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DOING POLITICS IN THE UNITED STATES SUPREME COURT

JOHN D. GORBY*

I. INTRODUCTION

Some time ago Rudolf von Ihering spoofed yearningly of the "juristischen Begriffshimmel" (heaven of legal concepts) somewhere way up in the sky.[1] Only pure legal concepts, he theologized, untainted by the world of reality, were admitted there. As a consequence of such demanding standards, only a few German legal thoughts and a couple of German law professors have passed through the gates of "juristischen Begriffshimmel."

The American tradition of doing politics in the Supreme Court has been too strong for many to escape the influence. Though it may sound harsh, American constitutional lawyers are not candidates for "juristischen Begriffshimmel," for their work has been blemished by blatant political concerns at least since 1803 when judicial review of legislation clearly began.

To discuss the American constitutional process from the perspective of the constitutional lawyer, this article delves into the his-

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1. Rudolph von Ihering [also spelled Jhering](1818-1892) is considered to be the most important European legal philosopher of his time. Although a German, he had a great influence on legal philosophy in America, particularly upon Dean Roscoe Pound, who arguably became America's most influential legal philosopher. Von Ihering laid the foundations for modern day sociological jurisprudence.

In his essay *Im juristischen Begriffshimmel (In the Heaven of Legal Concepts)*, in VON IHERING, SCHERZ UND ERNST IN DER JURISPRUDENZ (LEVITY AND EARNESTY IN JURISPRUDENCE) (1884), he poked fun at lawyers whose legal thinking seemed to be totally unrelated to social reality. According to his essay, only pure legal thoughts untainted by the world of reality were admitted to the "Heaven of Legal Concepts." Persons may also enter this "Heaven," but it is not easy. Only pure theoreticians are eligible for consideration—surely not lawyers. At the date of the writing of the essay, only a few German law professors, mostly Romanists, had actually been allowed into the "Heaven of Legal Concepts." For an edited translation of Von Ihering's essay, see M. COHEN & F. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 678 (1951).

tory of the American Constitution and the Supreme Court, discusses the attitude of constitutional lawyers and the development of strategy and considers the use of test cases, so-called "friendly" lawsuits, briefs *amicus curiae* and third party intervention.

American lawyers have had nearly 200 years of experience with a constitutional court that determines the validity of legislation as well as our society's fundamental values, and they have learned a great deal about the Court's decision making process. As the story of "Doing Politics" unfolds, it will become apparent that most American constitutional lawyers have become legal realists and rather sophisticated in their effort to infuse into the Constitution the values of their particular interest groups. Indeed, the idea that a lawyer's job is to help the court "find the law" would strike most American constitutional lawyers as absurd.

The United States Constitution of 1787 divided federal government power into three parts: legislative, executive and judicial. Although there was little debate in the Constitutional Convention about the role envisaged for the judiciary in this power division scheme, there was little doubt that the Supreme Court was to follow a common law model. It was to be a Court designed for resolving actual disputes between parties, and to settle actual arguments between states and quarrels beyond the scope of state courts. It cannot bring its judicial power to bear unless someone brings a case before it. As Justice Robert Jackson has said: "The Court lacks a self starter."

A suggestion was made at the Constitutional Convention during a debate about an executive veto of legislation: "The judicial should be joined with the executive to revise the laws." Delegate Rufus King objected: "The judges, when the case come before them, would surely stop the operation of such laws as are repugnant to the constitution; they should therefore have no part in making them, not even the negative power of veto."[2] King expressed the conventional idea about the judiciary. Indeed, to keep the Court's role in this constitutional scheme restricted to dispute resolution, the Constitution limited access to its federal courts to "cases" and "controversies."[3]

Over the years, the Supreme Court has developed legal concepts such as "standing to sue" or "justiciable legal interest" to assure that the Supreme Court restricts its judicial power to actual disputes between parties. But today these limitations may be more apparent than real, for the American constitutional lawyer is forever alert to opportunities to influence the development of constitutional law or, to "start up" the Court, to use Justice Jackson's analogy. As

2. C. BOWEN, MIRACLE AT PHILADELPHIA, 62 (1986).
3. U.S. CONST., art. III, § 2.

observed by Judge Simeon Baldwin, "the development of the law . . . is primarily the work of the lawyer. It is the adoption by the judge of what is proposed at the bar."[4] For better or worse, American constitutional lawyers have become increasingly sophisticated in their efforts to influence the development of constitutional law and, thus, the fundamental values of American society. And the Court, through exercise of its power of judicial review, has been most receptive.

II. THE POLITICS OF MARBURY V. MADISON

Tradition compels a review of *Marbury v. Madison*,[5] since every study of American constitutional law seems to begin with that case and the authority of the Court to review legislation. *Marbury* has more than traditional significance, since it has had a profound effect on American constitutional jurisprudence and legal theory. However, the politics of *Marbury* is relevant here, not its jurisprudence, since it is the politics of *Marbury* that provides background and insight into the "realist attitude" of the American constitutional lawyer. It is not that lawyers played such an important role in *Marbury*. There is little evidence of that. Rather, *Marbury* has played an important role in the development of the approach of the American constitutional lawyer. Today they understand that the Court has the power to decide what the Constitution means and, given the right case, will act boldly.

