738 (1824).

44 9 Wheat. (U. S.) 1 (1824), see 4 _BEVERIDGE, _op. cit._ _supra_ _note 27, c. 8._
vested property right. The Livingston-Fulton monopoly of steam transportation in New York waters was the same in kind as the Charles River toll bridge monopoly which Marshall thought should be sustained. An act forbidding states to restrict traffic on water highways connecting them with other states would have been clearly enough within the original intent with which Congress was empowered to regulate interstate commerce. But original intent that such regulations should be enacted by Congress, not the Court, was equally clear. And Congress had enacted nothing inconsistent with the Livingston-Fulton monopoly. Marshall purported, to be sure, to find that it had done so—by construction of an act to prevent smuggling. That act contained no provision even smelling of intent to prevent states from conditioning the use of their navigable waters as they pleased, unless by provisions facilitating frauds on the federal revenue. But for Congress to open all navigable waters to steamboats without Livingston-Fulton licenses would have seemed desirable to almost everybody everywhere. So why should not constitutional law, like equity, regard that as done which ought to be done? It did—sprouting seed whose later crop was a judicially re-written Commerce Clause.

Marshall's one incontestible consistency with original intent and meaning was in *Sturges v. Crowninshield*. No one who reads the Contract Clause with knowledge of events in the so-called "critical period" can doubt that it then meant that states should never, whatever the emergency or depth of depression, relieve debtors by stay laws or moratoria. *A fortiori*, if they could not postpone debts, they could not provide for their cancellation on part payment. In the year of depression 1819 Marshall so held, in the case of a state bankruptcy law which would have relieved a bankrupt of obligation to pay fully, if and when he ever could, a debt contracted before its enactment. And he dissented when, a few years later, his colleagues, "yielding to popular insistence," sustained a similar bankruptcy law in its application to debts contracted after its enactment.

In other cases, however, Marshall himself construed the Contract Clause as having meanings which there is no evidence that anyone would have been likely to think it had in the beginning. Suppose the proponents

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41 1 Stat. 305 (1793). On giving bond not to defraud the revenue, coasting vessels were to be licensed, and thereby exempted from customs inspections and port duties.
of the Constitution had promulgated the following in 1787: "This clause means, among other things, that no state can rescind a grant of millions of acres of land which was induced by wholesale corruption of its legislature; it means also that no state can rescind or amend a corporate charter unless granted on that condition." Had these meanings been clear, would the Constitution have been adopted? In *Fletcher v. Peck* even Marshall hinted uncertainty as to whether it was the Contract Clause or something higher which forbade Georgia's rescission of its grant to speculators of all the land in Alabama and Mississippi. Both parties to the case wanted a decision validating the claims of holders under the corrupt grantees. The agreed facts presented such a holder as *bona fide purchaser for value* of his speculative paper title, *without notice* of the corruption whose public notoriety had been considerable. Marshall said:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? ... It is, then, the unanimous opinion of the court, that ... the state of Georgia was restrained, either by general principles which are common to free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be ... rendered null and void."

And for a century thereafter the game of buying gifts from legislative bodies, and washing them clean by transit through "*bona fide purchasers,*" was played repeatedly, to the advancement of wealth of or in the nation.

There is no intention of suggesting that any of these cases, or any other case specifically mentioned elsewhere in this article, was not decided as the deciders sincerely believed was for the best. How and why for the best? Best for what? Hard questions. Therefore better left unanswered. It is enough, the judge can tell himself, that conscience tells me I am right. Hamiltonian aims and values lived on and propagated after Hamilton was shot. But Hamiltonian lucidity was self propagated less easily. If any judge had it before Holmes, he kept it shut up in recesses of his being. Most judges, probably, have been put partly and incoherently aware of their own deepest grounds for unmechanical decisions. The ways of their profession have relieved them from even trying to become articulately clear respecting them. If, conforming with

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49 *Fletcher v. Peck*, 6 Cranch (U. S.) 87 (1810).
50 *Dartmouth College Case*, 4 Wheat. (U. S.) 518 (1819). See 4 BEVERIDGE, *op. cit. supra* note 27, c. 5.
51 See 6 Cranch (U. S.) 87, 133-9 (1810).
the ways, they gave decisions surface dressings of plausible if specious claims of consistency with and compulsion by "true" or "original" intent or meaning of constitutional provision, statute, precedent, rule, or, at a pinch, of principle, few lawyers, except in cases as nation-shaking as _M'Culloch v. Maryland_, would risk professional respectability by telling what they saw beneath the surface if they looked there. And non-lawyers were usually too much baffled by the complexity of legal surfaces to see through them.

