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"Government by a Few Conservative Men": An Examination of Louis Boudin's Understanding of the Abuse of the Judicial Power and the Decline of Judicial Restraint by the Supreme Court

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Abstract

For the first 150 years of the existence of the judicial power, it was liberals who advocated for the limited role that the Supreme Court should play in America's constitutional democracy. Since the 1960's and the Civil Rights Movement, there has been an increase in liberal judicial activism. This thesis seeks to explore the progression of judicial restraint and activism over the history of the Supreme Court through the eyes of Louis Boudin, a constitutional expert writing in the 1930's. Boudin, a radical liberal, asserts in Government By Judiciary that the judicial branch has been constantly expanding its own power far beyond the scope intended by the Framers of the Constitution as evidenced by ever-increasing activism. Boudin believes the Judiciary is threatening the very existence of the American constitutional democracy. This paper provides and in depth analysis of Boudin's arguments and applies them to the modern judicial power through the Rehnquist Court.

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Introduction

Ideas and ideals of judicial restraint and activism have influenced the decision-making of many Supreme Court justices since the Framers of the Constitution created American judicial power in the late eighteenth century. For the first 150 years of the judicial history of the nation, the partisan divide among justices could be seen by their approach to judicial restraint and activism in deciding cases that come before the Court. Judicial restraint calls for allowing for the Executive and Legislative branches, as well as the governments of the states, to function without unnecessary interference by the Judiciary, save in the case of a clear constitutional violation. Restraint requires the justices to presume the constitutionality of laws unless no reasonable person would believe them to be constitutional, a "low-bar rational basis" test. Judicial activism occurs when justices accept as their role and partake in the functions typically reserved for the popularly elected branches and those of the states. Activism represents the expansion of judicial decision-making in order to address matters of policy and resolve contentious issues facing the nation.

This thesis seeks to explore the progression of restraint and activism over the history of the Supreme Court through the eyes of Louis Boudin, a constitutional expert writing in the 1930's. Boudin, a radical liberal, asserts in his two-volume work Government By Judiciary that the judicial branch is constantly expanding its own power far beyond the scope intended by the Framers of the Constitution as evidenced by ever-increasing activism. Boudin believes the Judiciary is threatening the very existence of the American constitutional democracy. He argues that when the Supreme Court takes on the qualities of the legislatures, both state and federal, it becomes a super-legislature. This results in policy-making, which is far beyond the extent of the Court's powers as described in the Constitution. Boudin angrily asserts that this activism results

in the creation of an undemocratic government of unelected and unaccountable men, instead of the one of laws envisioned by the Framers.

In Government By Judiciary, Boudin explores the history of the United States Judiciary chronologically, beginning with foreign judicial systems that predated the founding the United States. The first chapter of this thesis introduces Boudin's theory about how the Court should function within the larger government structure and in relation to the other branches of government. It examines the constitutional theory of his main influence, James Thayer, a Harvard law professor and renowned constitutional expert, and it identifies similarities in the way that both Thayer and Boudin consider constitutional questions based on their written works.

Boudin goes on to analyze the early years of the existence of Supreme Court, as the justices and the nation tried to understand and define the nature and limits to its power. Chapter Two examines the landmark decision *Marbury v. Madison* (1803) in which Chief Justice John Marshall establishes the power of judicial review—the Supreme Court's ability to strike down pieces of legislation that the justices understand to contradict provisions of the Constitution. This enables the Court, for the first time, to be the predominant interpreting authority interpreting the Constitution and gives it the sole power of deciding whether or not a piece of legislation is constitutionally valid. Boudin interprets this as an extraordinarily activist decision on the part of Chief Justice Marshall, but explains that it was necessary for the fluid functioning of the government under the Constitution. But Boudin also recognizes that this decision creates the platform upon which generations of future justices can expand this power, building on Marshall's concept of judicial review. This expansion creates tremendous potential for abuse, allowing the Judiciary to be essentially unchecked by the other branches.

Chapters Three, Four and Five delve into some of the cases that Boudin identifies to represent major abuses of judicial power and examine his analysis of these activist decisions on the part of the Supreme Court. Boudin uses these cases as tools to further his point that the Court needs to be restrained in the way it operates especially in relation to the other branches of government. Chapter Three specifically looks at the decision in *Dred Scott v. Sandford* (1857). It explores the specific nature of Chief Justice Taney's decision and the impact that the Court's second voiding of a Congressional statute had on the nation. Boudin woefully concludes that Taney fundamentally changed the power balance among the government branches and as he redefined the nature of the judicial power.

Chapter Four evaluates Boudin's view of the activism evidenced in *Lochner v. New York* (1905). This case occurs at a time when economic policy questions were of great political contention and conservatives and liberals on the Court were torn as to how much the states should be able to regulate commerce using their "police powers." Boudin charges that conservatives favoring activism in trade and economics had completed the transformation of the Court into a super-legislature with this decision. These justices made policy decisions when a majority of the Court disagreed with the choices made by the states. Boudin concludes that the Court's striking down of a law regulating baking hours was an abuse of the judicial power and a clear attempt by the Judiciary to use powers that were never granted to it by the Constitution.

Chapter Five examines the Court in its post-*Lochner* and pre-New Deal era in which its activism was in flux. It examines the decade in which the Court tries to distance itself from the *Lochner* case and finally overturns it in *Bunting v. Oregon* (1917). After this decision, however, the Court reverses course again and moves back towards the constitutional philosophy it adopted in *Lochner* with *Adkins v. Children's Hospital* (1923). Boudin observes that judicial power by

this time does not even remotely resemble that envisioned by the Framers in the Constitution or even that developed by Chief Justice John Marshall in *Marbury v. Madison* (1803).

Finally, Chapter Six examines the phenomenon that began in the 1950's and 1960's in which liberal members on the Court (historically the strongest proponents of judicial restraint) adopted a much more activist stance. Liberals faced a dilemma: they continued to advocate restraint concerning questions of economic policy, but they wanted become more activist concerning the protection of civil rights and civil liberties with the rise of the Civil Rights Movement. This chapter looks at the changing nature of the Court after Chief Justice Warren retired in 1969. It concludes with an examination of Chief Justice William Rehnquist and his emphasis on the importance of judicial restraint. It goes on to analyze the similarities and differences that can be seen between Rehnquist and Boudin's understandings of judicial restraint.

This chapter also examines the fact that voting patterns on the Supreme Court have become increasingly predictable as the constitutional philosophies of the justices have become a more important aspect of the appointment process. This is a recent phenomenon that justices have been asked to so definitively express their understanding of the Constitution. Once public, it becomes very difficult for justices to diverge from those views and to render decisions on Constitutional issues pragmatically on a case-by-case basis. This fact contributes to a decline in the judicial restraint and leads the Court to become more activist, involving itself in those functions originally assigned to other branches.

CHAPTER 1:
Louis Boudin's Thoughts and Influences

Louis Boudin was born in Russia in 1874. When he was seventeen years old, his family immigrated to New York City. When he arrived in America, he began his legal studies at New York University, quickly emerging as a promising constitutional law scholar. From his youth in Imperial Russia, Boudin was influenced by Marxist thinkers and soon joined the Socialist Labor Party of America, developing a reputation for extreme liberal positions in the late nineteenth and early twentieth centuries. Boudin published many works during his lifetime, including Government By Judiciary, his two-volume work examining his view that the Judiciary consistently and systematically usurped of power from the Executive and Legislative branches and from the people themselves. Government By Judiciary was published in 1932 in the midst of the Great Depression at the very end of President Herbert Hoover's term and just before President Franklin Roosevelt took office.

In this two-volume text, Boudin expresses his great frustration with the current state of the Judicial Branch and the direction in which it is headed. Boudin understands the Judiciary to be a mechanism to resolve power-based disputes between the Constitution and other Federal and state laws or statutes. Boudin asserts that the Court should begin with the assumption that a law or statute is constitutional and apply a low-bar rational basis test to confirm or deny this assumption. When it applies this test, most legislation is found to be constitutional. By contrast, when the Court tries to assess whether a statute is "reasonable" based upon its substance, its evaluation too closely resembles legislating, and the Court is performing functions that are beyond the powers allotted to the courts by the Constitution.

Boudin identifies a fundamental shift taking place in the Judiciary from the time of the *Marbury v. Madison* (1803) decision—which officially asserted the Court's power of judicial

review—and the period in which he was writing in the early 1930's. He argues over time the Judiciary has departed from its true and appropriate function in American governance and is becoming a super-legislature. He believes that this has happened slowly, over the course of years, as a number of justices have parsed out the implications and pushed the boundaries of the power of judicial review, in the process losing sight of the true function of the Judiciary. Boudin points out that not all justices have lost sight of the limitations on the role of a judge, but fewer of these individuals have been present on the bench as time goes on. He writes, "If we compare the decade 1818-1828 in our judicial history, with that of 1918-1928, perhaps the most striking difference will be found in the fact that the great opinions delivered in the United States Supreme Court one hundred years ago were opinions delivered *on behalf* of the Court, while the great opinions of our own decade were delivered *in opposition* to it."[1] (Emphasis in original)

For Boudin, in an ideal democratic society, there would be no need for a judicial branch to resolve issues of power among the other branches because the Executive and Legislative branches would function within the limits of their own powers as defined by the Constitution. This would require the popularly elected representatives to abide by guiding principles, and this in turn would inform the Court's decision making in a consistent and thoughtful manner, encouraging them to employ a low-bar rational basis test in examining laws and policies. It is these principles that would lead the Court to produce restrained decisions. Boudin writes,

> On principle there should be no such thing as Judicial Power. But even *with* the Judicial Power principles are not useless. In fact, they are absolutely necessary, if the courts are to remain courts instead of becoming super-legislatures. And principles require the formation of hard and fast rules. At least, hard and fast for all *practical* purposes. Even hard and fast rules will be deviated from at times. But with such rules the Constitution, and the right of the people to self-government, would be at least *reasonably* safe from judicial interference.[2] (Emphasis in original)

[1]Louis B. Boudin, *Government By Judiciary*, vol. 2 (New York: William Goodwin), 1932, 548.
[2]*Ibid,* 491.

Boudin is extremely concerned with the apparent encroachment of the Judiciary on the rights and power of the people to self-govern. He believes that developing rules is key to justices better understanding the limits of their power. Because his ideal democratic society does not—and cannot—exist, the judicial branch fills the role of mediating disputes of power involving the Constitution. He justifies the existence of the judicial power by arguing,

> As has been stated repeatedly in the course of this work, the entire basis of the Judicial Power—the foundation upon which the entire structure is reared—is the principle that an unconstitutional law never had any validity. That it is so much waste paper—or, rather, waste motion. It is upon that theory only that the Judicial Power can be justified. And the upholders of the Judicial Power have always claimed that a court in declaring an act of Legislation unconstitutional does not declare the law null and void, in the sense of *making* it null and void, but merely establishes the proposition that the law *has always been* null and void,—it really never existed.[3] (Emphasis in original)

The Supreme Court, as a government institution, is inherently undemocratic in the eyes of Louis Boudin because, unlike the Executive and Legislative branches, the justices on the Court are not popularly elected and serve life terms only contingent on proper behavior. Boudin understands this to be a necessary evil to enable the Courts to make difficult decisions without concern for public opinion or political pressure. But this judicial structure creates the conditions for judges to easily abuse the power they are given and to override the people's ability to self-govern. One of the main motives for Boudin to write Government By Judiciary was to respond to what he saw as increasing irresponsibility of justices in the wielding of their official powers. Boudin believes that as Courts issue decisions based upon powers they do not directly possess, the people—and the ability of the people to democratically govern—is slowly diminished. Boudin cites the lack of accountability in the judicial branch as the reason why judicial power can expand with few repercussions.

[3] *Ibid,* 352.

In American society, the Supreme Court is less well understood than the other branches of government in large part because of this lack of accountability. If Congressional representatives are not to some degree transparent to their constituents or vote in ways that the people do not approve, they can simply be removed from office during the next election cycle. This is not the case with the Judiciary. It operates with an air of mystery. Boudin elaborates, "The Legislature always acts in the full light of day, and in a manner to be easily understood by any intelligent citizen; while the courts, on the other hand, do their work in the seclusion of a court room, protected by a smoke-screen of technical jargon which is utterly unintelligible to the ordinary citizen."[4]

The perplexing nature of the Court is exacerbated by the occasional choice to address questions that are not central to a given case or, conversely, to avoid answering a question that the public sees as important. Despite Boudin's warnings, this is a phenomenon that has continued to occur on the Supreme Court long after Boudin wrote.

> But the most important difference between the action of the Legislature and that of the Judiciary is that the Legislature always proceeds to attack problems directly, while the courts frequently attack them indirectly and in a manner calculated to obscure the real issues involved. Thus the country often knows nothing of what is actually happening to it while the courts are deciding its fate…[O]rdinarily, the true meaning and possible effects of a court decision are seldom known to the laity, and sometimes not even to the legal profession.[5]

Boudin's constitutional philosophy was highly influenced by that of James Thayer, a Harvard Law School professor and leading constitutional law expert in the nineteenth century. In his article, "The Origin and Scope of the American Doctrine of Constitutional Law," Thayer outlined his views on the proper role of the Judiciary. He argues that the Courts need to be restrained in their decision-making in order to fulfill their proper role in the constitutional

[4] *Ibid,* 289.
[5] *Ibid,* 289.

democracy. Thayer was Boudin's first inspirational for his own constitutional theory. It was Thayer who proposed the rational basis test to determine the constitutionality of legislation and argued for great deference to the Legislature in matters of policy-making. Both Thayer and Boudin argue that the Supreme Court should only strike down a law if there is a blatantly obvious violation of the Constitution that "any rational man" could identify. Thayer claims that the Court's power was greatly expanded with *Marbury v. Madison* (1803), and its fundamental nature changed. In the century after Chief Justice John Marshall wrote this landmark opinion, the power of the Judiciary expanded even more to become what Boudin identifies as a dangerous tool building to levels far beyond what was intended in the Constitution. Thayer believes it is a slippery slope when justices insert themselves in the functioning of the other two popularly elected branches. He argues it is difficult to contain once the power of the courts spiral out of control.

In his article, Thayer seeks to clarify the process through which the Judiciary should strike down a piece of legislation as unconstitutional and develops a better understanding of the true scope of the judicial power. Through an examination of the history of the Court post-*Marbury v. Madison* (1803), Thayer identifies judicial restraint as one of the most important values that a justice can embrace and defines it as essential to the functioning of a consistent and thoughtful Court. He believes that restrained judges will be cognizant of the larger implications of their rulings and will interfere with the Legislative and Executive branches only when they have no alternative. He sees the Court's role as to maintain the Constitution as the supreme governing document of the United States and to ensure that subordinate laws and statutes do not conflict with its provisions. Like Boudin, Thayer argues that justices should strike down legislation only if no rational man could conceive it to be constitutional. This position raises

serious questions when close five-four decisions that are handed down by the Court.