Outgoing Federalist President John Adams, the second president of the United States, believed President-elect Thomas Jefferson was a dangerous radical and that his election and the control his Anti-Federalists had gained over Congress was a national disaster. These fears were well expressed by Adam's Secretary of State John Marshall who prophesied that Jefferson would "sap the fundamental principles of government."[6]

To avert this feared national disaster to the extent possible and to give the Federalists an opportunity to revamp, Adams took significant steps to maintain some Federalist power in the government by controlling the federal judiciary. To this end, he appointed Marshall, a 45-year-old vigorous opponent of Jeffersonian principles, to the position of Chief Justice of the United States. His Federalists Congress, for its part, enacted the Circuit Court Act of 1801[7] that

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4. B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT at x (1962).
5. 5 U.S. (1 Cranch) 87 (1810).
6. Much of the materials about *Marbury* is based on John A. Garraty's article *The Case of the Missing Commissions*, in J. GARRATY, QUARRELS THAT HAVE SHAPED THE CONSTITUTION 1 (1962).
7. Circuit Court Act of Feb. 2, 1801, ch. 4, 2 stat. 89.

created 16 new judgeships, confirmed 42 appointments to the federal judiciary and reduced the number of justices sitting on the Supreme Court from six to five, presumably so Jefferson could not fill the next Supreme Court vacancy when it occurred.

During his last night as president, Adams signed a number of commissions appointing so-called "midnight judges" to offices created by the Circuit Court Act of 1801. These commissions were to be sent to Secretary of State Marshall's office for delivery, but Marshall, who at this time was both secretary of state and chief justice, failed to deliver several commissions, including William Marbury's, before the expiration of Adams' presidency.

When President Jefferson learned the extent to which his predecessor had packed the judiciary with Jefferson's "most ardent political enemies," Jefferson was indignant, criticizing Adams' behavior as an "outrage on decency." When Jefferson learned that several of the judge's commissions were still in the State Department, including Marbury's, he ordered that they not be delivered. Marbury, in turn, sued Jefferson's new Secretary of State James Madison for his commission.

Marbury brought his case directly in the Supreme Court pursuant to a provision of the Judiciary Act of 1789 that gave the Court the authority to issue a "writ of mandamus," i.e., the authority to order a federal office holder to perform a duty required by law. The *Marbury* case created a crisis between the Court and the Executive, since it provided the Court with the opportunity to assert authority over the Executive branch.

Jeffersonians were well aware of the gathering storm and passed a Repeal Act that abolished the new federal judgeships. Federalists claimed the Repeal Act was unconstitutional, since the appointments to these judgeships were for life. To prevent the Supreme Court from declaring the Repeal Act unconstitutional and to stall for time, Jefferson's Congress abolished the June 1802 term of the Supreme Court. Unfortunately for Marshall, the Supreme Court at the time enjoyed none of the prestige of the modern Court and Jefferson was riding a wave of popularity.

When the Court finally ruled in *Marbury* in 1803, it avoided a direct conflict with Jefferson. In many ways the opinion was politically ingenious. The Court scolded Jefferson for withholding Marbury's commission "in plain violation" of the law, but at the same time held that Congress had no authority to add to the original powers of the Supreme Court that had been fixed by Article III of the Constitution. Thus, Marshall's Court 1) chided President Jefferson for violating the law, 2) asserted its judicial power over congressional enactments by declaring the Court's power to invalidate acts of Con-

gress and 3) averted a constitutional crisis by invalidating a Federalist statute and denying Federalist appointee Marbury his judgeship, thereby pleasing Jefferson and his Anti-Federalists.

However, from a political standpoint, Marshall's assertion of the Court's power to invalidate congressional enactments established a principle that enabled his Federalist Court to maintain control over what Federalists perceived was a "dangerously radical Jeffersonian Congress." In this sense, the *Marbury* decision was an extension of Adams' Federalist politics. Ironically, in 1803, no one, including John Marshall, understood the tremendous significance the Court's assertion of judicial control over acts of Congress would some day have for American society, far after the Federalist party would come to an end.

III. "Friendly Suits" and Test Cases Attacking Legislation and Decisional Law

A. *Fletcher v. Peck*

Within seven years after *Marbury*, American lawyers began to create or exploit legal problems for the purpose of invalidating legislative enactments. There is reason to believe the first case, the 1810 decision in *Fletcher v. Peck*[8] invalidating a state law was the result of a "friendly suit," *i.e.* a case in which an interest group's lawyers prepared the arguments for both sides. In *Fletcher*, an early, corrupt Georgia legislature had authorized conveyances of land to private persons. A later reform legislature annulled those conveyances by statute. In the meantime, the land had been sold to "good faith" private purchasers. Lawyers for the new owners challenged the annulling legislation on the theory that it "impaired the obligation of a contract," a limitation on the power of the states set forth in the Constitution.[9] In *Fletcher*, seven years after *Marbury*, American constitutional lawyers sensed they could achieve in the Supreme Court what they could not achieve in the state legislatures and were successful.