Decision at choice commonly proceeded upon assumption, commonly sincere, that there was a vague but organic connection between impersonal law and common right and reason. The usual process was argument that right and reason compel some desired "construction" of particular provisions or precedents. Those who liked the practical result of the "construction" would easily agree (1) that it was right and reasonable, and therefore (2) expressive of the "true" or original intent or meaning of the provisions or precedents, and therefore (3) compulsive upon the court. Occasionally, however, as in _Fletcher v. Peck_, it was uncomfortably obvious that no particular provisions or precedents could reasonably be "construed" as prescribing the desired decision. Candor then tended to compel the court to derive it from common right and reason almost nakedly—though a sort of fig leaf could be provided by presenting common right and reason, paraphrased into "general principles common to free institutions," as the ultimate Law of Laws, brooding behind and breathing through all particular provisions and precedents, and filling the gaps their human authors had left between them.

This way of perfecting impersonal law was not unconnected with the more usual legal ways. It had long hung, somewhat precariously, at their outskirts. The line of precedents by which it hung stretched thinly back at least to Coke. Coke, himself a graduate of the University of Cambridge, once had before him Dr. Bonham, whose degree in physic was from Cambridge. Coke was convinced that Cambridge made as good physicians as could be made anywhere. It followed that Dr. Bonham's competence to well practice physic was beyond question. Therefore a statute could not be construed as authorizing a Board of Censors to punish Bonham for practicing in London without its license. For that would be "against common right and reason."52 This was the

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This was, I think, the only instance in which Coke openly put "common right and reason" ahead of "the artificial reason of the law." It became familiar and popular in America through frequent resort to it (of course without reference to the facts of Bonham's Case) in the agitation which preceded the Revolution. See James Otis's argument on the Writs of Assistance, _Works of John Adams_, i, 523. After the Revolution Hamilton used it in _Rutgers v. Waddington_, FISKE, _CRITICAL PERIOD_ (1892) 127.
main authority in America for perfecting constitutions by common right and reason. For though Lord Mansfield might have seemed a better authority than Coke for common right and reason at common law, he had not used it against statutes. And Marshall was probably typical of most judges of his time in what seems to have been his feeling that strict conformity with rigid ways at common law was a sort of price due for his freer hand in constitutional cases.5

2. In the time of Shaw and Taney.

Until after 1860 orthodox faith was not much shaken—faith that Impersonal Law flows through judicial ministers who are impotent to affect it. This could be taken for granted as unquestionable even by judges and lawyers whose own practices were undermining the creed they clung to, almost knowing better.

Shaw was the next great underminer after Marshall. He instituted a way of viewing law which would permit occasional almost open use of Lord Mansfield’s freedom in non-constitutional cases without shock to faith. His statement of it was as follows:4

"It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy."

He made no attempt to state the few broad principles of which the common law consists. The consideration of “equity, natural justice, and that general convenience which is public policy” from which principles proceed seemed to him indeed to be “too vague and uncertain for practical purposes.” But the legal rules derived from these impractically vague sources “are rendered, in good degree, precise and certain, for practical purposes, by usage and judicial precedent.” Do the principles become, for practical purposes, also certain through the rules? Somewhat, it would seem; for when a case comes which no precedent will fit, “the general principle applicable to [meaning inferrable from?] cases most nearly analogous” governs decision—or rather, somewhat governs; for it may have to be modified “by considerations of fitness and propriety, reason and justice,” which grow out of the circumstances.

5 See Head & Amory v. The Providence Ins. Co., 2 Cranch (U.S.) 127 (1804); and Bank v. Dandridge, 9 How. (U.S.) 64 (1827).

4 See Norway Plains Co. v. B. & M. R. Co., 1 Gray 263, 266 (Mass. 1854).
Ever since Shaw launched it, this conception of law as consisting of impractically vague higher principles, operating judicial automata with the same mechanical precision as rules and precedents, has been approaching, though not reaching, coordinate standing, in the ways with the conception of law as consisting of specific mandates plain on the face of precedents. Lawyers and judges have respected both conceptions without concern for their consistency, but have usually kept their practice as consistent as possible with the latter. Perhaps the conceptions are reconcilable as follows: The higher principles hover obscurely over all legal fields, not ousting rules and precedents from usual practical control, but occasionally alighting here and there to leave new rules and precedents for mechanical judicature.