Boudin advocates for the concept of judicial restraint Thayer developed. In an appreciation of Justice Oliver Wendell Holmes' similar constitutional philosophy, Boudin writes, "And in so doing, he [Holmes] practically gives his own constitutional rule without attempting to formulate one…It is the familiar rule—long fought for by Mr. Justice Holmes, often stated in the name of the Supreme Court, but unfortunately never adhered to—that a law must be utterly unreasonable in order to give a court the right to declare it unconstitutional."[6] Boudin also looks to *Burns Baking Co. v. Bryan* (1924), a case that concerned the size and weight of bread being sold in Nebraska, to define his own constitutional theory. The Court struck down this statute as unconstitutional and Boudin points to Justice Louis Brandeis' dissenting opinion to support his view of the proper role of the Court and to identify when it is appropriate for the Court to strike down statutes. Boudin quotes Justice Brandeis,

> It is not our providence to weigh evidence. Put at its highest, our function is to determine, in the light of all other facts which may enrich our knowledge and enlarge our understanding, whether the measure, enacted in the exercise of an unquestioned police power, and of a character inherently unobjectionable, transcends the bounds of reason. That is, whether the provision, as applied, is so clearly arbitrary or capricious that legislators, acting reasonably, could not have believed it to be necessary or appropriate for the public welfare. To decide, as a fact, that the prohibition of excess weights 'is not necessary for the protection of the purchasers against imposition and fraud by short weights'; that it 'is not calculated to effectuate that purpose'; and that it 'subjects bakers and sellers of bread' to heavy burdens,—*is, in my opinion, an exercise of the powers of a super-legislature,—not the performance of the constitutional function of judicial review*.[7] (Emphasis in original)

Thayer explains that the people are responsible for electing their own representatives. These representatives, whether members of Congress or the Executive branch, create and enforce legislation that fills in the framework of the government institutions created by the Constitution.

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[6] *Ibid,* 488-489.
[7] *Ibid,* 501.

Since a formal election process takes place in which the people weigh their options for representation, these popularly elected representatives will tend to be rational men and rational men will rarely make irrational decisions. Following this line of logic, only very occasionally will there be a statute that "no rational man would think to be constitutional." Thayer writes in his "The Origin and Scope of the American Doctrine of Constitutional Law," "The constant declaration of the judges that the question for them is not one of the mere and simple preponderance of reason for or against, but of what is very plain and clear, clear beyond a reasonable doubt."[8] Advocates of judicial restraint, like Thayer and Boudin, promote the idea that the Court safeguards the people against rare irrational legislative actions and from the effects they might have on the populace, the states, or the relationship between branches of government.

Thayer describes the duty of the Court to be, "the mere and simple office of constructing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the construction as being of superior obligation,—an ordinary and humble judicial duty, as the courts sometimes describe it."[9] Thayer bases his views on the fact that judges are appointed, not popularly elected, and are therefore not constrained in the way that the Legislative and Executive branches both are. Judicial review can, however, be a double-edged sword for America's constitutional democracy based on how the justices chose to use this power. Judicial review, for Thayer, can be a positive tool to protect the people from an encroaching government and enable the justices to make unpopular decisions without fear of repercussions. But Thayer also believes that the power of judicial review can be

[8]James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7, no. 3 (1893), 151.

[9] *Ibid,* 138.

extremely dangerous and easily abused by justices with few and limited consequences. In summary, Thayer points out that, "Under no system can the power of the courts go far to save people from ruin; our chief protection lies elsewhere."[10]

The lack of a mechanism to prevent justices from abusing the power of judicial review is of real concern to both Thayer and Boudin. Adding to it is the fact that the individual justices determine for themselves how they choose to interpret the Constitution. As a result, the job of a President to fill a vacancy on the Supreme Court becomes highly politicized with justices capable of shaping American society for generations to come. During the late nineteenth and early twentieth centuries when Thayer and Boudin lived, liberals tended to value judicial restraint and to argue that over-involvement by the Courts had serious implications for the balance of power both among the branches and between the state and Federal governments.[11] Conservative justices, on the other hand, took a more activist stance, a position Thayer and Boudin both warned against.

Today, during the Senate confirmation hearings of Supreme Court nominees, many speak of their dedication to *stare decisis* and the precedents set by previous generations of justices. Given the intense partisan divide currently plaguing Congress, the two most important goals that Chief Justice John Roberts emphasized during his confirmation hearings were the need for increased conformity on the Court and for a greater dedication to precedents when deciding cases.[12] Yet, in his short time on the Court, Chief Justice Roberts has demonstrated that he is willing to break with precedent on highly contentious subjects like gun control, campaign finance and corporate "speech." This is precisely the kind of "judicial activism" that Boudin

[10]*Ibid,* 156.
[11]*Ibid.*
[12]Marcia Coyle, *The Roberts Court: The Struggle for the Constitution,* First Simon & Schuster hardcover edition (New York: Simon & Schuster, 2013), 84.

warns against and represents what he would consider a Judiciary taking on the role of a super-legislature.

Boudin stresses a need for a strong reliance on precedent, saying it is key to both the structure and function of the judicial branch. But, Boudin observes a significant movement away from this value over the Court's history: "But evidently our present Supreme Court is not only less a respecter of the age of constitutional practices than was the Supreme Court under Marshall, but it is also no respecter of its own prior decision—*a characteristic displayed by all possessors of absolute power*. Once power become absolute, there is nothing that can stand in its way"[13] (Emphasis in original). Boudin's strong words suggest that he believes that the power of the Judiciary is dangerously unchecked. This power has the potential to become absolute depending on who is wielding it and how. If it ever becomes absolute, Boudin believes it will jeopardize the very existence of America's constitutional democracy.

Boudin argues that one characteristic that exacerbates this danger is that the United States judicial branch is completely novel and different from any created before it. In order to prove this, Boudin evaluates the judicial branches of foreign nations that were created before the ratification of the U.S. Constitution. He observes that the American judicial branch has powers that have traditionally been allocated to the legislatures in nations such as Great Britain and France.[14] Reserving these powers for the legislative branch enables current elected representatives to be responsive to the demands of the people when creating policy. A system lacking a wholly independent judiciary can be swayed by public opinion, but governance is by men and women with something to lose from the decisions that they make—namely their positions as part of the Legislative branch. Boudin contrasts this with the American Judiciary

[13]Boudin, *op. cit.,* 204.
[14]Louis B. Boudin, *Government By Judiciary*, vol. 1 (New York: William Goodwin, 1932), 40-50.

and recognizes that our system relies on a completely independent judiciary, meaning that the nation can sometimes be governed by the decisions of dead men.

> A careful review of the facts of our history on this showing forces one to the conclusion that the only real difference between our government and the governments of other civilized countries is that in other countries the Men are accountable to the people, and their decisions are subject to be revoked and reversed by the people; while in this country the Men who wield the real power of the government are not accountable to the people, and their decisions are irrevocable and irreversible except by themselves. The net result is that we are ruled frequently by *dead Men* (not, however, the dead 'Framers,' but generations of dead judges), and always by *irresponsible Men*.[15] (Emphasis in original)

Boudin argues that these "irresponsible men" have ignored or forgotten the limits of the powers granted to them by the Constitution and resemble a runaway train that strives to judge the substance of a statute instead of answering a purely Constitutional question of power to legislate. The judiciary has taken on the role of regulating and monitoring the Legislative branch, and the justices now hand down decisions that are completely beyond their purview. Boudin argues that deference should be granted to the popularly elected branches contingent on the respect of the limits to their power to legislate and execute the law, which is the only proper question for the Judiciary to consider.

[15] *Ibid*, vii.

CHAPTER 2:
Marbury v. Madison

The *Marbury v. Madison* (1803) decision signaled a fundamental shift in both the extent of the judicial power and the role of the Supreme Court in America's constitutional democracy. Chief Justice John Marshall and his fellow justices were charged with settling a dispute between then-Secretary of State James Madison and William Marbury. President John Adams had appointed Marbury a Justice of the Peace in Washington, D.C., but at the last moment, Madison refused to deliver his commission to Marbury when President Adams' term as President ended. As Chief Justice John Marshall defined the issue, the Court needed to answer three fundamental questions, "1. Whether the Supreme Court can award the writ of mandamus in any case. 2. Whether it will lie to a Secretary of State, in any case whatever. 3. Whether, in the present case, the Court may award a mandamus to James Madison, Secretary of State."[16]

In Marshall's lengthy opinion, he systematically worked through each of these three questions. With respect to the first, Marshall concluded that Marbury had a right to the commission and the approval by the Senate and the signing of the commission by President Adams indicated that Marbury had been legally appointed a Justice of the Peace. The delivery of the document was not relevant to its validity. Second, because Marbury was entitled to the commission, the law must afford him some kind of remedy. Third, Marshall ruled that the Court could not grant the writ of mandamus because Section 13 of the Judiciary Act of 1789 that give the Court the power to afford this writ was, itself, unconstitutional. It invalidly expanded the cases that could be considered within the "original jurisdiction" of the Supreme Court, or the ability to bring cases directly to the Supreme Court. Congress did not have the power to extend the Court's original jurisdiction beyond what was written in the Constitution. Marshall explains,

[16] *Marbury v. Madison*, Pg. 5 U.S. 137, 139, (1803).

> In the distribution of this power it is declared that, "The Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction." It has been insisted at the bar, that, as the original grant of jurisdiction to the Supreme and inferior courts is general, and the clause assigning original jurisdiction to the Supreme Court contains no negative or restrictive words, the power remains to the Legislature to assign original jurisdiction to that Court in other cases than those specified in the article which has been recited, provided those cases belong to the judicial power of the United States.[17]

As evidenced by the careful language of his decision, Marshall demonstrates that he understands he must strike a balance, writing an opinion that will be followed by the Executive branch and maintain the authority of the Supreme Court to issue meaningful decisions. He also wants to make it clear to President Jefferson who ordered then-Secretary of State Madison to withhold the delivery of the commission, that Marbury had a right to the commission and had been legally appointed by President Adams. Marshall explains that the transmission of the commission to Marbury would have been simply a formality and that the appointment was completed when President Adams signed the commission. Chief Justice Marshall finds an interesting middle ground that both recognizes the right of Marbury to the commission, but also the lack of authority of the Court to provide him the remedy that he demanded—the writ of mandamus forcing President Jefferson to facilitate the delivery of the commission. In a very clever way, Marshall manages to reinforce the right of the individual and the need for him to receive a remedy from the Judiciary, while simultaneously concluding that the case should have come to the Court through appellate jurisdiction, preventing the Court from providing him the remedy that he sought.

Chief Justice John Marshall focuses on questions of power in his opinion. He applies his understanding of the distribution of government power to the facts of the case. Through this

[17] *Ibid,* Pg. 5 U.S. 137, 174.

opinion, Marshall examines both the power of the President to make such judicial appointments with the approval of the Senate and the power for the Supreme Court to hear the case and provide a remedy to the injured party. Marshall understands the Constitution to provide the framework for the allocation of power among the different branches of government. Through his opinion, Marshall demonstrates his reverence for the strict separation of powers and deciding cases involving the tension of powers through the lens of the Constitution.

> When an instrument organizing fundamentally a judicial system divides it into one Supreme and so many inferior courts as the Legislature may ordain and establish, then enumerates its powers, and proceeds so far to distribute them as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be that, in one class of cases, its jurisdiction is original, and not appellate; in the other, it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.[18]

It is in his answer to the third question that Chief Justice Marshall addresses the Court's power of judicial review and greatly expands the extent of that power. By declaring Section 13 of the Judiciary Act of 1789 an inappropriate use of Congressional power to change the type of cases falling within original jurisdiction of the Court, Marshall took the opportunity to assert that, if a case presents a law that is directly in conflict with the Constitution, it is duty of the justices to deem the law void. In his reasoning, a void law cannot not be enforced by the Courts because it undermines the sanctity of the Constitution as a governing document.[19]

> It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank. Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle,

[18] *Ibid,* Pg. 5 U.S. 137, 175.
[19] Ibid, Pg. 5 U.S. 137, 175-180.

> supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.[20]

Through this landmark announcement, Chief Justice Marshall officially sanctified the power of judicial review—the Supreme Court's ability to strike down pieces of legislation enacted by another branch that they understand to contradict provisions of the Constitution. By formalizing the assignment of this power to the Judiciary, Marshall dramatically expands the judicial power and makes it more nearly equal to the other two branches of government. Marshall states,

> *It is emphatically the province and duty of the Judicial Department to say what the law is.* Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. [21] (Emphasis in original)

The opinion of the Court in *Marbury v. Madison* (1803) represents a turning point for the Supreme Court and redefines its role in society. Marshall not only resolves the issues by declaring that a specific provision of the Judiciary Act of 1789 is void, but he continues and clarifies the powers of the Judiciary through commentary on the government structure in the United States:

> The Government of the United States has been emphatically termed *a government of laws, and not of men.* It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.[22] (Emphasis in original)

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[20] *Ibid,* Pg. 5 U.S. 137, 180.
[21] *Ibid,* Pg. 5 U.S. 137, 177-178.
[22] *Ibid,* Pg. 5 U.S. 137, 163.

Boudin dedicates an entire chapter of Government By Judiciary to analyzing the *Marbury v. Madison* (1803) decision and its impact on the Judiciary through the time he was writing in the early 1930's. Boudin ultimately concludes that U.S. government no longer resembles Marshall's government of laws, but instead has become a government of men. Dismayed, Boudin continues, "A careful examination of the actual course of decision will show that ours is not merely a Government of Men, but a Government of Conservative Men. And since the actual power of government is in the hands of a majority of the United States Supreme Court, our government could very well be termed 'Government by a Few Conservative Men.'"[23]

Although, Boudin agrees with the fact that Marshall's decision was an integral step in the development of the judicial branch, he does not praise the opinion as many of his contemporaries do. He finds many flaws with Chief Justice Marshall's line of argument and characterizes it as extremely weak in places.

First, Boudin points to a lack of precedent for a decision that so greatly expanded judicial power through the Constitutional interpretation of the validity of laws. He wrote, "*It must be borne in mind that no question of the constitutionality of any act of Congress had been raised up to the time of the actual delivery of the opinion and the decision of the case*"[24] (Emphasis in original). At a time when the Judiciary was not in the forefront of the minds of the people, Boudin points out that this was a high-profile case highlighting the partisan divide between Federalists and Anti-Federalists.[25] Marshall's opinion, though, was unexpected by all. This was especially true because Marshall did not decide the case in its natural order and in the order in which Marbury's attorney argued it. If he had, Marshall still would have been able to establish the power of judicial review and strike down Section 13 of the Judiciary Act of 1789. But

[23] Boudin, *op. cit.*, vol. 2, 545-546.
[24] Boudin, *op. cit.*, vol. 1, 206.
[25] *Ibid,* 197.

because he would have announced that the Court could not rule on the case due to the fact that Section 13 was null and void, he would not have been able to assert Marbury's right to the commission. By changing the order in which the questions were answered, Marshall was able to assert the Judiciary's ability to order the Executive to deliver the commission to Marbury and to indirectly lecture President Jefferson for attempting to interfere with this process.[26] As a result, Boudin concludes that,

> But not only is Marshall's opinion devoid of any foundation because his basic inferences are historically untrue, but it is vulnerable even when tested by his own favorite logical method. Outside of the unwarranted assumption and inferences made by him, Marshall's opinion on this point consists of only one argument: The *reductio ad absurdum*. An attempt is made to reduce to absurdity the contrary position, by a citation of a few provisions of the Constitution, followed by the rhetorical query: What would happen to these provisions if the Legislature were uncontrolled by the Judiciary?[27] (Emphasis in original)

Boudin further criticizes two of Marshall's major inferences as historically untrue. First, Boudin points to Marshall's assertion that, "*all those* who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently *the theory of every such government must be* that an act of the legislature repugnant to the constitution is void" (Emphasis in original).[28] Boudin points out that this statement was simply false and that the French Constitution of 1791, for example, easily disproves this. Looking at countries that rely on civil law, Boudin argues that Marshall's argument that the Judiciary must be the final arbiter of the meaning of the Constitution is debunked.[29]

Boudin also points out that Marshall makes no reference to the intention of the Framers, though they had drafted the Constitution only two decades before prior this decision. One of Marshall's colleagues on the Supreme Court, Justice Paterson, had been an active member of the

[26] *Ibid,* 204-205.
[27] *Ibid,* 224.
[28] *Ibid,* 222.
[29] *Ibid,* 222-223.