B. *Dred Scott v. Sandford*

The most significant case in Supreme Court history, *Dred Scott v. Sandford*,[10] most likely started out as a "friendly lawsuit."[11] The

8. 10 U.S. (6 Cranch) 87 (1810).

9. U.S. Const., art. 1, § 10.

10. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). Much of the materials about Dred Scott's case is based on Bruce Catton's article *Dred Scott's Case* in J. Garraty, *supra* note 6, at 77.

11. *See* Erlich, *Was the Dred Scott Case Valid?*, 55 J. Amer. History 256

spirit of constitutional manipulation seems surely to have been there.

Dred Scott was a slave. History pictures him as somewhat dull and hardly the type of person who would fight hard for his freedom. His owner, Dr. John Emerson, took Scott to Illinois, a free state, in 1834, where he lived on "free soil" for five years. In 1838, Emerson returned with Scott to Missouri, a slave state. Soon thereafter, Emerson died, leaving Scott to his widow. In 1840, Mrs. Emerson moved to New York, where she met and married Calvin Chaffee, a radical anti-slavery congressman from Massachusetts. At any time she could have freed Scott but instead left him in Missouri with another anti-slavery man, attorney Henry Blow. At the time Blow had organized the Free Soil Movement in Missouri and wanted Scott to be free. Scott's case, originally entitled *Scott v. Emerson*, was filed in 1846. More important than Scott's freedom was the fight against slavery as an institution, which because of the acquisition of new territory from Mexico, was becoming a greater national problem.

The Mexican War had been fought and won, and the United States came into possession of vast new territories going west to California. After the Jefferson administration purchased the Louisiana Territory in 1803, the question of whether that territory would be slave or free was resolved by the Missouri Compromise of 1820, according to which all land north of the southern boundary of Missouri would be free. The Missouri Compromise worked until the Mexican territories were acquired, out of which new states would soon be created. Should these states be slave or free? This became the burning and dominant issue in American politics. The *Dred Scott* case raised very dramatic questions about the future of slavery in America.

Congressman David Wilmot attempted without success to persuade Congress to exclude slavery in land taken from Mexico. This severely upset abolitionists. In 1850 a compromise was worked out, whereby California would be admitted as a free state, a tough Fugitive Slave Law would be enacted and the new states would decide themselves whether they would be slave or free. Senator Stephen Douglas of Illinois, on the premise that this principle of "popular sovereignty" should also prevail in Kansas and Nebraska, introduced legislation to that effect. This legislation passed, repealing the Missouri Compromise. Now, settlers of Kansas and Nebraska could decide themselves whether slavery might exist there.

(1968) (arguing that the case was filed to obtain freedom for slaves). *But see* D. FEHRENBACHER, THE DRED SCOTT CASE 251 (1978) (arguing against anti-slavery conspiracy, claiming that Mrs. Emerson's defense of lawsuit was primarily motivated by the money Scott had earned, not by abolitionist concerns). *See also* P. FINKELMAN, AN IMPERFECT UNION 223, n.126 (1981) (agreeing with Fehrenbacher).

All of this made the *Dred Scott* case extremely important. In 1856, James Buchanan had just been elected president, to a large extent because he had not taken a strong position on the slavery issue. More importantly, Buchanan did not want to take a strong position. In his inaugural address, he assured the nation that the Supreme Court would soon resolve the question of Congress' authority to legislate on slavery in the new territories and asked the nation to accept and abide by the Court's decision. And thus, with the blessings of a coy president, the most explosive issue in the nation's history was thrust in the lap of the Supreme Court by a "friendly lawsuit" concocted between abolitionists.

Two days after Buchanan's inauguration, the Supreme Court announced the *Dred Scott* decision. The Court held that Scott was not a citizen, and thus the Court had no jurisdiction to hear the case, and that provisions of the Northwest Ordinance and the Missouri Compromise, which outlawed slavery, were unconstitutional, since they deprived slave owners of their property without due process of law. Interestingly, this was the first time since *Marbury v. Madison*, fifty-four years earlier, that the Supreme Court had taken advantage of its power of judicial review and invalidated an act of Congress.

Two days after the Supreme Court's decision, Scott was freed. Though Scott himself had achieved his goal, his case led, three years later, to the Civil War—the most bloody of all American wars. Indirectly, through war, the slavery question was resolved once and for all.

From the perspective of "doing politics" in the courts, the *Dred Scott* case also has an important lesson to teach. The abolitionists' effort to force the Supreme Court into acknowledging national anti-slavery values with a "friendly suit" backfired. In retrospect this result was easy to anticipate, since there were five southern judges and seven democratic judges on the nine member Court. Today consitutional litigators would be less likely to make such a monumental mistake, since as a routine matter they attempt to anticipate the result before litigating. But it seems that constitutional lawyers at that time had not developed such sophistication. Nor had they done so at the time of *Plessy v. Ferguson*.[12]

C. *Plessy v. Ferguson*

Toward the end of the last century, the American commitment to equality was generally repudiated. In 1877, twelve years after the

12. Much of the materials about *Plessy* is based on C. Vann Woodward's article *The Case of the Louisiana Traveler* in J. GARRATY, *supra* note 6, at 145.

end of the Civil War, federal troops were pulled out of the South and a clear tide of racism and "Jim Crow" was to come. Around the 1890's a number of Southern states enacted Jim Crow laws requiring Blacks to ride in separate railroad cars. Black people held a number of national conventions during this time to stem the tide of racism, but all they were able to accomplish was to pass resolutions of protest.