Few judges have felt sure enough of their own strength to risk presenting judicial choices naked except for arguments of their justice or expediency. Shaw himself preferred to dress them as consistent with precedents or their analogy. At this he was adroit. In Commonwealth v. Hunt,\(^5\) for example, his reversal of a labor conspiracy conviction was determined by a sagacious view of political and economic policy in the conditions of 1842; he dressed it plausibly as based on the rule that an indictment must be construed strictly. His veils were sometimes thinner. Among his contemporaries, however, few but disgruntled fanatics were disturbed if they saw through them. For most of Shaw's choices, though not all,\(^6\) were based upon incontestibly accurate perceptions of what would work for "general convenience"—i.e., the satisfaction of most people who mattered in his own time and place. Where most of the members of an old Puritan congregation had become Unitarians, Shaw gave them property in the meeting house as against the Congregationalist rump.\(^7\) Since railroads were few and new and weak, and everyone wanted them to grow and thrive, why not relieve them of insurer's responsibility for freight discharged at their own depots, though not yet delivered to the consignees?\(^8\) While their lines were short and employees few, and probably in intimate personal relations, it might also seem sensible to most people to say that adoption of the Fellow Servant Rule would make railway servants hold one another to high standards of care, diminishing the risks of travel for the

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\(^5\) 4 Metc. 111 (Mass. 1842). The case name is the title of my article in (1932) 32 COLUMBIA LAW REV. 1128.

\(^6\) These are among his more controversial decisions: Com. v. Kneeland, 20 Pick. 206 (Mass. 1838); Com. v. Webster, 5 Cush. 295 (Mass. 1850); Com. v. Anthes, 5 Gray 185 (Mass. 1855).

\(^7\) In a line of cases commencing with Stebbins v. Jennings, 10 Pick. 172 (Mass. 1830).

\(^8\) Norway Plains Co. v. B. & M. R. Co., 1 Gray 263 (Mass. 1854).
This rule, however, maintained and followed by mechanical jurists, made trouble later. So did the doctrine that liability must be based on fault with which Shaw superfluously supported a sensible decision. The case was this: A man was separating fighting dogs. His up-raised stick struck a bystander behind him, who sued. The trial judge charged that the defendant was liable for the battery unless justified, and that separating fighting dogs was not a legal duty and therefore not a justification. Shaw set aside the verdict.

While Shaw, mainly in other fields, was strengthening the way of deciding, almost openly, in accordance with views of common right and reason, justice, general convenience, utility for the greatest good of the greatest number, natural law, general principles common to free institutions, expediency, reasonableness under the circumstances, or whatever one prefers to call it, the Supreme Court under Taney was confirming the preëminence of that way in the constitutional field. The Taney court's differences from Marshall had that tendency. So did its expression of its internal differences in voluminous separate opinions.

The justices of the Supreme Court were, however, chary of unmechanical decisions except in constitutional cases. Their general attitude is illustrated in the otherwise unimportant case of United States v. Reid.

In a federal court in Virginia, Reid had been found guilty of murder on the high seas. He had offered a co-defendant not on trial as a witness. The two trial judges ruled that the co-defendant was incompetent to testify. On motion for a new trial they differed as to whether this ruling had been right, and certified the question to the Supreme Court.

If a Virginia statute of 1849 were applicable, the co-defendant should have been allowed to testify. The Judiciary Act provided that “the laws of the several states,” except where federal Constitution, treaties or statutes otherwise require, “shall be regarded as rules of decision in trials at common law” in the federal courts. But a trial for a federal crime is not at common law. And it could not be supposed unless it expressly said so that Congress had empowered other sovereignties, the states, to prescribe rules in trials for offences against the United States. By its omission to say anything about rules for such trials Congress must have intended to refer the federal courts “to some

62 12 How. (U. S.) 361 (1851).
63 1 Stat. 92, c. 20, § 34 (1789); U. S. C. A. § 725.
known and established rule” which it supposed to be “so familiar and well understood” that specification would be superfluous. “The only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts.” Congress has therefore, by necessary implication, enacted that each federal court shall apply in criminal cases the testimonial law of the state in which it sits as it stood in 1789. And in Virginia in 1789 co-defendants had been incompetent to testify.