Constitutional Convention and could have easily attested to the intent of the other Framers. Instead, Marshall writes, "And since the Constitution itself was silent on the subject and resort had to be had to inferences in order to prove the intentions of the Framers, the utter failure to refer to these intentions as stated by them is most curious, to say the least."[30] Boudin argues that this statement suggests Marshall was not as confident as his opinion makes him appear that the intentions of the Framers would support his assertion of the power of judicial review.

Despite these points of contention, Boudin does not argue that it is a careless or thoughtless opinion. The decision in *Marbury v. Madison* (1803) is recognized as the landmark decision that enabled the Court to strike down pieces of legislation as void. After a thorough examination of the opinion itself, Boudin points out that nowhere in it does Marshall use the word "unconstitutional."[31] As a result, Boudin chooses to interpret the meaning and impact of this decision in a slightly different way than many later commentators. Boudin writes,

> That position was this: *That the Judiciary were not the special guardians of the Constitution, appointed to that office by provisions of the Constitution itself. It was not the "supreme authority" of the American system of government, established by the United States Constitution. The Judiciary, therefore, had no right to declare any law unconstitutional in the sense of nullifying that law or destroying it. It was, however, one of three independent and co-ordinate branches of the government, and as such it was not bound by the opinion of the Legislature as to the meaning of the Constitution, and could decide the question of constitutionality for itself; and having come to the conclusion that the law was void for repugnance to he Constitution, disregard it in its own decisions.*[32] (Emphasis in original)

Boudin understands Marshall's opinion to be one that established the Court as the arbiter of issues of power allocation. Boudin believes from the language of Marshall's opinion, that Marshall interprets the role of the Court to be an evaluation mechanism concerning the constitutionality of laws on their rational basis as opposed to on the substance of individual

[30] *Ibid,* 223.
[31] *Ibid,* 227.
[32] *Ibid,* 227.

statutes. Evaluation based on substance allows the Court to make direct policy through its decisions. Boudin asserts, "But when constitutionality ceased to be the question of *power* which it was under Marshall and his immediate successors, and became a question of reasonableness of the *use* of an admitted power, the written constitution which was the *source* as well as the *measure* of the Judicial Power under the Marshall theory of constitutional government was thrown overboard" (Emphasis in original).[33] Boudin concludes that there is considerable difference between deciding whether legislation has a "rational basis" and deciding whether it is "reasonable."

Boudin also evaluates the impact of this decision on the greater sweep of judicial history that he addresses in his work. He recognizes the major importance of this decision, but stops there, refusing define *Marbury* as the predominant pivot point in the course of judicial history. He argues that many historians define judicial history as pre- and post- *Marbury v. Madison* (1803) and that does not accurately understand the effect of subsequent decisions handed down by the Court.

> The official tradition with respect to *Marbury v. Madison* divides the history of the Judicial Power in the United States into two unequal epochs: The short period between the adoption of the United States Constitution and *Marbury v. Madison*, which is represented as a sort of preliminary or testing period; and the *post-Marbury* period, which is supposed to be a uniform development of our judicial history under the aegis of John Marshall and his successors in office, lighted by the torch of that great opinion.[34]

Boudin acknowledges the importance of *Marbury v. Madison* (1803), but does not view Marshall's decision as the singular turning point in constitutional law. "With such a view of history of the Judicial Power, turning points in that history are extremely awkward to deal with; so they had best be overlooked. And overlooked they were. In fact, they still are being

[33]Boudin, *op. cit.*, vol. 2, 441.
[34]Boudin, *op. cit.*, vol. 1, 275-276.

overlooked, to the great detriment of a real understanding of our history."[35] The other turning points he identifies include, but are not limited to, *Dred Scott v. Sandford* (1857), *Lochner v. New York* (1905), and a number of decisions occurring in the years before the Great Depression.

[35]Boudin, *op. cit.*, vol. 2, 275-276.

CHAPTER 3:
Dred Scott v. Sandford

When the Supreme Court agreed to hear *Dred Scott v. Sandford* (1857), it was clear that the justices were prepared to make their first ruling directly addressing the question of the constitutionality of slavery in America. Slavery had been a contentious issue even before the ratification of the Constitution, creating many roadblocks for the Framers as they attempted to create a governing document acceptable to all. As a compromise, the Framers chose not to directly address the issue. In 1857, in a 7-2 decision, the Court found that because Dred Scott was a slave, he was not a citizen of the United States and therefore did not have standing to bring a case to court. Chief Justice Taney, who authored the opinion of the Court, also declared that the federal government could not regulate slavery in the territories added to the union after the ratification of the Constitution. This rendered the Missouri Compromise unconstitutional. *Dred Scott v. Sandford* (1857) was the first time since *Marbury v. Madison* (1803) fifty years earlier that the Court had declared an act of Congress unconstitutional.[36]

Dred Scott was a slave living in Missouri, a slave state. Scotts' owner took him across state lines to two free states, first Illinois and then Minnesota, and then returned to Missouri with Scott. After these travels, Scott's owner attempted to sell him to the respondent, Mr. Sandford. Scott chose to file a suit in court to regain the free status he claimed he had obtained by traveling to and residing in the two free states with his previous owner. The lower court agreed with Dred Scott but the decision was appealed to the Supreme Court, which reversed the lower court's ruling granting Mr. Scott his freedom. It was clear from the language of Chief Justice Taney's

[36]D. R. Tarr and A. O'Connor, eds. "Legislation Declared Unconstitutional," *CQ Encyclopedia of American Government*, Congress A to Z. (Washington, D.C.: CQ Press, 2003), http://cqpress.com/context/constitution/docs/legislation.html.

opinion that he intended to resolve the issue of slavery dividing the nation once and for all. But his politically charged opinion only helped spark the Civil War four years later in 1861.

Chief Justice Taney writes a long decision to answer one central question:

> The question is simply this: can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?[37]

Taney used both historical experience and the intent of the Framers to assess whether "Negroes" could be "citizens" of the United States as he deems all white males to be. He repeatedly distinguished "Negroes" from other "races," especially Native Americans. Though Native Americans had not officially participated in colonial America, they had their own freedom, independence and an established governing order as a people. Therefore, they retained the ability to participate in the governing structure of the United States. In contrast, "Negroes" never attained this level of civil freedom and had always been considered property to be bought and sold, even in other nations.

Chief Justice Taney spends nearly half of his opinion defining the meaning of the words "citizen" and "people" as used in the Constitution by the Framers. He digs through historical evidence looking back to the British participation in slave trade prior to, and during, the settlement of the colonies. This was the only type of interaction that took place between the British and people of African descent. Taney extends this thinking to the Framers, many of whom were one and the same. Chief Justice Taney argues that the Framers had never considered "Negroes" to be anything but property and would not have included them in their definition of a

[37] *Dred Scott v. Sandford*, Pg. 60 U.S. 393, 403, (1857).

citizen who could actively participate in the government. He looks back to the Declaration of Independence for proof of the Framers' intentions:

> "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed." The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.[38]

Weakening Taney's argument is the fact that some of the information he cites in support of his argument was not entirely true. For example, Taney refers to the fact that "Negroes" were not included in those people who framed and adopted the Constitution. In a few states, such as Massachusetts, they were in fact allowed to vote on the ratification of the Constitution. Regardless, Taney continues to search through many of the major documents that outlined the government of the United States to reinforce his argument. He identifies two Constitutional provisions that include some mention of slavery and explains how they help to further prove his point. The first Constitutional provision reserves the right of each of the thirteen original states to import slaves until 1808 if each state considers it "proper."[39] The second provision requires the states to respect the property rights of the master and compels other states to return any escaped slaves.[40] Chief Justice Taney supports these points with in depth analysis of the nature

[38] *Ibid,* Pg. 60 U.S. 393, 410.
[39] *Ibid,* Pg. 60 U.S. 393, 411.
[40] *Ibid,* Pg. 60 U.S. 393, 411.

of state slavery laws, including in northern states such as Massachusetts and Connecticut.[41] Chief Justice Taney concludes that he has proved beyond a doubt that the term "citizen" used by the Framers had not been intended to include "Negroes."

> What the construction was at that time we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "people."[42]

He bolsters the impact of his decision by recognizing the animosity surrounding the issue of slavery. But he points out that the justices cannot be swayed by public opinion and must make a decision based on the Constitution. He recognizes it as the Court's duty to interpret the Constitution through the language used and in his analysis he finds that policy-making is a responsibility of the Legislature and not that of the Judiciary. Therefore, Chief Justice Taney comments,

> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.[43]

He later continues,

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more

[41] *Ibid,* Pg. 60 U.S. 393, 413.
[42] *Ibid,* Pg. 60 U.S. 393, 426.
[43] *Ibid,* Pg. 60 U.S. 393, 405.

> liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. [44]

Taney seems quite confident in his final definition of a "citizen" of the United States and he specifically asserts that, with careful historical examination, he would be able to determine the status of any group of people as citizens and contributing members of society.

> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. [45]

The natural limit of Chief Justice Taney's can be seen in his determination that Scott did not have the right to bring the case in front of the Court since he was not a citizen. Taney continues, though, to judge the constitutionality of the Missouri Compromise. He declares that Congress does not have the power to ban slavery in specific U.S. Territories as the Missouri Compromise attempts to do. He cites the Fifth Amendment as a safeguard against the seizure of personal property by Congress without proper and equivocal compensation. Scott's travel and residence into a "free territory" did not make him free because the Missouri Compromise is void and an abuse of Congress's power.

> Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned is not warranted by the Constitution, and is therefore void, and that neither Dred Scott himself nor any of his family were made free by being carried into this territory, even if they

[44] *Ibid,* Pg. 60 U.S. 393, 426.
[45] *Ibid,* Pg. 60 U.S. 393, 404.

had been carried there by the owner with the intention of becoming a permanent resident.[46]

Based on the language of the Constitution, Taney finds only a few provisions that reference slavery, none that forbid it, and nothing that creates special powers to differentiate between different kinds of property. He concludes that Congress did not have the authority to limit the ability of citizens to own property in specific territories:

> The powers of the Government and the rights of the citizen under it are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government or take from the citizens the rights they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.[47]

Chief Justice Taney is keenly aware of the impact that his decision will have on the nation, especially one as divided over slavery as the United States was at the time. Knowing this, he explains his understanding of the role of the judiciary in the federal government and the implication of his decisions based on this defined role. Taney writes about the duty of the Judiciary to recognize the binding provisions of the Constitution and that the Constitution does not expressly give the power to Congress to make laws limiting slaves as property in certain territories. He concludes that the Judiciary cannot support Congress's attempt to do so through the enactment of the Missouri Compromise:

> It is a question for the political department of the Government, and not the judicial, and whatever the political department of the Government shall recognize

[46] *Ibid,* Pg. 60 U.S. 393, 452.
[47] *Ibid,* Pg. 60 U.S. 393, 451.

> as within the limits of the United States, the judicial department is also bound to recognize and to administer in it the laws of the United States so far as they apply, and to maintain in the Territory the authority and rights of the Government and also the personal rights and rights of property of individual citizens as secured by the Constitution. All we mean to say on this point is that, as there is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a Territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution and its distribution of powers for the rules and principles by which its decision must be governed.[48]

In his chapter analyzing the *Dred Scott Case* and Chief Justice Taney's opinion, Boudin voices his disappointment with the both the nature of arguments in the opinion and the implications they have for the future of the nation. The Missouri Compromise was only the second piece of Congressional legislation to be struck down by the Court, and Boudin compares the two cases that brought about this result and differentiates between them. Outraged, Boudin writes,

> *The Dred Scott decision is the very foundation of our constitutional system as it exists today.* Popular belief and professional opinion to the contrary notwithstanding, Taney, not Marshall, is the Father of the Judicial Power. And its foundations were laid not in *Marbury v. Madison* (1803) but in *Dred Scott v. Sandford* (1857). Marshall was at most a pretender to the throne, while Taney established a real kingdom. But even Marshall's pretentions did not extend to the vast domain which Taney actually conquered. In *Marbury v. Madison* Marshall put forward the comparatively modest claim that in passing upon the right of Mr. Marbury to be Justice of the Peace of the District of Columbia during the next few years, the judges had the right to compare the law of Congress with the Constitution on the question of power of the Supreme Court to issue a writ of *mandamus*, and, if they found that the law of Congress was not in accordance with what they believed to be the provisions of the Constitution, to disregard the law of Congress. But in the *Dred Scot Case*, Taney and his associates undertook, in the language of Mr. Justice Wayne, to *settle by judicial decision the peace and harmony of the country*.[49] (Emphasis in original)

From this decision by the Court, Boudin concludes that the constitutional system, upon which the Federal government is based, was completely and fundamentally redefined by Chief

[48]*Ibid,* Pg. 60 U.S. 393, 447.
[49]Boudin, *op. cit*., Vol. 2, 2.

Justice Taney. In the process, he reformulates the power balance of the three branches and upsets the strict separation of powers. Boudin identifies this as one of the most major shifts in constitutional theory up to that time by the Court. Boudin accuses Taney of trying to resolve a fundamental policy question—slavery—for the nation through a judicial decision. By striking down of the Missouri Compromise as unconstitutional, Chief Justice Taney and his six pro-slavery colleagues advance their own preference on a policy matter. Boudin charges,

> *The declaration of the Missouri Compromise Act unconstitutional was therefore clearly a sheer act of usurpation of political power even under the official and orthodox doctrine of judicial review.* Thus we come to the conclusion that the very first time when the United States Supreme Court actually used its power to declare a law of Congress unconstitutional in a manner to make a difference to the people of the United States, it did so by a sheer act of usurpation even according to the official and orthodox theory of judicial review as expounded by its official interpreters. And this is more than merely an interesting historical fact. It exhibits the true nature of the power—*its dangerous character as a political institution*.[50] (Emphasis in original)

Boudin argues that this abuse of the judicial power creates the real potential for this branch to function unchecked by the others, having the capacity, as a result, to destroy the entire fabric of America's constitutional democracy. A decision like the *Dred Scott Case* demonstrates for Boudin how detrimental and dangerous the Judiciary has the potential to become. Chief Justice Taney and his colleagues striking down a law as unconstitutional in order to create policy for the nation and to settle "peace and harmony" in the country, Boudin argues, is a flagrantly inappropriate use of the judicial power by the justices.