When the "separate-car" legislation was introduced in the Louisiana legislature, Louisiana Blacks organized the American Citizens Equal Rights Association to fight it. At the time there were sixteen Blacks in the Louisiana legislature, but they were unable to prevent the passage of the separate-car legislation. Under this law, persons one-sixteenth Black or more were not permitted to ride with Whites in railway cars.

The Equal Rights Association contemplated boycotting railroads but instead decided to "make a test case, and bring it before the federal courts." They formed a "Citizens' Committee to Test the Constitutionality of the Separate Car Law" and chose Albion Tourgee, a famous carpetbagger lawyer and novelist, to be lead counsel.

Tourgee wanted to use a "nearly white" person as plaintiff to show the law's arbitrariness. To complicate matters, railroad officials did not enforce the law, but finally an agreement was worked out whereby the railroad would post Jim Crow law signs, a white passenger would complain to the railroad about the presence of a negro in a "white" car, the conductor would direct the passenger to go to the Jim Crow car and the passenger would refuse to go.

In June 1892, Homer Plessy, Tourgee's "perfect plaintiff" since he was seven-eighths Caucasian and one-eighth black, took a seat in a white coach. Presumably the railroad, which also did not like the separate-car law, agreed to cooperate. When Plessy refused to comply with the conductor's request to go to the Jim Crow car, he was arrested.

Attorney Tourgee attacked the constitutionality of the statute by seeking an order prohibiting state court judge Ferguson from applying the law. Thus began the case *Plessy v. Ferguson.*[13]

In November 1892, *Plessy* reached the United States Supreme Court. Although Tourgee argued with a spirit of egalitarianism, notions of equality did not seem to be in keeping with the mood of the Court or of the Nation. The tide of racism was rising in both the South and North.

The Supreme Court did not announce its decision for over three

13. Plessy v. Ferguson, 163 U.S. 537 (1896).

years. In those three years, the tide crested. Even the North seemed to back off its commitment to equality. When the Supreme Court upheld the "separate but equal" doctrine it was obvious that the decision was in accord with the spirit of the times.

In *Plessy*, Tourgee, in attempting to win in the Court what had been lost in the battle in the Louisiana legislature, spoke with the egalitarian and forgotten convictions of a bygone era. His attempt to do politics in the Supreme Court, though thoughtfully planned, occurred at the wrong time. The author of *Plessy*, Justice Henry Brown, was a Northerner. Indeed, even vigorous dissenter Justice John Harlan, three years later, voted to uphold the constitutionality of segregated schools in *Cummings v. Board of Education*.[14] And the "separate but equal" doctrine of *Plessy* became etched in constitutional stone, where it remained for fifty-eight years until *Brown v. Board of Education*[15] in 1954.

IV. Social and Welfare Legislation and the "Laissez Faire" Constitution

The early years of the United States were characterized by a rural, small enterprise, individualistic economy. Religious doctrine emphasized the intrinsic value of the individual. The popular notions of Adam Smith's economic theories exercised great influence on American thought. It was generally assumed that the public interest was promoted by each individual seeking his own personal interest.

These fundamental individualistic notions of American thought were well expressed by two presidents of the first half of the nineteenth century. Jefferson supposedly said: "That government is best which governs least."[16] Four decades later President Martin Van Buren stated: "The framers of our excellent constitution . . . wisely judged that the less government interfered with private pursuits, the better for the general prosperity."[17]

These ideas suited the early years of the United States very well; the nation was vast. Many doubted whether the wilderness between the Atlantic and the Pacific would ever be tamed. Anyone who complained about his economic status was likely told to "Go West," where land and opportunity were unlimited. One need only make the effort, and it would all be there.

This individualistic, "laissez faire" spirit found a constitutional

14. 175 U.S. 528 (1899).
15. 347 U.S. 483 (1954).
16. B. Twiss, *supra* note 4, at 10 (quoting Addresses and Messages of the Presidents of the United States from 1789 to 1839 at 594 (1839)).
17. *Id.* at 11.

theoretician in Professor Thomas Cooley of the University of Michigan Law School. He was one of America's most influential constitutional authorities. In 1868, the same year Karl Marx published *Das Kapital* and the year the fourteenth (or Civil Rights) amendment to the Constitution was adopted, Cooley published his *Constitutional Limitations*. In this most influential book about the nature and function of the United States Constitution, he argued that the Constitution incorporates the notion that private pecuniary motives may lead to public gain and that economic enterprise should be private, not governmental, and left alone to flourish. Most importantly, however, he identified the clause "due process of law" in the fifth and fourteenth amendments with notions of vested rights that had been used to protect property[18] and saw contractual freedom as a property right. By so doing, he turned the "due process" clause into a substantive guarantee of property rights rather than a mere guarantee of procedural fairness. Thus, he performed his greatest service to those lawyers and judges who would later seek to embody *laissez faire* in American constitutional law.[19]

However, by the turn of the century, the wilderness had all but disappeared; the cities had grown large and industrialized; large masses of European immigrants, with little acquaintance or faith in *laissez faire* thinking, came to America. Smith's *laissez faire* philosophy had begun to be replaced with the thought of European socialists. As the impact of industrialization began to be felt, several states enacted social and economic legislation designed to improve working conditions for workers, *e.g.*, legislation forbidding employers from interfering with union activities of employees[20] and fixing hours of labor.[21] This legislation required the state with its criminal law to interfere with the private pursuits of businesses and workers. In short, these statutes conflicted seriously with the *laissez faire* ideas of American business and finance.