Taney and his colleagues were not blood-thirsty men. They could not have reflected with satisfaction upon the result which presumably followed their decision—the hanging of a man without benefit of evidence which might have established his innocence. Had they felt free to choose, they might have preferred the Virginia law as it had been since 1849, permitting co-defendants to testify, to the old rule of exclusion. If they could have brought themselves to hold the Virginia statute applicable, by construing the Judiciary Act as prescribing for each federal court the testimonial law of its state as of the time of trial, no one would very strongly have objected, and a considerable weight of opinion would have been approving. For Jeremy Bentham had already given wide currency to the principle which in the Funk case was called “the fundamental basis of all rules of evidence”—the principle that testimonial law should be well adapted to the successful development of the true facts of cases. Bentham had, moreover, specified the rule excluding co-defendants, and also all the other old rules of exclusion which have fallen since, as peculiarly flagrant instances of ill adaptation to that end. The time was of reform, and Bentham was the hero of all intelligent reformers. Some of the reform waves, more or less Benthamite in inception, with which the times abounded were, to be sure, meeting intense opposition—especially those for codification of law, popular election of judges, prohibition, and abolition of slavery. But other reforms had won general approval: free public education, for example, penal reform, abolition of imprisonment for debt, mechanics’ liens, and many piecemeal abrogations or changes of archaic rules of common law such as the Virginia act of 1849 illustrates.

Taney and most of his colleagues disapproved of abolitionists and doubt—

54 Sup. Ct. 212 (1933).
56 See Dicey, op. cit. supra note 6. Among ardent American Benthamites were Edward Livingston, Robert Rantoul, Jr., and David Dudley Field.
less also of codifiers who declaimed loosely against the common law, they were not purblind reactionaries. I strongly suspect that they were Benthamite enough to have welcomed permission of co-defendants' testimony in the federal courts had Congress expressly granted it. But they did not feel free to grant such a permission themselves, or see a possibility of doing it except for federal courts in states whose statutes gave it. This possibility seemed blocked by a higher principle than that rules should make for getting at the truth. For they assumed that if they should hold now that federal trials for crimes against the nation were subject to truth-serving state statutory rules of witnesses' competency, it would follow that they were holding, or would have to hold later, that federal criminal trials were subject to whatever rules of competency state legislatures might enact, not excluding rules tending to defeat truth or national sovereignty. Even judges who were Democrats and Southerners could shudder at such an enormity. And it was not yet possible for any judge to say, or even think, such a thing as Holmes's "The power to tax is not the power to destroy while this Court sits." Such a proposition would have seemed of anarchy, not law.

The Taney court had, to be sure, for use on occasion, the concept of a higher common law, known to federal judges, and endowed, at least in instances, with power to constrain them to decisions contrary to what passed as common law in the courts of the states in which they sat. They might logically have said what the Funk case today takes for granted—that this common law, instead of the respective common laws of the several states as of 1789, determined competency to testify in federal criminal cases; and held that this common law, adapted by its principles to changed conditions of which the Virginia statute was some evidence, made co-defendants competent as witnesses in federal criminal trials in all the states, regardless of their statutes. But this could not have occurred to them. Occasions when the questions were of such things as competency to testify were not within the undefined class of occasions on which resort to this concept, or any freedom to legislate judicially, seemed to them fitting or even possible.

The class of occasions fit for judicial legislation was, as it still is, defined unverbally in the ways by the feelers of judges' minds or souls. If judicial legislation was not confined to adaptation of law to business convenience or prosperity, that, since Lord Mansfield's time, had been its most frequent and professionally respectable object.

Taney and his colleagues gave a holder of negotiable paper suing

See Panhandle Oil Co. v. Knox, 277 U. S. 218, 223 (1928).
See CARDOZO, op. cit. supra note 9.
in a federal court a more liberal rule as to consideration than he might get in a court of the same state;\(^7\) promoted improved facilities for transportation by destroying the Charles River bridge monopoly;\(^7\) opened the federal courts to suits by corporations through a flagrant fiction;\(^7\) and gave to corporations right to do business in states in which they had no legal existence.\(^7\) But they could not dream of overruling a long customary rule as to competency to testify even if they would have liked to and none but rule-bound lawyers would have minded. The ways included no custom of legislating on such a subject, or with the object of better adaptation of rules to truth. Their judicial honor, their sworn duty, their professional respectability, required them to keep law there as they found it, untouched by personal desires, even if for juster justice. They must indeed lean backwards to avoid such infiltration of their desires into law. The air they had always breathed was saturated with medieval-Puritan-Coke-Locke assumption that only a law of known, certain, definite, stable, established rules is tolerable. When the silence of the Judiciary Act of 1789 made it hard to find the law which they must keep intact, and put them under unavoidable necessity of legislative choice, they must, to feel sure of their own judicial integrity, choose what they felt as legally usual rather than what they felt as expedient or just.

(To be continued)

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\(^7\) Swift v. Tyson, 16 Pet. (U. S.) 1 (1842).