Boudin is more concerned with the implications this opinion has on the relationship between the branches of government than he is with the specific facts of the case. Despite this, he does address slavery as a policy issue, sarcastically commenting about the evidence that Chief Justice Taney presented about "Negroes" and his definition of the term "citizen." For example,

[50] *Ibid,* 25.

he mentions, "The point of his argument was that Negroes were considered so degraded a race that the Constitution could not possibly have meant them to be included in the word 'citizens,' when it provided that a citizen may sue in the Federal courts."[51] Boudin strives to educate his readers about the implications of judicial power this case raises because he feels that Taney's opinion received attention mostly for its resolution—even if temporary—of the issue of slavery. Boudin identifies a different, and greater, problem with it. "But the general criticism was directed to the attempted settlement of the Slavery question, rather than to the change in our constitutional system which was involved…The attempted disposition of the Slavery question made in the *Dred Scott Case* endangered the entire existence of the Union under the Constitution."[52]

Boudin focuses his analysis more centrally on the fact that after the Court granted itself the power to make fundamental policy decisions for the nation, only the Court possessed the power to check itself or place limits on its own power. He explained,

> The Union had been preserved without slavery, *notwithstanding*, the *Dred Scott* decision. But it has been preserved Chief Justice Taney's decision as to the Supremacy of the Judicial Power. This statement may come as a shock to those who were brought up on our standards of histories, all of which assure us that the *Dred Scott* decision had been overruled "on the field of battle" "by force of arms." But "arms" are of as little importance as are "men," in our theory of government, unless, of course, the 'men' happen to be judges, particularly judges of the United States Supreme Court. A decision of the U.S. Supreme Court can, therefore, be overruled only by the court itself, or by special amendment to the Constitution. *And even constitutional amendments are effective only in so far as the U.S. Supreme Court approves them*.[53] (Emphasis in original)

Boudin expands on the point that the Judiciary negates any incentive for the justices to bind themselves to the Constitution aside from their own personal beliefs about the power and functioning of the Judiciary. Any accountability measure built into the structure of the

[51] *Ibid,* 13-14.
[52] *Ibid,* 3.
[53] *Ibid,* 3.

government and applied to the judicial branch is destroyed by the striking down of the Missouri Compromise as the Court tries to resolve a national policy issue that was not its to decide in the first place. Boudin argues that the power that the justices have given themselves as a result of the *Dred Scott* case is absolute and a constitutional amendment cannot even truly limit it: [54]

> For, once you admit that the power exists, there is no limit upon it except the will of those who wield it. And no one who reads the *Dred Scott Case* can have the hardihood to say that those who wield this power are seriously bound by the true meaning of the Constitution, or even by their own expressed views of the Constitution, or of their own powers thereunder. It is this that is our excuse for considering this case at such great length. It was not merely a wrong decision. It was a revolution.[55]

In his analysis, Boudin takes issue with the fact that Chief Justice Taney did not address the questions involved in the case in the natural order that they occurred, enabling him to produce a more expansive opinion. Boudin asserts, "The real reason for Chief Justice Taney's departing from the natural and logical order of the case was that that course would have prevented him from discussing the constitutionality of the Missouri Compromise Act and *that was his chief purpose in the second decision*" (Emphasis in original).[56] Boudin argues that Taney used *Dred Scott* to further his primary interest of striking down the Missouri Compromise and allowing the continued institution of slavery in newly acquired territories. This could not have been achieved if Taney decided the case in its natural order.. Boudin elaborates,

> Not only the logic of the case, but the economy of the argument demanded that the effect of Scott's sojourn in Illinois should be considered first. And Chief Justice Taney practically confesses that he was not doing the proper thing in departing from the natural order of the case, by the excuse which he gives for doing so. He says that he wanted to consider first the question of the freedom of Scott and his family, and then, if he should decide against the freedom of the rest of the family, he would consider whether Scott himself was free. But this was clearly subterfuge. *For as a matter of fact the ground upon which he finally disposed of the question of Scott's sojourn in Illinois—namely, that upon his*

[54] *Ibid,* 25.
[55] *Ibid,* 25.
[56] *Ibid,* 19-20.

> *return to Missouri he lost the benefit of whatever freedom he may have acquired in free territory, disposed of the whole case, and the very elaborate discussion of the entire question of the constitutionality of the Missouri Compromise Act became superfluous*.[57] (Emphasis in original)

Boudin believes that ideally a restrained Supreme Court would have come to a very different decision in *Dred Scott v. Sandford* (1857). Boudin looks to John Davis, the President of the American Bar Association in 1929 for his conception and definition of the judicial power to contrast that of Taney. Boudin quotes Davis stating,

> We have no power *per se* to review and annul acts of Congress on the grounds that they are unconstitutional. That question may be considered only where the justification for some direct injury suffered or threatened, presenting a justifiable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.[58] (Emphasis in original)

Using Davis's statement to guide his analysis, Boudin argues that Chief Justice Taney should not have strayed beyond identifying Scott's status as a slave or a free man. Addressing the constitutionality of the Missouri Compromise is both an overextension and misunderstanding of the nature of the judicial power. Furthermore, policy after the fact focuses on slavery and ignores the fundamental change in judicial power brought about by Taney:

> As to the constitutional amendments—the so-called "war amendments"—it is clear that whatever they may have done to the particular problem involved in the *Dred Scott* decision, the problem of Slavery, they certainly did not touch the general constitutional change effected by that decision—that of the Supreme Court arrogating to itself, and thereby to every other court in the land, *the right to settle by judicial decision the peace and harmony of the country, i.e. raising the Judiciary to a position of supreme political power*.[59] (Emphasis in original)

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[57] *Ibid,* 19-20.
[58] *Ibid,* 20-21.
[59] *Ibid,* 3.

CHAPTER 4:
Lochner v. New York

Louis Boudin began to study law and develop his own constitutional philosophy at the same time that James Thayer published his most significant works. Boudin was heavily influenced by Thayer's lectures and writings. Simultaneously, the Supreme Court was beginning to address contentious economic issues emerging from the Industrial Revolution and the technological advances that accompanied it. The Court was asked to begin to parse out the limits imposed on the powers of the individual State governments to dictate and control their own economies. When drafting the Constitution, the Framers provided Congress with the power to regulate "interstate commerce" (in addition to international trade).

This distinction between the national and state economies did not pose problems from the time of the ratification of the Constitution through the nineteenth century because a majority of the states' economies were based on agriculture and consequently largely local. At the beginning in the twentieth century, following the Industrial Revolution, the national economy began rapidly expanding and technological developments enabled new types of commerce to emerge. These advances allowed for perishable goods to be stored more efficiently and shipped over greater distances, blurring the distinction between the domains of the states versus the federal government. As the national economy expanded, more commerce was "interstate" and fell within Congress's power to regulate.

The beginning of the twentieth century brought this issue of power between the federal and state governments to a head. The stark differences in constitutional philosophies among the justices on the Court and the partisan nature of economic policy questions were highlighted. At the time, conservatives highly valued the strength of contracts and the importance of the free market with little interference from the Federal government. The ability of the individual to

function freely and independently in the marketplace was central to conservatives. Liberals, on the other hand, tended to place value on the rights of the states to make decisions and create policies deemed to be in the best interest of their populace. A case that highlights this fundamental split on the Court is *Lochner v. New York* (1905).

Lochner v. New York (1905) involved the constitutionality of a New York State statute that limited the working hours of bakers. The state argued that it was acting within its "police powers" to regulate the welfare of its constituents. Counsel for Lochner, the owner of the bakery that violated the statute, argued that the law restricted the right of individuals to freely enter into contracts and therefore violated the contract clause of the U.S. Constitution. The contract clause reads:

> *No State shall* enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; *pass any* Bill of Attainder, ex post facto Law, or *Law impairing the Obligation of Contracts*, or grant any Title of Nobility.[60] (Emphasis added)

Justice Rufus Peckham—joined in a five-to-four decision by Justices Fuller, Brewer, Brown, and McKenna—asserts that limiting the number of hours bakers can work is not a permissible use of the state's police power. Peckham identifies the key legal issue in the case to be a question of which right takes precedent: the right of the state to take an interest in public health and pass legislation regulating related industries, or the individual's right to enter into contracts freely without interference from the government. Framing the legal issue, he writes,

> Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may

[60]U.S. Constitution, Art. 1, Sect. 10, Clause 1.

> choose or the right of the State to prevent the individual from laboring or from entering into any contract to labor beyond a certain time prescribed by the State.[61]

Justice Peckham considers whether the use of the police power was "fair, reasonable, and appropriate" [62] or "unreasonable, unnecessary and arbitrary." [63]

> In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.[64]

Justice Peckham introduces a fundamentally new constitutional philosophy to the Judiciary that involves evaluating the constitutionality of legislation based on its perceived reasonableness. Applying the new standard he writes,

> The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.[65]

Justice Peckham explains that the connection between baking hours and public health is not strong enough to warrant state regulation of the industry and curtailing the individual's right to freely contract his labor. He finds that working conditions in many other occupations pose much greater risk to public health than those in baking. He also points out that if the state could limit the working hours of bakers, there would be no limit to what it could regulate:

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[61] *Lochner v. New York*, Pg. 198 U.S. 45, 54, (1905).
[62] *Ibid,* Pg. 198 U.S. 45, 56.
[63] *Ibid,* Pg. 198 U.S. 45, 56.
[64] *Ibid,* Pg. 198 U.S. 45, 55.
[65] *Ibid,* Pg. 198 U.S. 45, 57.

> It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities?…No trade, no occupation, no mode of earning one's living could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid although such limitation might seriously cripple the ability of the laborer to support himself and his family.[66]

Justice Peckham warns about the ever-expanding powers of the state. He asserts that the state inappropriately invoked its police powers in this case and that it should not have interfered with the rights of the individual to freely contract. Justice Peckham and his conservative colleagues argue that the Court cannot tolerate such an abrogation of rights and notes that the Court will not hesitate to strike down this kind of economic policy legislation. Justice Peckham points out in his opinion that the state is attempting to limit the ability of "grown and intelligent men"[67] to create and voluntarily enter into contracts.

> The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees if the hours of labor are not curtailed.[68]

Peckham argues that the Court has a duty to inquire into the real purposes of legislatures. He is suspicious of the motives of the New York State legislature in enacting the legislation at issue:

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[66] *Ibid,* Pg. 198 U.S. 45, 59.
[67] *Ibid,* Pg. 198 U.S. 45, 61.
[68] *Ibid,* Pg. 198 U.S. 45, 61.

> It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.[69]

Questions of economic policy were highly contentious and partisan at the turn of the twentieth century. In the decision in *Lochner*, Justice Peckham and his one vote majority demonstrate precisely how they believe economic policy should be modeled in America. They highly value limited interference by state and federal governments and a free market in which individuals can voluntarily create contracts with one another.

Many liberals, including Boudin, were outraged by the activism of the Court displayed. They believe that the states should be free to enact policies in the best interest of their citizens. Justices Harlan and Holmes each authored a dissenting opinion in *Lochner v. New York* (1905) questioning the new constitutional philosophy put forward by Peckham and urging deference to the legislative process in the states.

In his dissenting opinion, Justice Harlan, joined by both Justices White and Day, voices his grave concern with Justice Peckham's opinion. Justice Harlan points out that it does not matter how wise or unwise the substance of the legislation; the Court's role is simply to determine the power to legislate rather than pass judgment on the merits of the legislation. He accuses Justice Peckham of losing sight of this fact. Justice Harlan writes,

> If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the

[69] *Ibid,* Pg. 198 U.S. 45, 64.

> means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional.[70]

Both Justices Peckham and Harlan point to *Allgeyer v. Louisiana* (1896) as precedent that should be applied to *Lochner v. New York* (1905). This case, decided only nine years prior to *Lochner*, concerned a Louisiana statute that prohibited out-of-state insurance companies from conducting business within the state of Louisiana. State officials asserted that this was an appropriate exercise of the police power. Allgeyer and Company was an insurance company that conducted business in Louisiana in violation of the statute. The Court found that the Louisiana statute was an inappropriate exercise of the police power of the state violating its citizens' liberty to create and enter into contracts and Allgeyer and Company's right to conduct business within the state if they so choose. Justice Peckham writes,

> The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana* 165 U. S. 578. Under that provision, no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right.[71]

Justice Harlan points out that the Court's opinion in *Allgeyer v. Louisiana* (1896) explicitly acknowledges the right of the state to regulate contracts:

> Speaking generally, the State, in the exercise of its powers, may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone, among which rights is the right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation. This was declared in *Allgeyer v. Louisiana,* 165 U. S. 578, 165 U. S. 589. But, in the same case, *it was conceded that the right to contract in relation to persons and property*

[70] *Ibid,* Pg. 198 U.S. 45, 68.
[71] *Ibid,* Pg. 198 U.S. 45, 53.

> *or to do business within a State may be "regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes*." (P. 165 U. S. 591).[72] (Emphasis added)

Justice Harlan expresses a constitutional philosophy very different from that of Justice Peckham. Harlan argues that the Court is not empowered to strike down legislation merely because justices believe it is unreasonable. Justice Harlan asserts that the Court should only strike down legislation as unconstitutional when the State has misused its power. Upon evaluation of the facts of the case, Harlan understands the majority of the Court to have overstepped its power to strike down a state statute, doing so based on its content and in order to shape economic policy.

> Granting then that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the wellbeing of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute, for the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.[73]

Justice Harlan argues that the state must be able to operate without unnecessary interference by the federal Judiciary. It is essential for the Judiciary to trust the state to act in informed and intelligent ways with the well being of its population both in the short and long term as a top priority. Because it is irrelevant whether the Court "trusts" or not, the question is whether they have the power to act. The role of the Judiciary is to determine the legitimacy of the state to legislate rather than how wise and reasonable any piece of legislation is in a practical sense. Justice Harlan writes,

[72] *Ibid,* Pg. 198 U.S. 45, 65-66.
[73] *Ibid,* Pg. 198 U.S. 45, 68.

> We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the State has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the State alone in the management of its purely domestic affairs so long as it does not appear beyond all question that it has violated the Federal Constitution.[74]

Even if the Court could evaluate the statute based on the reasonableness of its content, the state representatives must still be trusted to have an interest in protecting public health and to understand the needs of their constituents. He continues,

> It is plain that this statute was enacted in order to protect the physical wellbeing of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government, the courts are not concerned with the wisdom or policy of legislation. So that, in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon, I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation.[75]

Justice Holmes also authors a brief dissenting opinion and famously criticizes the way in which Justice Peckham decided *Lochner v. New York* (1905). Justice Holmes argues that Peckham's opinion is based on economic policy not constitutional law. To Justice Holmes, Peckham is making policy rather than answering a legal question concerning the power of the

[74] *Ibid,* Pg. 198 U.S. 45, 73.
[75] *Ibid,* Pg. 198 U.S. 45, 68.

state. Holmes writes, "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." [76]

Justice Holmes argues that whether Justice Peckham and the majority agree or disagree with the policy of New York State is irrelevant to the constitutional question. The Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[77]

For Justice Holmes, the state was acting within its legitimate police powers to regulate the public health of its citizens. The role of the Supreme Court is to determine the power to legislate and not the reasonableness of a specific statute. "But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."[78] He writes, "It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract." [79]

In his brief opinion, Justice Holmes advocates the kind of judicial restraint that James Thayer and Louis Boudin believe is essential to avoid the abuse of judicial power. He argues

[76] *Ibid,* Pg. 198 U.S. 45, 75.
[77] *Ibid,* Pg. 198 U.S. 45, 76.
[78] *Ibid,* Pg. 198 U.S. 45, 75.
[79] *Ibid,* Pg. 198 U.S. 45, 75.

that the New York legislature is composed of elected officials who are reasonable men who understand the needs of their constituents. These reasonable men have implemented a statute that regulates the hours that bakers can work presumably in response to a valid public health concern. Whether the legislation is wise or unwise, state legislators have the power to implement it. Holmes believes Justice Peckham is distorting the relevant constitutional provisions in order to promote his own opinion about economic policy:

> Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss."[80]

The *Lochner* case took place as Louis Boudin's own constitutional philosophy was being evolved. Like Holmes, Boudin takes issue with the majority opinion. Though he praises Justice Holmes's dissent, he doesn't think it goes far enough. Boudin thinks Holmes has failed to acknowledge the novelty of the majority's sweeping claim that it has the constitutional power to evaluate the reasonableness of legislation. Boudin accuses Peckham of changing the established role of the Court to completely reverse the requirements of those bringing the case to the Supreme Court. Justice Peckham seems to acknowledge no duty to defer to democratically elected legislatures and begins with the presumption that the state statute was unconstitutional and thereby imposes a burden of proof on the state to prove its constitutionality.