When the lobbying efforts of American businesses lost in the state legislatures, businesses summoned America's finest constitutional lawyers to win in the courts. Indeed, the American Bar Association (ABA) was initially formed by lawyers for large business and financial interests. In addition to representing similar clients, these lawyers shared the same *laissez faire* philosophy, were similarly influenced by Cooley's theories of due process and constitutional limitations, worked together in developing a theory of constitutional

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18. See B. Twiss, *supra* note 4, at 25-26.
19. *Id.*
20. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).
21. *See* Lochner v. New York, 198 U.S. 45 (1905) (statute limiting the working hours of bakers).

limitation on the states' power to infringe on contractual liberty, attended the same bar association meetings, shared briefs and written arguments, and generally supported each other in challenging state social and economic legislation.[22]

Although there is little direct proof that any of the cases in which the Supreme Court invalidated economic and social legislation began as test cases,[23] there can be little doubt that, if they were not test cases at the beginning, the business and financial interest groups quickly recognized the potential of these cases for making law.

The most significant case of the era was *Lochner v. New York*,[24] a 1905 case involving a constitutional attack on a New York statute that limited the hours bakers could work each week. As criminal cases go, a violation of the New York statute entailed only applying a mild fine and was hardly worth expending a fortune in litigation. However, the *Lochner* case had great potential for embodying freedom of contract and, thus, *laissez faire* into the liberty clause of the fourteenth amendment. That was worth litigating about. Frank Field, who argued successfully against the statute, was an early and prominent member of the ABA and part of that group of attorneys who seemed bent on protecting free enterprise. The goals of business interest groups were realized in *Lochner*, for it not only established liberty of contract as a fundamental constitutional right, and thus made *laissez faire* a part of the Constitution, but it also became the main precedent case used by defenders of free enterprise to invalidate economic and social legislation designed to improve working conditions as well as the New Deal legislation of the early 1930's.

An interesting example of efforts of powerful business interest groups to effect constitutional values is found in the 1918 case *Hammer v. Dagenhart*.[25] This case invalidated a federal child labor statute. The plaintiff Dagenhart was a poor man who lived in part off of wages of his child, who had been employed in a North Carolina coal mine but had been rendered unemployable by the Child Labor Act. Dagenhart was represented in the case by Morgan O'Brien, then president of the New York Bar Association, and William Hendren, later a member of the National Lawyers Committee that was created to attack New Deal legislation. Where did Mr. Dagenhart obtain the funds to hire New York's leading lawyers? The answer is, of course, that the case was financed by a special interest group of *lais-*

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22. The materials in this section are generally based on B. TWISS, *supra* note 4.
23. *But see* Wickard v. Filburn, 317 U.S. 111 (1942); Carter v. Carter Coal Co., 298 U.S. 238 (1936).
24. 198 U.S. 45 (1905).
25. 247 U.S. 251 (1918).

sez faire businessmen, trying to win in the Supreme Court what they had lost in Congress. They were indeed victorious, for the Court invalidated the Child Labor Act.

After 1932, when Franklin Roosevelt was elected president and attempted to pull America out of its Great Depression with economic and social legislation of the New Deal program, champions of *laissez faire* and free enterprise formed the National Lawyers Committee of the American Liberty League ("Lawyers Committee"). It has been said that every large corporation had its representative in the Liberty League. Its Lawyers Committee undertook to invalidate New Deal legislation incompatible with free enterprise.

A favorite example of a "friendly suit" designed to invalidate New Deal legislation, likely inspired by the National Lawyers Committee, is the 1937 case *Carter v. Carter Coal Company*.[26] In *Carter*, the president of the company sued his own firm to enjoin it from obeying a New Deal statute, the Bituminous Coal Conversion Act of 1935, which regulated miners' working hours and wages. The Supreme Court in 1937 agreed with the president of the coal company, and declared the statute unconstitutional.

The parties in the *Carter* case were the company president and his company. The attack was in reality against a federal statute. However, there was no representative of the federal government to defend the statute. The Supreme Court's invalidation without participation of the federal government so angered Congress that it immediately enacted a new law requiring that the United States Justice Department be notified of any case in which the constitutionality of a federal statute is challenged and authorizing intervention by the Justice Department. The *Carter* decision also angered President Roosevelt, for at that time he unveiled his plan to "pack" the Supreme Court by adding new justices who would uphold New Deal legislation.

Although the Lawyers Committee did not achieve its goals of invalidating all New Deal legislative restrictions on free enterprise, it had educated the nation about the potential for Supreme Court manipulation. By now, the nation was well aware of efforts of lawyers representing political interest groups as well as the potential to manipulate development of the law by the Supreme Court as it exercised its power of judicial review.