> But under the decision in the Lochner case the positions are reversed: We start with the general proposition that restraints upon the liberty of contracts are 'meddlesome interferences.' The presumption is, therefore, against the

[80] *Ibid,* Pg. 198 U.S. 45, 76.

> constitutionality of all laws abridging the freedom of contract. And the burden of proof is, therefore, upon those asserting the validity of the law to prove its constitutionality, by proving, to the satisfaction of the court, the reasonableness of the interference. And if this reasonableness be not clearly proved the law must be declared unconstitutional.[81]

This is an entirely new concept that, while the Court had begun developing in earlier economic policy cases, is fully asserted for the first time in *Lochner v. New York* (1905). Boudin believes Peckham makes no attempt to evaluate the New York state legislature's ability to pass such a statute, but instead only looks to the content of the law and with his conservative majority, strikes it down:

> "It will be noted that Mr. Justice Peckham does not say that the provisions with respect to the hours of work which the Court is here deciding unconstitutional, would, or should, appear unreasonable to all intelligent men. Nor does he set up any objective standard whereby such a question could be determined, or even pretend that such a standard is necessary, or has been used. It is sufficient if the Court, that is to say, a majority of its members, say so."[82]

Boudin identifies that the Court's transition into acting as a super-legislature (the greatest threat he sees that the Judiciary poses against the people) is complete after the *Lochner* decision. When justices become concerned with the reasonableness of statutes and the Judiciary assumes the legislative function of creating policy, the Constitution becomes irrelevant. Boudin compares the election process of selecting representatives to this new active role of the Judiciary. The way the Judiciary is setting aside the Constitution is analogous to the people stepping aside to allow their elected representatives to make policy decisions. Boudin argues that the main difference is that elections formally allow the people to give their self-governing power to elected representatives temporarily. The people will vote in future elections and reevaluate whether they want the same representative to continue to serve them, either state or Federal. This cannot be the case with the Judiciary and the Constitution. Boudin explains,

[81]Boudin, *op. cit.*, vol. 2, 438-439.
[82]*Ibid,* 439.

> Clearly the Constitution cannot umpire such a contest as that suggested by Mr. Justice Peckham between the legislative power and individual rights, in which the claims of each must be weighed and decided from time to time as the exigencies of the contest may demand, under varying circumstances and conditions, with no other rule than that of reasonableness, which notoriously is a matter of individual judgment. The Constitution may appoint such umpires. And if we understand the new theory of constitutionality, the Constitution has done so. But upon so doing the Constitution must, like the electorate after an election, retire from the scene, having abdicated the powers of sovereignty into the hands of its chosen representatives. With this difference, however: The retirement of the electorate is only temporary, and it can, therefore, exercise some control over its agents by retiring them from public life and reversing their decisions whenever they should be found unsatisfactory. But the Constitution cannot exercise such power. Nor can anyone on its behalf. Its retirement from the scene is therefore both complete and permanent, as our subsequent judicial history clearly demonstrates.[83]

Boudin understands Justice Peckham's opinion to be an attempt to set the Constitution aside and for the Judiciary to usurp power. In his view, this new constitutional philosophy threatens the fundamental understanding of the American constitutional democracy created by the Framers. Boudin accuses Peckham of tossing aside a century worth of judicial history and precedent in order to promote his own opinion concerning current economic policies. "But when constitutionality ceased to be the question of power which it was under Marshall and his immediate successors, and became a question of reasonableness of the use of an admitted power, the written constitution which was the source as well as the measure of the Judicial Power under the Marshall theory of constitutional government was thrown overboard."[84]

Boudin points to *Allgeyer v. Louisiana* (1896) as the case that facilitated the Court's decision in *Lochner*. The constitutional theory developed in that decision enables the conservative justices to evaluate economic policy based on its reasonableness with precedent to support that decision:

> The sad truth is, that out constitutional theory ever since the *Allgeyer Case* has been the same in substance, and that that substance included the possibility of

[83] *Ibid,* 441.
[84] *Ibid,* 441.

> such decisions as the *Lochner*, the *Ives*, the *Child Labor*, and the *Adkins* cases. That theory did not of course *require* these decisions, but it made them possible. For that theory was, in effect, nothing more nor less than that the United States Supreme Court, and every other court in its own sphere or domain, was a super-legislature passing upon the acts of the ordinary legislature practically at will—killing some, maiming or deforming others, and permitting only those to survive which the judges, or the majority of them, approve of, or at least do not emphatically disapprove of."[85]

Boudin's outrage with Justice Peckham opinion leads him to also express frustration with the dissenting opinions, as well, because he does not believe either Justice Harlan or Holmes goes far enough. He criticizes both Holmes and Harlan for failing to acknowledge the absolute newness of judicial evaluation of statutes based on their reasonableness. Boudin feels that they both needed to explicitly address Justice Peckham's complete disregard for the constitutional philosophy developed by Chief Justice John Marshall in *Marbury v. Madison* (1803), substituting his own instead:

> But the most interesting thing about these dissenting opinions, from our point of view, is a certain deficiency, which, we regret to say, occurs in Justice Holmes' opinion as well as in Mr. Justice Harlan's, and which to us, seriously mars Mr. Justice Holmes' otherwise truly great masterpiece. This deficiency, to our mind, consists in the utter absence of any criticism of the *basic position* of Mr. Justice Peckham's constitutional doctrine. Neither of these opinions calls to attention the *newness* of Mr. Justice Peckham's constitutional doctrine. Nor exposes the radical departure from our constitutional theory as definitely settled and universally understood before the advent of Field, Peckham & Co. or its revolutionary character as far as the framework of our constitutional government is concerned, in that it raises the courts to the position of super-legislature.[86]

Boudin complements Justice Harlan for adequately responding to, and criticizing the assertions made by, Justice Peckham concerning the reasonableness of the New York Statute. "Mr. Justice Harlan's less famous dissenting opinion, in which Justices White and Day concurred, is a very able criticism of Justice Peckham's assertion of the unreasonableness of an eight hour law for bakers, and of the rather puerile arguments advanced by Mr. Justice Peckham

[85] *Ibid,* 479.
[86] *Ibid,* 440.

as to the 'arbitrariness' of the ten hour limit set by the law." [87] But Boudin does not find any hints that Justice Harlan understands the implications of the sudden shift in constitutional theory for the future of the Court. For Boudin, Harlan is reactionary in the composition of his dissent and addresses the details of Justice Peckham's argument, but never entirely disputes his approach.

Boudin outwardly praises the Holmes' decision as brief but one that will "probably rank in the annals of our jurisprudence with Justice Curtis' dissent in the *Dred Scott Case*."[88] Boudin points out, though, that Justice Holmes, too, does not take his argument far enough. "That Mr. Justice Holmes disagrees with the rule formulated by Mr. Justice Peckham and adopted by the majority of the Court is quite evident…But we doubt very much whether his dissent was meant to go as far as the basic position of the *new* constitutional theory, namely, that questions of constitutionality are not questions of *power* to legislate, but of the reasonableness of legislation" (Emphasis in original).[89] Boudin argues that Holmes danced around the fundamental issue: Peckham fundamentally changes the role of the Court and its function in American society.

Boudin argues that *Lochner v. New York* (1905) best exemplifies the sort of legislating from the bench that he most abhors. The case, to him, is an obvious example of how the Supreme Court has slowly become a super-legislature, radically departing from it true mission for Boudin. He argues that Chief Justice John Marshall intended for the Court to act as an evaluator of the power to legislate when he described judicial review for the first time in *Marbury v. Madison* (1803). Boudin writes, "And so they decided that there was no escape

[87] *Ibid,* 439.
[88] *Ibid,* 439.
[89] *Ibid,* 440.

except in the rule set up by John Marshall, and followed by his successors before the advent of the 'modern' constitutional doctrine—namely, that *constitutionality is a question of the power to legislate and not of the use made of that power*" (Emphasis in original).[90]

[90]*Ibid,* 505.

CHAPTER 5:
The Post-Lochner and Pre-New Deal Court

A Movement Away from Lochner v. New York (1905)

After the Court decided *Lochner v. New York* (1905), there was immediate criticism of its incursion into the policy-making realm reserved for the Legislative branch. In response to criticism from liberals and conservatives alike for over-extending its power, the Supreme Court began to shift away from this unpopular position. Boudin remarks that the justices began to try to distance themselves from the decision in the *Lochner Case* and writes,

> But if "enlightened public opinion" expressing itself in criticism of a particular decision of the United States Supreme Court, may not be able to make that Court turn around and overrule the decision criticized in order to get itself *au courant* of that opinion, it may cause it to pause or just swerve a bit from the direction marked by the criticized decision, so as to be able in time to get around it. That is exactly what happened to the *Lochner Case*.[91]

Boudin finds that the backlash from *Lochner v. New York* steered the Court into a whole new era—the Progressive Era—complimented by Theodore Roosevelt's accession to the presidency in 1901 following assassination of William McKinley. The justices realized that consequences from public opinion would damage the relationship between the Judiciary and the other branches and undermine the authority of its decisions if nothing changed. For many, the Court had gone a step too far and the backlash forced the justices to address the controversy. Boudin writes,

> Whatever the psychological reasons for the *Lochner* decision, in so far as they had their source in contemporary history, may have been, it is clear that after the storm of adverse criticism of that case actually broke, the Court found that it had made a grave error, and was at least ready to compromise with current public opinion. As a result, the Progressive Era ushered in by Mr. Roosevelt's election to the presidency found its reflection in what might be called the Progressive Phase in history of our Government by Judiciary.[92]

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[91] *Ibid,* 460.
[92] *Ibid,* 461.

After *Lochner*, Boudin identifies a transition period in which the Court slowly overturns *Lochner v. New York*. Boudin asserts that this period began with the Court's decision in *Muller v. Oregon* (1908) and was complete in 1915 with *Bunting v. Oregon*. During this time, the Court was forced to deal with its tarnished reputation and the public's growing distrust of the justices as a result of their abuse of judicial power. Boudin analyzes the effect that public opinion has on the Court and concludes that the structure of the Court prevents it from ever being either reactionary or progressive in comparison to the public:

> That the Supreme Court is not the most reactionary tribunal in the United States may be freely granted. In fact, its composition and manner of its appointment prevent it from being such. And the same causes prevent it from being the most progressive tribunal in the United States. The truth is that the United States Supreme Court is peculiarly the child of chance; and chance plays a more important in its decisions than in the decisions of any other court in the land.[93]

Boudin's assertion that chance serves as a major factor for the Court falls in line with his understanding that the judicial power is dangerous and has the potential to be abused. This is partly the result of the role that chance plays in their decisions—for instance, who is serving on the Court at a given time, the specific facts of the case, etc. In *Muller v. Oregon* (1908), Boudin is concerned that the Supreme Court again decided a case using the same activist philosophy as it was in *Lochner v. New York* (1905).

Muller v. Oregon (1908) involved the constitutionality of an Oregon state statute that limited the working hours of women. The Court upheld the constitutionality of this statute and reasoned that a distinction should be drawn between men and women concerning specific kinds of labor. The majority cited both the impact they believed heavy labor could have on a woman's body and the effect it could have on her maternal instincts. As a result, the state of Oregon, the

[93] *Ibid,* 462-463.

Court asserted, had the authority to enact this statute. The Court's decision creates the false sense for many that it was transitioning away from the decision in *Lochner* to being increasingly progressive concerning the powers of the states. Boudin strongly disagrees with these assertions about *Muller v. Oregon* (1908) and believes the opinion of the Court reinforced the constitutional theory put forward in *Lochner*. He writes,

> That the decision was a victory for liberal ideas of government, and indicated a progressive attitude on the part of the Supreme Court towards labor legislation, is beyond question. But that it had a deep significance as regards that constitutional problem, which is the basis for our entire problem of social legislation in general and labor legislation in particular, is quite untrue, and its reputation in that respect is entirely undeserved. This decision, contrary to general belief, did not announce any better or different constitutional *principle* than that formulated in *Lochner v. New York*. If anything, it was worse than the *Lochner Case* from the point of view of constitutional *principle*, because it accentuated the worst features of that decision.[94] (Emphasis in original)

Boudin argues that, despite the Court's striking down a law as unconstitutional in *Lochner* and upholding the law in question in *Muller*, both opinions rely upon the same constitutional theory. This theory emphasizes that legislative interference with the citizen's liberty to contract should take place very limitedly. In the *Lochner* case, the Court decided that the New York State legislature did not have a strong enough reason to interfere with the liberty of contracts of bakers. In the *Muller* case, the Court simply applied the same rule and found that Oregon's law demonstrated that it was necessary for the state to limit the liberty of contract due to the physiological differences between men and women. Boudin argues,

> For upon careful examination it will be found that the Court not only reaffirmed the principle laid down in *Lochner v. New York* that there must be special reasons for legislative interference with liberty of contract by way of limiting the number of hours of labor, but it actually went a step further and announced, in its reservation, that even where special circumstances give the Legislature a right to legislate, the Court still reserve to itself the right of inspecting each part of the legislation separately, in order to make sure that the legislative notion of the protection needed does not go beyond that of the Court in each separate

[94] *Ibid,* 464-465.

instance.[95]

After identifying the same constitutional theory in both cases, Boudin focuses on the fact that the justices reinforce in both decisions that it is the role of the Court to determine the circumstances when the state is justified in limiting the liberty to contract. For Boudin, the Court's actions solidify the expansion of the judicial power through the affirmation of the positive relationship between the Court's economic theory and the Constitution. This decision ensures that the Court can be the only government institution to evaluate the constitutionality of legislation. Boudin argues that despite the Court's recognition of its own error in *Lochner*, it did not fully understand the nature of that error and how to correct it. Boudin quotes part of Justice Brewer's majority opinion to further prove his point that *Muller v. Oregon* (1908) was not a progressive decision.

> "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a wide-spread and long continued belief concerning it is of consideration." The Court was clearly taking care that the trees should not grow too tall. It was making sure that the situation should not slip out of its own hands…Clearly, it was not only maintaining the principle of *Lochner v. New York*. It was improving upon it quite a bit.[96]

In the decade following the *Lochner* case, the Court moved away from its decision and officially overturned it in 1917 in *Bunting v. Oregon* (described on the following page). Boudin argues the Court took a decade to reverse the decision for three reasons. First, as is discussed briefly above, the Court is not, and will never be, the most progressive branch of government. Its design and structure prevent if from being so and it took time for the Court to shift away from its intense focus on protecting the liberty of contract and to respond to the strong public reaction

[95] *Ibid,* 467.
[96] *Ibid,* 467-468.

to the opinion. Second, many were satisfied with the steps the Court took in *Muller v. Oregon* (1908) and did not recognize the identical constitutional theory that was applied in *Lochner*, applied in this case as well. Lastly and most significantly, when deciding Bunting v. Oregon (1917), every justice—save Justice McKenna—that composed the majority of the Court in *Lochner v. New York* (1905) had retired and been replaced, changing the position of the Court regarding economic policy cases.[97]

Bunting v. Oregon (1917) is a case involving the constitutionality of a Oregon state statute limiting the working hours of mill, factory, or manufacturing workers in addition to their overtime hours.[98] Writing for the majority, Justice McKenna announces the Court's decision to uphold the constitutionality of the Oregon statute and support the claim that the purpose of the law was to protect the health of employees. He contends that this law is fair and does not provide any kind of advantage to certain workers. It is interesting to note that Justice McKenna was selected to write this opinion because he is the lone holdover from the Court that decided *Lochner* and was in the majority.

From the Court's announcement in *Bunting v. Oregon* (1917), Boudin understands the opinion of the Court to be another major landmark for the constitutional history of the nation. Boudin identifies it as the opinion that invalidates *Lochner v. New York* (1905) and recognizes the state's legitimate interest in protecting public health through the police power of the state. With this decision, the Court finished divorcing itself from valuing the liberty of contract above all and applying its own economic theory to the Constitution. Unlike other landmark decisions, *Bunting v. Oregon* (1917) is not often recognized because of the manner in which Justice McKenna wrote the opinion, specifically failing to mention by name *Lochner v. New York*

[97] *Ibid,* 471.
[98] *Ibid,* 471.

(1905).[99] Boudin quotes the passage from Justice McKenna's opinion where he struck down *Lochner v. New York* (1905) to demonstrate its lack of force and clarity:

> "This case is submitted by plaintiff in error upon the contention that the law is a wage law, not an hours of service law, and he rests his case on that contention. To that contention we address our decision, and do not discuss or consider the broader contentions of counsel for the state that would justify the law even as a regulation of wages. There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful "for preservation of the health of employees in mills, factories, and manufacturing establishments." The record contains no facts to support the contention, and against it is the judgment of the legislature and the supreme court, which said: "In view of the well known fact that the custom in our industries does not sanction a longer service than ten hours per day, it cannot be held as a matter of law that the legislative requirement is unreasonable or arbitrary as to hours of labor. Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Britain, 9; in the United States, 9 3/4; in Denmark, 9 3/4; in Norway, 10; Sweden, France, and Switzerland, 10 1/2; Germany, 10 1/4; Belgium, Italy, and Austria, 11, and in Russia, 12 hours.'"[100]

By neglecting to mention the *Lochner* case, the Court limits the scope of this decision. Boudin reprimands the Court for choosing not to put its full weight behind its decision and weakening its own argument. He remarks, "The greatest merit of the *Bunting Case* consisted in the overruling of the *Lochner Case*, even though that case is not referred to in the opinion. It also did away with the reservations contained in *Muller v. Oregon*."[101] Boudin continues, "If the Court had actually intended to lay down another rule, as was afterwards claimed by some of its members, the Court had only itself to blame if its work fell short of its purpose—for this was the direct result of its not having the courage to say so in unmistakable term."[102]

[99] *Ibid,* 471-472.
[100] *Bunting v. Oregon*, Pg. 243 U.S. 426, 438, (1917).
[101] Boudin, *op. cit.*, vol. 2, 471.
[102] *Ibid,* 471-472.

A Return to Lochner v. New York (1905)

Despite the seeming strides made by the Court in the decade post-*Lochner v. New York* (1905), in the early 1920's, the Court handed down a series of decisions that represented a return to *Lochner* and the expansion of the judicial power. This culminated with *Adkins v. Children's Hospital* (1923), which involved a District of Columbia statute guaranteeing a minimum wage to women and children. In this opinion, Justice Sutherland decides that the minimum wage law was unconstitutional because it exceeds the limits of the police power of the state. Instead, he chooses to uphold the liberty of contracts and the ability of citizens to function within the marketplace free from government intrusion and regulation.

Justice Sutherland examines the judicial power of review and the duty of the Judiciary to strike down laws if they are inconsistent with provisions of the Constitution, referencing Chief Justice Marshall's articulation of that power. He writes,

> The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity, and that determination must be given great weight. This Court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt. But if, by clear and indubitable demonstration, a statute be opposed to the Constitution, we have no choice but to say so. The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A congressional statute, on the other hand, is the act of an agency of this sovereign authority, and, if it conflict with the Constitution, must fall; for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power—that power vested in courts to enable them to administer justice according to law. From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not

> the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law.[103]

Justice Sutherland includes this explanation of the power of judicial review immediately preceding his striking down the D.C. minimum wage statute as unconstitutional. He references a number of cases as precedents, including *Allgeyer v. Louisiana* (1897), *Lochner v. New York* (1905), *Muller v. Oregon* (1908) among many others. Looking at these three particular cases that inform his opinion, they have an interesting factor in common: each expands judicial power while simultaneously reinforcing the liberty to contract and asserting the conservative economic preferences of the Supreme Court at the time. Concerning the Washington, D.C. minimum wage law, Justice Sutherland writes,

> The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guarantees of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question.[104]

To support this claim he quotes extensively from Justice Peckham's opinion in *Lochner v. New York* (1905). This includes both Justice Peckham's evaluation of the tension between two powers—the state's police power and the individual's liberty of contract—and his determination that the liberty of contract must prevail. The only way in which Justice Sutherland admits that the liberty of contract is not an absolute right that could never be limited is by assigning the right to evaluate and validate any legislation to the Courts.

> There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule, and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.

[103] *Adkins v. Children's Hospital*, Pg. 261 U.S. 525, 544 (1923).
[104] *Ibid,* Pg. 261 U. S. 525, 545.

> Whether these circumstances exist in the present case constitutes the question to be answered.[105]

Justice Holmes authors a dissenting opinion that questions the motives of the justices in the majority and criticizes the reasons they cite to strike down the statute. The foundation of Justice Holmes's argument is the idea that the Legislature is comprised of reasonable men whose responsibility it is to make policy decisions and enact pieces of legislation in the best interest of their constituents. This argument aligns with Boudin's views concerning how the Supreme Court should decide cases, only striking down laws when absolutely necessary and granting deference to the expertise of the Legislature. Justice Holmes writes,

> To me, notwithstanding the deference due to the prevailing judgment of the Court, the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have learned our greatest lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price, it seems to me impossible to deny that the belief reasonably may be held by reasonable men.[106]

In his brief dissenting opinion, Justice Holmes is concerned with the Court's return to valuing the liberty of contract at the cost of balance of powers and states' rights. Justice Holmes does appreciate the sanctity of contracts, but thinks that the Court is mistaken to interpret the phrase "liberty of contract" to mean the right of the people to do whatever they please in the realm of business and employment. No right is absolute, Holmes argues, and it is appropriate that, when a right is limited, the state legislature would be the political body to impose these limitations because of its responsiveness the people. Holmes writes,

> The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later, that innocuous generality was

[105] *Ibid,* Pg. 261 U. S. 525, 546.
[106] *Ibid,* Pg. 261 U. S. 525, 567-568.

> expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.[107]

Holmes believes the majority of the justices are reverting back to evaluating legislation based upon substance, rather than judging whether it is within the power of the Legislature to create such statutes. Holmes writes in response, "The criterion of constitutionality is not whether we believe the law to be for the public good."[108] Justice Holmes wants to consider the question of the power that is at stake in *Adkins v. Children's Hospital* (1923). Based on his examination of the case, he affirms that the state does have a vested interest in public health that could be manifested through the enactment of a minimum wage law. Justice Holmes's dissent is reminiscent of Justice Harlan's in *Lochner v. New York* (1905) based on his denial of the constitutional theory employed by the majority to decide the case.

Boudin is greatly dismayed by this decision and the backwards trend adopted by the Court, but Justice Holmes' dissent serves as a small beacon of hope for Boudin. He praises Holmes for his articulation of a different constitutional principle that relies heavily on restraint and deference to the Legislature. Boudin explains, "And in so doing, he [Holmes] practically gives his own constitutional rule without attempting to formulate one…It is the familiar rule—long fought for by Mr. Justice Holmes, often stated in the name of the Supreme Court, but unfortunately never adhered to—that a law must be *utterly unreasonable* in order to give a court the right to declare it unconstitutional" (Emphasis in original).[109] Boudin appreciates the way that Holmes employs a Thayerian concept of judicial restraint in this decision. He identifies Justice Holmes as a dedicated progressive, on a Supreme Court filled with justices who operate

[107] *Ibid,* Pg. 261 U. S. 525, 568.
[108] *Ibid,* Pg. 261 U. S. 525, 568.
[109] Boudin, *op. cit.*, vol. 2, 488-489.

in overly activist and reactionary ways.

For Boudin, *Adkins v. Children's Hospital* (1923) also highlights another power that the Court has granted itself: the power to reverse course regardless of its own precedents. He argues this decision gave the Court full authority to make governing decisions for the nation with regard to its own previous decisions. Boudin identifies this as the culmination of the expansion of power by the Supreme Court that began with *Marbury v. Madison* (1803) and the development of the power of judicial review, and continued with the drastic limitation of legislative power by the Court in *Allgeyer v. Louisiana* (1897). The Judiciary is now so powerful and dangerous, in Boudin's thinking, and has changed so drastically from its original construction by the Framers of the Constitution that it is barely recognizable.

> It proves that the Judicial Power is not only strong enough to erect barriers against progress but strong enough to force the country backwards. These are all practical matters of the first importance to all those who are interested in the welfare of the country. Not to 'radicals' only, or 'liberals' or 'progressives,' but to all ordinary, sensible persons, who believe that small concessions to public sentiment are in the end much cheaper for the propertied classes that the uncompromising attitude which will give up nothing that is not taken away forcibly.[110]

Boudin also points out that *Adkins* did not have to be decided in the manner that Justice Sutherland chose. He elaborates that the precedents Sutherland cites are chosen expressly to enable him to move the Court backwards. There were other cases that could have guided his opinion in a different direction altogether. For Boudin, the Court's changes in position on economic policy after *Lochner v. New York* (1905) through *Bunting v. Oregon (1917)*, while moving closer to prevailing public opinion also moved them away from being bound by existing precedent. The justices in the majority chose to only cite the precedents that suited their own economic policy preferences and applied them to the facts of the *Adkins v. Children's Hospital*

[110] *Ibid,* 478.

(1923). Boudin suggests that the prevailing constitutional theory applied to economic cases had not truly changed since *Allgeyer v. Louisiana* (1897) when the Court prevented the state from limiting insurance companies conducting business in Louisiana. Boudin writes,

> The sad truth is, that out constitutional theory ever since the *Allgeyer Case* has been the same in substance, and that that substance included the possibility of such decisions as the *Lochner*, the *Ives*, the *Child Labor*, and the *Adkins* cases. That theory did not of course *require* these decisions, but it made them possible. For that theory was, in effect, nothing more nor less than that the United States Supreme Court, and every other court in its own sphere or domain, was a super-legislature passing upon the acts of the ordinary legislature practically at will—killing some, maiming or deforming others, and permitting only those to survive which the judges, or the majority of them, approve of, or at least do not emphatically disapprove of.[111]

Boudin uses this progression of the Court's stance on economic policy to examine the greater shift of judicial power over time and to understand the modern role of the Court compared to its construction in the Constitution. By the early 1920's, Boudin believes that the Court has become the worst possible version of itself. He feels that the Judiciary has abandoned all of the guiding principles that both impose limits on its power and provide an accountability structure. The Judiciary no longer consists of justices functioning within a branch of government whose role was limited and defined. The Court, through its activist decisions, has greatly expanded its own power and is no longer the institution it was envisioned to be by the Framers. Boudin argues,

> On principle there should be no such thing as Judicial Power. But even *with* the Judicial Power principles are not useless. In fact, they are absolutely necessary, if the courts are to remain courts instead of becoming super-legislatures. And principles require the formation of hard and fast rules. At least, hard and fast for all *practical* purposes. Even hard and fast rules will be deviated from at times. But with such rules the Constitution, and the right of the people to self-government, would be at least *reasonably* safe from judicial interference.[112] (Emphasis in original)

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[111] *Ibid,* 479.
[112] *Ibid,* 491.

This is not an isolated anomaly. It is a continuing and worrisome trend that began in the *Lochner* case and continues to be seen in *Burns Baking Co. v. Bryan* (1924). This case involves the constitutionality of a statute regulating the weight of loaves of bread to prevent fraud by merchants and cheating of customers. Boudin points out that this law also ensured fair competition between bakers. Justice Butler writing the opinion of the Court asserts that,

> Undoubtedly, the police power of the state may be exerted to protect purchasers from imposition by sale of short weight loaves. Schmidinger v. Chicago. Many laws have been passed for that purpose. But a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. Lawton v. Steele. Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted. Meyer v. Nebraska, supra; Welch v. Swasey; Dobbins v. Los Angeles; Connolly v Union Sewer Pipe Co.; Lawton v. Steele.[113]

Justice Butler's opinion is reminiscent of Justice Peckham's in *Lochner v. New York* (1905) both in the language used and the themes are present. Justice Butler explores in great depth the details of the bread-making process and describes them in his opinion.[114] He does so to try to prove that this law is an abuse of the police power of the state and that the state interest is not strong enough to override the individual's liberty of contract. He suggests the law includes arbitrary regulations and unnecessary restrictions in the manner that the state chose to enact them.

Justice Butler concedes that the state does—in some cases—have the power to regulate the loaf-size and weight of bread, but the state must do so in different way that does not violate the liberty of contracts. Butler openly evaluates the statute based on the reasonableness of its substance instead of on the Nebraska legislature's right to pass such a statute. Justice Butler

[113] *Burns Baking Co. v. Bryan*, Pg. 264 U.S. 504, 513, (1924).
[114] *Ibid,* Pg. 264 U.S. 504, 513-515.

concludes that the statute is not reasonable and is therefore unconstitutional. For Boudin, Butler is attempting to shape policy, which is not the duty of an appointed justice.

Justice Brandeis writes a dissenting opinion (which Justice Holmes also signed) that proves the Court was wrong in its interpretation of the facts of the case, and asserts a different constitutional theory. Boudin praises Brandeis for his ability to write such an opinion. Brandeis introduces Congressional testimony that notes the positive effect of the law on the workers' rights and its support from industry. Boudin explains,

> In fact, he managed to do what a dissenting judge is very rarely able to do in such cases, and that is, prove that at least a large section of industrialists whose rights are supposed to be protected by declaring the law unconstitutional considered the legislation necessary…We are not, however, concerned here with Justice Brandeis' demonstration of the fact that the Supreme Court was wrong in its judgment, but with his opinion as to the function that the Supreme Court was exercising in rendering it.[115]

Boudin is interested in Justice Brandeis' assertion the Court had erred in both the method it employed to decide *Burns Baking Co. v. Bryan* (1924) and in the selection of the constitutional theory to support its decision. Justice Brandeis clearly distinguishes between his concept of judicial review and the definition asserted by the majority in the opinion of the Court. Brandeis identifies the use of reasonableness as the major distinction between these two definitions. He claims that judicial review is a tool that allows the Court to strike down legislation when it is unreasonable only when the Congress did not have the power or the right to enact such legislation. According to Brandeis, the majority evaluates the substance of the legislation itself and concludes that Congress possesses the power to impose regulations on the bread baking industry but they disagree with the legislation that was enacted. Justice Brandeis writes,

> It is not our providence to weigh evidence. Put at its highest, our function is to determine, in the light of all other facts which may enrich our knowledge and enlarge our understanding, whether the measure, enacted in the exercise of an

[115]Boudin, *op. cit.*, vol. 2, 501.