As far as New Deal legislation was concerned, the Supreme Court in 1937 repudiated its decision in *Lochner* as well as the idea that free enterprise and *laissez faire* economics are built into the American Constitution. What Coolley and his followers did was to

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26. 298 U.S. 238 (1936).

create a constitutional limitation based on a *laissez faire* system, and what the Supreme Court did in 1937 was to remove that limitation. For more than forty years, free enterprise lawyers played a major role in determining the basic values of American society.

Nonetheless, by 1940 the teachings were clear. Other political interest groups began to establish their own lawyers committees to promote and protect in the Supreme Court the political values they cherished but were unable to protect in the legislatures.

V. NAACP and Racial Discrimination in American Society

Although the National Association for the Advancement of Colored People (NAACP) was founded in 1909 by Blacks in partial response to Jim Crow laws, it did not establish its legal Defense Fund until 1939. From the beginning,[27] the NAACP was involved in lawsuits, but these were mostly criminal cases or discrimination cases in which the NAACP could provide help to an individual in need. But defending the *status quo* was not satisfactory. Having learned much from the experiences of lawyers representing political interest groups, such as the American Civil Liberties Union (ACLU) and the champions of *laissez faire* economy, the NAACP hired a full-time lawyer in 1935 and started to take aggressive steps toward eliminating discrimination and segregation through the courts.

To achieve these goals, the NAACP developed a long range litigation strategy designed to 1) eliminate the white primary elections, 2) eliminate segregation in interstate travel, 3) eliminate school segregation and 4) end housing discrimination.

One example of NAACP legal action—the attack on restrictive racial covenants—will suffice to show how sophisticated political interest groups had become. In many areas of the United States, it was impossible for Blacks to move into White neighborhoods because of restrictive racial agreements or covenants between neighbors. Those agreements provided that one could not sell his house to any person with Black ethnic background.

The fourteenth amendment provides that "no state shall deny any person equal protection of the laws." The Supreme Court in 1883 in *The Civil Rights Cases*[28] had taken the language of the amendmant literally and held that the Constitution did not prohibit "wrongful acts of individuals, unsupported by state authority." As a consequence, the Supreme Court held in 1926 in *Corrigan v. Buck-*

27. The materials in this section are based on C. Vose, Caucasians Only 30-73 (1959).
28. 109 U.S. 2 (1883).

ley[29] that the Constitution did not provide blacks with any relief from those restrictive racial agreements.

In the late 1930's and early 1940's the NAACP developed a strategy to change the constitutional law on restrictive covenants. At first there was an effort to abolish these covenants through legislation, but there was little hope for that kind of political success. As expressed in an editorial in the *Chicago Sun*: "If the legislative fight is lost, the campaign of the National Association for the Advancement of Colored People to obtain a definitive test of the covenants in the U.S. Supreme Court must be pressed with all possible vigor."[30]

During the early years, the NAACP recognized that the dominant social theory favored segregation of the races. The NAACP Legal Defense Fund was consciously aware that it had to wait for a favorable social climate. The wrong timing could be disastrous, as *Dred Scott* and *Plessy* had taught. In the 1920's and 1930's there were a number of sociological studies about effects of racial segregation, and the nation had become better informed about Negro housing problems. And the world's experiences with the Nazi regime and the human rights era following World War II had awakened America's mind about the problems of its own racism. The time had come.

In 1945, Professor Dudley McGovney of the University of California published a law review article in which he argued that a state court decision enforcing a restrictive racial agreement between private persons is a form of action by the state and thus violates the fourteenth amendment.[31] This was an issue the Supreme Court had not considered in *Corrigan v. Buckley*. McGovney's article gave the NAACP a sound constitutional theory with which to attack the old case law upholding restrictive covenants.

The NAACP had long felt that litigation of constitutional issues in a sociological vacuum[32] had resulted in undesirable doctrines. The NAACP Legal Defense Fund was inspired in part by efforts of another political interest group doing politics in the courts (the National Consumers League), which had prodded the state of Oregon to submit, very successfully, written arguments filled with sociologi-

29. 271 U.S. 323 (1926).

30. C. VOSE, *supra* note 27, at 72.

31. *See* McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 CAL. L. REV. 5 (1945).

32. *See* C. VOSE, *supra* note 27, at 70; *see also* Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem*,12 U. CHI. L. REV. 198, 207 (1945).

cal data in *Muller v. Oregon*.[33] The Defense Fund concluded that future litigation should be supported by "relevant sociological data in the records and briefs." In fact, the NAACP was extremely aware of the political nature of its litigation.

> No court should be called upon to determine the validity of an anti-Negro restrictive covenant on the tacit assumption that only the parties litigant and the parcel of land to which they assert rights will be affected by the decision. Instead, the relationship of the restriction to the entire community should clearly appear.[34]

Sociological studies of the 1920's established sufficient data to show that racially restrictive covenants presented a problem affecting a large portion of the community. In 1945, the NAACP held its Chicago Conference for developing test cases to challenge in the Supreme Court the constitutionality of judicial enforcement of racially restrictive covenants. Thus began the search for the right case.