> unquestioned police power, and of a character inherently unobjectionable, *transcends the bounds of reason*. That is, whether the provision, as applied, is *so clearly arbitrary or capricious that legislators, acting reasonably, could not have believed it to be necessary or appropriate for the public welfare.* To decide, as a fact, that the prohibition of excess weights 'is not necessary for the protection of the purchasers against imposition and fraud by short weights'; that it 'is not calculated to effectuate that purpose'; and that it 'subjects bakers and sellers of bread' to heavy burdens,—is, in my opinion, an exercise of the powers of a super-legislature,—not the performance of the constitutional function of judicial review.[116] (Emphasis in original)

During the early 1920's, the Court continued to exert power over the legislative process and Justices Brandeis and Holmes continued to assert their own new constitutional principle similar to the dissent in *Burns Baking Co. v. Bryan* (1924). Boudin commends the two justices for taking "a long step forward"[117] on a Court that was otherwise moving the country increasingly backwards. This constitutional principle identified by Boudin is characterized by a remembrance of the ideals and values that Chief Justice John Marshall distilled in his opinion in *Marbury v. Madison* (1803). Boudin remarks,

> It seems that the use which the United States Supreme Court in its newest phase was making the rule of "reasonableness," to which the entire Court had settled down during its Progressive Phase, made Justice Holmes and Brandeis realize the utter untenability of that rule, as well as its dangerous character. And so they decided that there was no escape except in the rule set up by John Marshall, and followed by his successors before the advent of the 'modern' constitutional doctrine—namely, that *constitutionality is a question of the power to legislate and not of the use made of that power*.[118] (Emphasis in original)

Looking Forward

By the early 1920's, Louis Boudin is completely dismayed with the Supreme Court's trajectory concerning social and economic legislation. The more he analyzes cases during this time period, the more he is convinced that there is little hope for a return to a restrained Judiciary. In the first fifty years of the modern judicial branch up through *Dred* only two

[116] *Ibid,* 501.
[117] *Ibid,* 505.
[118] *Ibid,* 505.

legislative acts had been struck down as unconstitutional. In the twentieth century, though, it was a much more common practice, evidence of the activism on the Court that Boudin despises:

> The conscience of the present judges of the United States Supreme Court demands of them an increasing degree of supervision of social legislation, resulting in a marked increase in the number of legislative acts declared unconstitutional by the United States Supreme Court. One cannot help being impressed by the number of decisions in which social legislation has been declared unconstitutional by a divided court and over vigorous dissent since the *Adkins Case*.[119]

Boudin published Government by Judiciary in 1932 and it included cases through the early 1920's. He published as the Great Depression gripped the nation, resulting in a virtual war between the branches of government. The regressive Supreme Court continued to support the liberty of contracts above all, and battled with the new Executive, President Franklin Roosevelt, who sent an ambitious agenda of social legislation to Congress in an attempt to pull the nation out of the Depression. Then the Court included the ultra-conservative "four horsemen"—Justices Butler, McReynolds, Sutherland, and Van Devanter—who exercised a stranglehold over the Court and maintained its post-*Lochner* constitutional philosophy.

In response to the Court's repeated striking down of his social and economic legislation, President Roosevelt's put forward a "court-packing plan." In the plan, Roosevelt threatened to add a new justice to the Supreme Court for every justice over the age of seventy. This direct threat to the make-up of the Court caused Justice Owen Roberts, who had consistently voted with the conservatives, to change his position out fear that the Court would be expanded and President Roosevelt would be able to appoint multiple new justices. This last minute switch by Justice Roberts—known as "the switch in time that saved nine"—preserved the institution of the Supreme Court in its form, but brought major changes in the constitutional theories under which it operated.

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[119] *Ibid,* 498.

CHAPTER 6:
Looking Forward After Boudin

The term "judicial activism" is commonly used to refer to justices who frequently vote to strike down laws enacted by democratically elected legislatures. In the twenty-first century, these activists are typically those identified as "conservatives," like Justices Roberts, Scalia and Thomas. More than a century ago, the "judicial activists" on the Court were also "conservatives." Like liberals today, the liberals of that earlier era complained loudly and bitterly about judicial activism.

During the early twentieth century and the *Lochner* era, the courts focused heavily on cases addressing business and economic issues. When the Court decided a case, politically conservative justices tended to be the ones advocating for activism by striking down Congressional or state legislation. This activism aligned with the conservative values of the functioning of the uninhibited free market and limited government interference with business. Conversely, those justices who identified as liberal advocated for a more restrained judiciary, which deferred to the decisions of the popularly elected branches of government. During the era of Chief Justice Earl Warren (1953 through 1969), however, the Court shifted its focus away from questions of economic policy and towards questions of individual and minority rights. As the cases coming before the Supreme Court changed, there was a marked shift in the tendency towards activism on the part of the justices. The liberal justices began to advocate for a more activist role for the Court when answering questions concerning individual rights and civil liberties. Conservative justices, on the other hand, began to argue for increased restraint in these cases, a reversal of their historical positions.

Judge Richard Posner of the 7th Circuit Court identifies this period of time as the "death of judicial restraint" as it was conceived by Thayer and described in his 1893 Harvard Law

Review article, "The Origin and Scope of the American Doctrine of Constitutional Law." At New York University's Brennan Center for Justice's Jorde Symposium in 2011, Posner outlined his understanding of the underlying causes for the death of judicial restraint at this time. Posner is known for his conservative stances and his frequent publications in conjunction with the Federalist Society—a conservative legal society founded by Antonin Scalia and several of his then-law school colleagues. Judge Posner defined Thayerian restraint as the view that to strike down a law as unconstitutional, it is not enough for the justice to believe it to be unconstitutional. The justice must conclude that no rational person would be able to support the constitutionality of the law in question.[120] To display Thayerian restraint, justices must limit their own interference with the decisions of the popularly elected branches.

Judge Posner points to multiple factors causing this "death" and he examines the Supreme Court during the Civil Rights Movement to understand the activism of the time.[121] As a conservative it is perhaps not surprising that Posner sees the primary catalyst for the death of Thayerian restraint was the appointment of the Earl Warren as Chief Justice. Warren and his fellow justices changed the face of America in terms of civil rights and civil liberties in the 1950's and 1960's with decisions that continue to affect the nation today.[122] The Warren Court is often characterized as valuing and protecting the rights of minority groups. The Civil Rights Movement was a time of intense racial discord in America. It was directly due to the Warren Court's striking down of prejudicial laws enacted by state legislatures that integration of public institutions began across the nation.

[120]Richard Posner, "The Rise and Fall of Judicial Self-Restraint," lecture presented at the Jorde Symposium, Brennan Center for Justice, New York University, October 5, 2010, YouTube video, 1:22:18, http://www.youtube.com/watch?v=_ro0w0_Az_s.

[121]*Ibid.*

[122]*Ibid*.

Many of the Court's decisions regarding civil rights and civil liberties were unpopular because the justices' views on the rights of minority citizens did not reflect prevailing public opinion at the time, especially in southern states. This made them difficult to enforce. The Congress and Executive branch also did not agree about the status of minority groups, which exacerbated the issue. This political and geographic divide provided the opening for the Warren Court to take on questions of race and minority rights. Congress's impasse on the issue of civil rights put the Court in the position to take a lead role in making policy.

Brown v. Board of Education of Topeka (1954), the Warren Court's most famous decision, demonstrates the difficulty that the Court faced when it handing down unpopular decisions. Writing for a unanimous Court, Chief Justice Earl Warren rejected the "separate but equal" standard adopted in *Plessy v. Ferguson* (1896). Warren concludes that "separate but equal" accommodations were inherently unequal. Topeka's segregated schools must be integrated. This decision was exceedingly unpopular in the South and it required the National Guard to enforce the decision in some districts (Little Rock, Arkansas in 1957). Integration was a contentious issue throughout the nation, despite race relations being far better in northern states. This was evidenced by the riots over court-ordered integration by bussing in Boston, Massachusetts in the 1970's. *Brown* demonstrates the tension that liberals had felt between their historic advocacy of a restrained judiciary in the area of economic policy (restraint supported by Thayer and Boudin) and their dedication to protecting civil rights and civil liberties for individuals and minority groups, which resulted in judicial activism in these arenas.

Posner also identifies a sharp rise in the expression of specific, defined constitutional philosophies by the justices, as a cause of the death of Thayerian judicial restraint.[123] Posner postulates that earlier generations of justices benefitted from an increased tolerance for pragmatic

[123] *Ibid*.

decision-making and decreased scrutiny of changes of opinion from case to case. Consistency in decision-making has become a highly valued trait in modern day judges, largely as the result of the increased politicization of judicial appointments. During the appointment process, the President and the Congress now question and expect to understand a clearly expressed constitutional philosophy of a nominee. This level of detail and specificity of opinion was not expected in earlier decades. With the Executive and Legislative branches wanting to be able to predict the decision making of justices in advance, this has required most nominees to have a long history of articles and opinions. This in turn has led to candidates for judicial appointments lacking the diversity in background and previous experience that had been present in previous generations of justices.[124] These justices focused less on "theorizing about how to decide constitutional issues"[125] and more on how precedents would apply to the specific facts of the case to form the decision. The shift towards the professionalization of justices began, Posner believes, in response to the activism of the Warren Court. Conservatives felt that through each successive appointment, the Court needed to be rebalanced which could only occur if the views of prospective justices were well understood before their confirmation.

The nature of judicial activism on the Supreme Court has clearly shifted since Louis Boudin was writing in 1932. The Court today faces different challenges than it did during the first hundred and thirty years of its existence. Boudin identifies that the Judiciary and the justices' use of the power of judicial review exponentially expanded up to the late 1920's in ways that he saw as antithetical to American constitutional democracy. Boudin writes that through their abuse of power, justices created a government of men—namely the unelected Supreme Court justices—who usurped the government of laws described in the Constitution.

[124] *Ibid*.
[125] *Ibid*.

Judge Posner recognized that Thayerian judicial restraint had become increasingly difficult for justices to apply because of the activism of the Warren Court and the resulting politicization of judicial appointments.[126]

The Response Post-Warren Court and the Impact Chief Justice William Rehnquist

Chief Justice Earl Warren retired from the Court in 1969 and was succeeded by Warren Burger, the first appointment to the Supreme Court by President Richard Nixon. As Chief Justice Warren stepped down, President Johnson had attempted to elevate the liberal Associate Justice Abe Fortas as his replacement as Chief Justice. The conservatives in the Senate, though, tired of what they saw as liberal activism and filibustered Johnson's nomination of Fortas. Instead, Nixon selected Warren's replacement and chose Burger, who was known as a conservative and a strict constructionist in his understanding of the Constitution. Nixon hoped Burger would play an integral role in reforming the liberal activism of the Court..[127]

Unexpectedly, Burger demonstrated that his conservative background did not define him.[128] Nixon's attempt to fundamentally change the political direction of the Court created instead the beginning of the extreme politicization of the Supreme Court nomination process. Presidents strove to appoint justices who would align with their political views. Chief Justice, though, tended to make decisions that were to some degree pragmatic and varied from case to case. Burger's voting patterns proved to be more difficult to predict than President Nixon expected. On multiple occasions he wrote opinions that were seen to be in alignment with the Court's recent liberal history. For example, Chief Justice Burger voted in the majority in *Roe v. Wade* (1972), one of the Court's most famous cases. This landmark opinion written by Justice

[126] *Ibid*.
[127]"Warren E. Burger," *The Oyez Project at IIT Chicago-Kent College of Law*, accessed April 10, 2014. http://www.oyez.org/justices/warren_e_burger.
[128]*Ibid*.

Blackmun upheld a woman's right to an abortion as a privacy right afforded protection by the Fourteenth Amendment.[129]

Decided during the same term, in *Wisconsin v. Yoder* (1972), Chief Justice Burger once again sided with many of his liberal colleagues in a decision protecting individual's right to free exercise of religion. In the case, members of the Mennonite Church claimed that it violated their religion to send their children to school through the age of sixteen as was mandated by the state. In an opinion authored by Burger, the Court determined that the right to religious freedom trumped Wisconsin's interests in promoting public education through mandatory school attendance.[130] Once again, as in *Roe v. Wade* (1972), Chief Justice Burger surprised conservatives and voted to protect the rights of individuals and minority groups with many of his liberal colleagues. President Nixon expected Chief Justice Burger to be a much more predictable justice in his decisions. The transition by justices, identified by Posner, from pragmatic decision making to the following pre-expressed constitutional philosophies was not completed until Burger's retirement in 1986.[131]

Two years after Chief Justice Burger's appointment to the Court, President Nixon also appointed William Rehnquist and they served together until Burger's retirement.[132] Rehnquist was then elevated to Chief Justice and a central aspect of his expressed constitutional philosophy relied on the Court acting in a restrained manner. Throughout his thirty-three year tenure on the Court, Rehnquist demonstrated a deep appreciation for a restrained judiciary, advocating for very limited judicial interference with legislative processes. Rehnquist's constitutional theory is

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[129]"Roe v. Wade," *The Oyez Project at IIT Chicago-Kent College of Law*, Accessed April 14, 2014, http://www.oyez.org/cases/1970-1979/1971/1971_70_18.

[130]"Wisconsin v. Yoder," The Oyez Project at IIT Chicago-Kent College of Law, Accessed April 14, 2014, http://www.oyez.org/cases/1970-1979/1971/1971_70_110.

[131]Peter H. Irons, *Brennan vs. Rehnquist: The Battle for the Constitution*, 1st edition, (New York: Knopf, 1994), Preface.

[132]*Ibid,* Preface.

based on the premise that elected officials represent the views of the people and make decisions on their behalf, the definition of self-government upon which the American constitutional democracy is founded. Popularly elected officials must be trusted to understand the needs of the people because they can be held directly accountable for their actions.[133] This is not the case for the Judiciary in which justices are generally appointed, rather than elected, and most serve life terms. Rehnquist argues that members of the judiciary should be hesitant to reverse legislative decisions unless absolutely necessary. These general views echo the writings of Louis Boudin fifty years prior.

Chief Justice Rehnquist describes his constitutional philosophy and his interpretation of the Constitution in his article "The Notion of a Living Constitution" (1976). Liberals justices tend to describe the Constitution as a "living" document, understanding it as more flexible and malleable than the modern day conservative conception of the Constitution as "fixed." Rehnquist uses his article to expand on this idea and explain in what specific and limited ways he views the Constitution as a "living" document. He also defines the ways in which it should not be considered "living" including arguing against the views that many of his liberal colleagues on the Court support.

He points to the description of the "living" Constitution that the liberal Justice Holmes provided in his *Missouri v. Holland* (1920) opinion. Rehnquist believes that this definition best embodies the very limited way in which the Constitution could be construed as "living." Rehnquist quotes Holmes,

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they

[133] *Ibid,* Chapter 1.

had created an organism; it has taken a century and has cost their successors must sweat and blood to prove that they created a nation".[134]

Holmes' language best describes Rehnquist's understanding that the Constitution will have to be applied in situations never envisioned by the Framers. But Rehnquist warns that the Judiciary must be careful not to expand the scope of its Constitutional powers beyond those that were intended.[135] He believes the Framers of the Constitution intentionally used general and broad language so the Constitution could be applied to the future landscape of America.[136] He argues that this allows the Constitution to be a framework for society across generations. Rehnquist reasons that this requires the Judiciary to be restrained in its decisions making and that the Court must give deference to the policy-making of the Legislative branch.

Chief Justice Rehnquist argues that justices do not need to act as the "keepers of the covenant," referring to the Constitution.[137] In Rehnquist's view, the judicial branch should simply serve to question certain popularly elected branches to ensure that they are using their own powers as policy is created. Rehnquist argues for a limited Judiciary and writes, "Surely there is no justification for a third legislative branch in the federal government, and there is even less justification for a federal legislative branch's reviewing on a policy basis the laws enacted by the legislatures of the fifty states."[138]

Because its activism causes the Judiciary to take on a legislative role, Rehnquist believes the potential for abuse is high, especially given the lack of accountability that accompanies appointment rather than election. He expresses his wish for the Judiciary to be popularly elected just like the other branches, "Even if one were to disagree with me on this point, the members of

[134]William Rehnquist, "The Notion of a Living Constitution," *Harvard Journal of Law and Public Policy* 29, no. 2. (Spring 2006), http://elawnigeria.com/articles/Notion%20of%20a%20Living%20Constitution.pdf, 402.
[135]*Ibid,* 401-403.
[136]*Ibid,* Pg. 402.
[137]*Ibid,* Pg. 406.
[138] *Ibid,* 406.

a third branch of the federal legislature at least ought to be elected and responsible to constituencies, just as in the case of the other two branches of Congress. If there is going to be a council of revision, it ought to have at least some connection with popular feeling."[139] For Chief Justice Rehnquist, it is absolutely essential that justices do everything in their power to limit their interference with the decisions of elected officials to only those times when it was absolutely necessary because of clear Constitutional violations. Rehnquist also places great weight in the powers of the states and believes that the Judiciary should show equal restraint in dealing with them. [140]

In his article, Rehnquist criticizes injecting personal moral values into Constitutional interpretation. He implies that some justices—not surprisingly he believes often those more liberal—infuse their own morality into the decisions they make. For Rehnquist, this is a wholly inappropriate use of their power. For him, the role of the justice is to decide cases as questions of power. Personal preferences and even strongly held values must be put aside in order to fairly evaluate constitutional claims. Furthermore, he points out that every person—including himself—develops different values throughout their lifetime and there is no effective way to evaluate the superiority of one set of morals over another. "There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the sanction of law."[141] Rehnquist finds it impossible to use this as the foundation of his legal opinions and this, he says, enables him to take unpopular positions when necessary.[142]

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[139] *Ibid,* 406.
[140] *Ibid,* 404.
[141] *Ibid,* Pg. 413.
[142] Irons, *op. cit.*, Chapter 2.

In his article, Rehnquist cites many of the same cases that Louis Boudin does in Government by Judiciary as emblematic of dangers of an overly activist judicial branch. He provides a brief summary of the historical context surrounding the *Dred Scott Case* and argues that the justices applied the wrong notion of the "living" Constitution and issued a disastrous opinion as a result. The Judiciary had effectively taken on the duties of the Legislative and Executive branches and attempted to solve an issue that was not theirs to address. Rehnquist writes,

> The Court in *Dred Scott* decided that all of the agitation and debate in Congress over the Missouri Compromise in 1820, over the Wilmot Proviso a generation later, and over the Kansas-Nebraska Act in 1854 had amounted to absolutely nothing. It was, in the words of Macbeth, "A tale told by an idiot, full of sound and fury, signifying nothing." According to the Court, the decision had never been one that Congress was entitled to make; it was one that the Court alone, in construing the Constitution, was empowered to make.[143]

Rehnquist argues that despite the fact that the *Dred Scott v. Sandford* (1857) decision was overturned by the American Civil War and the resulting Civil War Amendments, Chief Justice Taney's opinion injured the reputation of the Supreme Court for decades to come.[144] Rehnquist also cites *Lochner v. New York* (1905) and its further negative impact on the reputation of the Supreme Court less than fifty years after the decision in *Dred Scott*.[145]

In his evaluation of *Lochner*, Rehnquist points out that by striking down the New York statute limiting the working hours of bakers, the Judiciary was usurping the power of the State Representatives to govern and make decisions for their constituents. Instead, the justices chose to protect the liberty of contracts as superior to the power legislature to make policy decisions. Rehnquist criticizes,

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[143]Rehnquist, *op. cit.* 410.
[144]*Ibid,* Pg. 411.
[145]*Ibid,* Pg. 410-411.

> The fourteenth amendment, of course, said nothing about any freedom to make contracts upon terms that one thought best, but there was a very substantial body of opinion outside the Constitution at the time of *Lochner* that subscribed to the general philosophy of social Darwinism as embodied in the writing of Herbert Spencer in England and William Graham Sumner in this country. It may have occurred to some of the Justices who made up a majority in *Lochner*, hopefully subconsciously rather than consciously, that since this philosophy appeared eminently sound and since the language in the due process clause was sufficiently general not to rule out its inclusion, why not strike a blow for the cause?[146]

It becomes clear from the writings of both William Rehnquist and Louis Boudin that each man highly values a restrained and thoughtful Judiciary despite the fact their political philosophies could not have been more different. Boudin, an extreme liberal with Socialist sympathies, insists on judicial restraint by the Supreme Court being used to maintain and check the powers of the judicial branch which could most easily be most abused. For Rehnquist, a conservative on the Court, the ability of the people to self-govern had its base in majority rule and the interference by the Courts inhibited this process.[147] Despite both men believing that Chief Justice John Marshall's assertion of the power of judicial review in *Marbury v. Madison* (1803) is a crucial step in the evolution of the American Judiciary, they also recognize that it opened a virtual Pandora's box of potential abuse. Chief Justice Rehnquist asserts,

> In addition, Marshall said that if the popular branches of government-state legislatures, the Congress, and the Presidency—are operating within the authority granted to them by the Constitution, their judgment and not that of the Court must obviously prevail. When these branches overstep the authority given to them by the Constitution, in the case of the president and the Congress, or invade protected individual rights, and a constitutional challenge to their action is raised in a lawsuit brought in federal court, the Court must prefer the Constitution to the government acts.[148]

He continues that if the Judiciary does not engage in restraint concerning the power of judicial review, the core democratic value of majority rule will be nullified. He understands such

[146] *Ibid,* Pg. 411.
[147] *Ibid,* Pg. 404-405.
[148] *Ibid,* Pg. 404.

judicial power to be extremely dangerous to the conception of American democracy by the Framers.[149]

Boudin would agree that a real potential for abuse of this power exists and urges the Court to grant the Executive and Legislative branches deference in their policy-making. However, he is much less focused on its effect on majority rule in America. Boudin demonstrates deep care and frustration for minorities in America but he identifies the activism of the Court (through the 1930's) as creating more harm than good for minority rights. Boudin uses *Dred Scott v. Sandford* (1857) and *Lochner v. New York* (1905), among other cases, as blatant examples of the dangers of judicial activism. Unlike Rehnquist, Boudin was unable to comment on the Warren Court's activism during the Civil Rights Movement. Based on his evaluation in *Dred Scott v. Sandford* (1857), though, Boudin can be assumed to appreciate both judicial restraint and the protection of minority rights as not wholly antithetical. Boudin quotes Justice Harlan, whom he believes offered an appropriate constitutional philosophy that fostered judicial restraint. Justice Harlan wrote,

> *But it is for Congress, not the judiciary, to say what legislation is appropriate*; that is, best adapted to the end to be attained. *The judiciary may not, with safety to our institutions, enter the domain of legislative discretion, and dictate the means which Congress shall employ in the exercise of its granted powers. That would be sheer usurpation of the functions of a co-ordinate department, which, if often repeated, and permanently acquiesced in, would work a radical change in our system of government*"[150] (Emphasis in original)

A difference that cannot be ignored between Boudin and Rehnquist is their underlying constitutional philosophies. While they reach the same conclusion regarding judicial restraint, they come from very different traditions. As Judge Posner notes in his 2011 Jorde Symposium lecture, in recent years there has been a shift in favor of justices expressing specific and detailed

[149] *Ibid,* Pg. 403.
[150] Boudin, *op. cit.*, vol. 2, 147.

constitutional philosophies to apply to cases to aid in decision-making. [151] This was true during Chief Justice Rehnquist's tenure on the Court, but was not nearly as prevalent when Louis Boudin was writing. As a result, Boudin's understanding of judicial restraint tends to be much broader than that of Chief Justice Rehnquist. This was due to the fact that Boudin lived in a time during which pragmatic decision–making on a case-by-case basis was the norm for Supreme Court justices. Justices of his time demonstrated trends in their decisions but were not bound by theories offered during their confirmations.

[151] Posner, *op. cit.*

Conclusion

Louis Boudin comments in his two-volume work Government By Judiciary that the judicial power has dramatically changed throughout the history of the United States. From its establishment by the Framers as the least powerful branch of the Federal government, to its expansion with the development of the power of judicial review articulated in *Marbury v. Madison* (1803), and each Court's reaction to this power over time, Boudin identifies a notable trend of the growing usurpation by the Court of the powers of the other branches of government. Judicial power is no longer synonymous with Chief Justice Marshall's description in 1803—understanding the Court as an arbiter of questions of power in relation to the Constitution.

Through a series of activist decisions—both liberal and conservative—the Court has established itself as the peacemaker for the nation, resolving contentious issues that the other two branches can or will not. This was evidenced by both *Dred Scott* discussed in Chapter Three and *Brown* discussed in Chapter Five. The Court also demonstrated its ability to negate certain powers of the state to legislate for their constituents and to make specific policy decisions based on the substance of legislation as was demonstrated by the *Lochner Case* and discussed in Chapter Four. Through a series of decisions following *Lochner*, the Court showed that it was not bound strictly by the precedents set for it by previous generations of justices and that the Court could change positions regularly with no repercussions as was discussed in Chapter Five (*Muller v. Oregon* (1908), *Bunting v. Oregon* (1917), *Adkins v. Children's Hospital* (1923), and *Burns Baking Co. v. Bryan* (1924)).

This increasingly activist trajectory by the Court worries Boudin as he attempts to identify the changing limits on the judicial power. Boudin concludes that he can barely recognize the Judiciary in the form that it was created by the Framers of the Constitution by the

time he is writing in 1932. For Boudin, the Judiciary no longer only concerns itself with questions of the power to legislate based on the Constitution, but rather relies on the political opinions, moral values, and interpretation the Constitution of the justices themselves to decide cases. Boudin writes, "Accident has no doubt played an important role in the development of our constitutional law. But the *general* character of our government is determined by the *class* or *type of men* who administer it under the Judicial Power" (Emphasis in Original).[152]

Boudin warns about the potential for judicial power to be abused by the justices and urges that the justices must be restrained in their decision-making. He advocates strongly for the application of a low-bar rational basis test to cases by the Court. In order to do this, Boudin looks to James Thayer, Boudin's major influence on his constitutional philosophy. The two both argue that the Court should only strike down legislation as unconstitutional, on the state and Federal level, if no rational man would be able to conceive it to be constitutional. Using this test would negate the close 5-4 decisions by the Court and would allow for a more fluid functioning of the government. In very rare instances the Court would identify legislation that was completely irrational and the justices would be warranted in their exercise of the power of judicial review.

With each expansion of its power, the Judiciary moves itself closer to possessing absolute power, and Boudin charges that absolute power will always be abused by those who possess it. He observes that in *Dred Scott v. Sandford* (1857), Chief Justice Taney attempts to resolve the policy question of slavery and determine the "peace and harmony of the country."[153] Through this opinion, the Court comes close to granting itself absolute power over evaluating legislation. He accuses, "A decision of the U.S. Supreme Court can, therefore, be overruled only by the court

[152] Boudin, *op. cit.*, vol. 2, 545.
[153] *Ibid,* 3.

itself, or by special amendment to the Constitution. *And even constitutional amendments are effective only in so far as the U.S. Supreme Court approves them*" (Emphasis in original).[154]

For Boudin, there are long-term implications from the expanding power of the Judiciary and its impingement on the constitutionally afforded powers of the states and the other branches of government. Boudin is clearly concerned with the shifting relationship between each branch and the balance of power between the state and federal governments as a result of the Judiciary's abuse of power. He goes so far as to suggest that if the Court continues to decide cases not as questions of power but as questions of substance, the existence of the American constitutional democracy is in serious jeopardy. The slow but continual usurpation of power by the justices creates, for Boudin, a government of men instead of a government of laws. Boudin writes, "A careful examination of the actual course of decision will show that ours is not merely a Government of Men, but a Government of Conservative Men. And since the actual power of government is in the hands of a majority of the United States Supreme Court, our government could very well be termed 'Government by a Few Conservative Men.'"[155]

Boudin argues that if this trend of ignoring the true limits of the Court's powers continues, the Constitution will cease to be meaningful as a framework for the government of the United States. Boudin identifies glimmers of hope from specific justices that recognize the danger of the judicial power as he does. But, as history moves farther away from Chief Justice John Marshall's opinion in *Marbury v. Madison* (1803), the justices that advocate for the judicial restraint that Boudin admires tend to increasingly be voting in the minority.

With the Civil Rights Movement came a shift in the constitutional philosophy of liberals who had earlier advocated for restraint when addressing questions of economic policy. They

[154] *Ibid,* 3.
[155] *Ibid*. 545-546.

became increasingly activist when cases concerning with civil rights and liberties were addressed by the Court. The decidedly liberal nature of the Warren Court during the 1950's and 1960's resulted in increased politicization of Supreme Court nominees. President Nixon attempted to shift the Court from liberal to more conservative with his appointment of Chief Justice Warren Burger. Burger, who was expected to reliably vote with conservatives, turned out to be less predictable than President Nixon would have hoped and, in some cases, authored or signed on to some very liberal decisions, such as *Roe v. Wade* (1972).

The conservative shift that President Nixon had hoped to ignite did eventually take place approximately fifteen years later with the elevation of William Rehnquist to Chief Justice, replacing Warren Burger. Chief Justice Rehnquist guided the Court in a conservative direction, never deviating from his constitutional philosophy that emphasized the importance of majority rule and the power of the states. As a result of this theory, Rehnquist tried to resurrect the concept of judicial restraint within the Supreme Court.

Boudin valued the careful separation and balance of powers as articulated by the Framers of the Constitution and the reliance on the popularly elected branches to make policy decisions for the nation. He saw the proper role of the Judiciary as a safeguard against the abuse of power by the other two branches. It was the duty of the Court to strike down legislation as void only when irrational. The Court's usurpation of authority by issuing opinions outside this limited power was not only inappropriate in the eyes of Boudin, but would lead to an unchecked and uncontrollable Judiciary.

Chief Justice Rehnquist, however, was more concerned with the balance of power between the people and the government, both federal and state. He believed that majority rule is the most essential aspect of the constitutional democracy and without it, the government by the

people would cease to function. To preserve majority rule, Rehnquist would allocate great power to the states to make decisions for their own citizens. This would also result in limiting the powers of the federal government, especially that of the judicial branch. Rehnquist asserted that the judicial branch is the most undemocratic aspect of the national government and, therefore, the justices must be restrained.

Despite their vast political differences, Boudin and Rehnquist agreed that the Judiciary must be restrained in its decision-making. They believed this, however, for very different reasons and to achieve different goals based on the times in which they wrote. The two men point to similar cases to demonstrate the problems that arise out an activist Judiciary. But, Boudin and Rehnquist argue for restraint to be used in different ways, depending on the policy issue in question. While Rehnquist cares most about majority rule, Boudin wants to avoid the creation of a "government of men." He recognizes, though, that given the judicial history of the United States beginning with the development of the power of judicial review in 1803 by Chief Justice John Marshall, the Judiciary has already expanded (and often abused) its powers. Boudin believes that to a great extent, the transition from a government of laws to a government of men has already taken place.

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