In the meantime several lawsuits had been filed that involved racially restrictive covenants: one in Washington, D.C.;[35] one in Detroit, Michigan;[36] and one in St. Louis, Missouri.[37] Each case involved a neighborhood association that sought to force a black family to move from its recently purchased home. All these cases were appealed, and the appellate courts upheld the restrictive covenants and ordered the black families to move.

It appears that local branches of the NAACP were involved in the Washington, D.C. and Michigan cases from the beginning, but not in the St. Louis case. At this time there were several other restrictive covenant cases, including one in California and one in New York. In 1947, the NAACP held a conference to determine which cases should go to the Supreme Court. The NAACP wished to select the ideal case. It was felt that undisciplined petitions for Supreme Court review were unwise since the NAACP might build a record of too many denials of Supreme Court review. Though the conference could agree on this point, it could not decide which cases should be taken to the Supreme Court. A second conference was scheduled.

In the meantime, before the second conference, a petition for review was filed in *Shelley*, the St. Louis case. This provoked NAACP lawyers at headquarters in New York to file petitions for review in the Michigan and Washington, D.C. cases. The Supreme Court granted review.

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33. 208 U.S. 412 (1908).
34. C. Vose, *supra* note 27, at 70.
35. Hurd v. Hodge, 334 U.S. 24 (1968).
36. Sipes v. McGhee, 316 Mich. 614, 25 N.W.2d 638 (1947), *rev'd sub nom.* Shelley v. Kraemer, 334 U.S. 1 (1948).
37. Shelley v. Kraemer, 334 U.S. 1 (1948).

To prepare the Washington, D.C. and Michigan cases for presentation before the Supreme Court, the NAACP organized a group of sociologists and economists. Another NAACP conference was held in which it was urged that "sociologists should gather the material and get it published in journals and then supply it to a group of lawyers."[38] The NAACP published some sociological materials, as did the ACLU. The purpose: to influence the Supreme Court.

So much sociological material was available that a committee of sociologists was appointed to manage and organize the data. Those materials were published in 1948 in a book entitled *The Negro Ghetto*, just before the restrictive covenant cases were argued in the Supreme Court. Other materials were presented to the Supreme Court. It was the first time in a civil rights case that such extensive data was presented.

The NAACP also held a conference to encourage and organize *amici curiae* briefs. The NAACP felt strongly that the *amicus curiae* briefs should be coordinated. Although there was considerable communication between the NAACP, lawyers for the parties and drafters of the amicus briefs, there was no effort to maintain any control over those briefs. Eighteen interest groups filed amicus briefs in opposition to racially restrictive covenants.

Additionally, the NAACP tried to gain the United States government as an ally. Although it is most unusual for the United States to take a position in cases between private parties, President Harry Truman wanted to make a good civil rights record and, after considerable prodding, supported the NAACP position with its amicus brief. In 1948, the Supreme Court, composed of seven Roosevelt appointees and two Truman appointees, held that judicial enforcement of racially restrictive covenants was state action forbidden by the fourteenth amendment.[39]

The NAACP's thorough and sophisticated efforts to achieve in the courts what it could not achieve in the legislatures served as a model for later NAACP success in the famous school desegregation case *Brown v. Board of Education*.[40] Its success also served as a model for many other organizations to use the Supreme Court as a means of winning in the courts what they could not win in the legislatures.

Another great effort by political interest groups to invalidate legislation in the courts was the ACLU's and Planned Parenthood's sophisticated attack on state legislation that prohibited the use of

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38. C. VOSE, *supra* note 27, at 161.
39. *Shelley*, 334 U.S. 1.
40. 347 U.S. 438 (1954). *See generally*, Kelly, *The School Desegregation Case*, in J. GARRATY, *supra* note 6, at 243.

contraceptives. They carefully selected plaintiffs who would present the case in the most sympathetic light: a married couple, who for health reasons, could not have children; the director of the state Planned Parenthood Organization; and a professor of medicine at Yale Medical School. The result was *Griswold v. Connecticut*,[41] which established a constitutional right of privacy and found anti-contraception legislation incompatible with privacy. *Griswold* also served as the main precedent for *Roe v. Wade*,[42] the far-reaching American abortion case. In *Roe*, the NAACP model was followed: historical, sociological, legal and medical articles were published in advance of argument in the Supreme Court with the purpose of influencing the outcome.

VI. Defending Legislation

American lawyers and political interest groups have become very aware that the Supreme Court, in a sense, legislates the fundamental values of American society and can be influenced by sophisticated legal and non-legal strategy. But this insight has been deeply disturbing to those political interest groups that have fought hard and successfully for legislation, only to see it invalidated by a court within minutes after the legislation goes into effect.

A. *The Amicus Brief*

Originally the *amicus curiae* brief was for the benefit of the Court. Now, the nature of the brief has shifted from one of neutrality to clear advocacy. To a large extent, this is a consequence of growing awareness that the Supreme Court, rather than simply resolving conflicts between parties, is making policy decisions concerning conflicting public interests that affect the lives of everyone. It is indeed difficult for a member of a democratic society to sit back and watch the Court make these fundamental policy decisions. The amicus brief has provided some solution, and political interest groups for years have been submitting amicus briefs with the intention of influencing the outcome.

In some important cases, such as *Roe v. Wade*, there have been as many as sixty amicus briefs filed in the Supreme Court. The Supreme Court claims that the justices read all these briefs, but this defies common sense. Indeed, there has been a growing concern that the amicus brief is not a very effective means of influencing the Court. In addition to the Court being overloaded with too many such briefs, most experienced lawyers feel that Supreme Court cases

41. 381 U.S. 479 (1965).
42. 410 U.S. 113 (1973).

are won and lost on the trial record, and the time to get involved is at the trial level, not when the case first arrives at the Supreme Court.

As a consequence, political interest groups that have been successful in enacting legislation have attempted to intervene at the trial level as a party defendant and provide constitutional support for the challenged statute from the very beginning of the case.

B. *Third Party Intervention*

After *Roe v. Wade*, a number of state legislatures enacted so-called pro-life legislation that attempted to regulate abortion to the extent arguably permissible. For example, statutes were enacted that required parental consent for minors seeking abortions and a husband's consent for women seeking abortions, and statutes were enacted that prohibited public funding of abortions. Each time such a statute was enacted, a pro-choice political interest group, such as Planned Parenthood or the ACLU would file a test case challenging the validity of the legislation. Indeed, predictability of the statute being challenged is so great that pro-life legal groups, such as the Americans United for Life ("AUL") Legal Defense Fund, the national legal defense organization of the pro-life movement, can indirectly institute a test case by encouraging the legislature to enact a statute that will immediately be attacked. As long as the legislature cooperates, a test case will be initiated. Through this technique, a strategy to eventually secure the reversal of *Roe v. Wade* has been developed.

An example of such a long range litigation strategy could be: 1) attack the disliked legal case undramatically, chipping away slowly at its underlying premises; 2) develop close relationships with legislators who will seek legislative suggestions to please their constituents; 3) provide a draft statute; 4) identify experts to provide sociological data to support the reasonableness of the legislation; 5) enact the legislation with a preamble that finds supportive facts; 6) wait for an opposing political interest group, such as Planned Parenthood, to challenge the legislation; and 7) intervene at the trial level as a party defendant and attempt to control the lawsuit.

The AUL has attempted to intervene as a third party defendant under federal intervention rules in a number of right to privacy lawsuits. Sometimes the need for intervention was obvious. For example, in one case, the attorney general of the state of Illinois refused to defend his state's anti-abortion statute on the merits.[43] In other

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43. This occurred in Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979).

cases, the state provided adequate defense for the legislation, but the AUL wanted to have a more direct, controlling effect on the outcome than would be possible with an amicus brief.[44]

To participate, it is necessary to satisfy federal intervention rules, which require that an intervenor have a concrete interest in the outcome.[45] Since the pro-life movement is large, the AUL seeks possible parties from throughout the nation who have an interest that satisfies federal intervention requirements. For the most part, federal trial courts have been liberal in permitting the AUL to intervene.

Once a party to the lawsuit, the AUL can participate as any other party. It can put on evidence, make arguments, build a record for appeal and file an appeal. In several cases, e.g., the abortion funding cases, the AUL—as a third party defendant—has taken cases to the Supreme Court.

Two years ago in *Diamond v. Charles*,[46] the Supreme Court expressed serious reservation about third party intervention by obvious political interest groups and restricted its use. However, if one understands the nature and history of the decision making process of the Supreme Court, its law making function and the efforts of political interest groups to use the Court as a means of winning before the judiciary what they have lost in the legislature, one must be sympathetic to the desire of competing interest groups to participate in the political battles in the courts. The *Diamond v. Charles* decision, on the other hand, seems to be based on the faulty assumption that the Supreme Court, like other courts, merely resolves a pending dispute between two parties. But as is emphasized here, the Supreme Court is very involved in determining the fundamental values of American society and most political interest groups are acutely aware of this.

VII. Conclusion

Today, nearly every serious American political interest group has a legal branch — organizations like the ACLU, Planned Parenthood, the Sierra Club, the Nature Conservancy, the National Rifle Association, the Moral Majority, and AUL. Thus, "doing politics in the courts" has become a way of American life. However, from a broader perspective, the common thread coming from *Marbury v. Madison*, through *Dred Scott*, *Plessy v. Ferguson*, the free enterprise cases and finally to restrictive covenant and abortion cases,

44. This occured in Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979), *vacated sub nom.* Williams v. Zbaraz, 448 U.S. 358, *reh'g denied*, 448 U.S. 917 (1980).
45. Fed. R. Civ. P. 24 (a), (b).
46. 476 U.S. 54 (1986).

shows that the constitutional "case or controversy" limitation on the exercise of judicial power does not really provide much limitation. The limitation subsides because political interest groups and their lawyers are always alert to the opportunity to influence courts, always seem to have a "party" available and always seem to have a test case to use in their never ending quest to win in the courts what they cannot win in the legislatures. Consequently, can American constitutional lawyers realistically entertain any hope of spending eternity with several prominent German law professors in Rudolf von Ihering's "juristischen Begriffshimmel?"