Stanley Forman Reed: Perspectives on a Judicial Epitaph

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Death invites analysis. The departure of a Supreme Court Justice evokes an almost reflexive urge to evaluate his life and his deeds. This process of assessment is often complicated by chronology. But the passage of years does not guarantee perspective. Time may either affirm or impeach earlier judgments. Subsequent examination can also obscure positions or characteristics that enjoyed the contemporary appreciation of an earlier day. The mere passage of time may bestow a prominence based solely on survival. Persons of venerable years may be garlanded with attention because their attention refracts the events and personages they have outlived. Conversely, chronological attenuation from a moment of glory or the source of power risks elevating antiquity above discernment.

The factor of time underscores the emphasis current scholarship places on personality. Pundits commonly compartmentalize and characterize the activities of the Supreme Court with reference to the Chief Justice, although not every occupant of the center chair dominates his colleagues. A Marshall or a Warren may be offset by a Chase or a Vinson. Yet the habit, often artificial and based more on convenience than on reality, persists, intermittently displaced when attention is focused upon an Associate Justice who may be flamboyant, exceptionally able, strong-willed, or strategically situated.[1] Most Associate Justices are usually consigned to a different fate:

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1. *See, e.g.*, Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33 (1931); Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181; TIME, Oct. 9, 1964, at 48 (cover story on Justice Black).

> AMONG THE MOST capricious of Clio's tricks is her ability to obscure totally men who in their time managed to nudge the direction of the course of events. Through misinterpretation or lack of evidence or just simple neglect, an army of men lie interred in the past, their lives forgotten, their impact on history unrecorded. Perhaps most of them deserve a silent obscurity; but for others this is not the case, as a study of their lives adds, at the least, depth and texture to our understanding of their times.[2]

A case in point is Stanley Reed. When he died on April 3, 1980, the obituaries were perfunctory.[3] Yet his death is worthy of notice because it was a sombre reminder that the era of the Roosevelt Court had finally ended. The final survivor of FDR's nine appointments,[4] Stanley Reed came to the Court after serving as Solicitor General for thirty-four tempestuous months. From March 1935, to January 1938, Stanley Reed was the primary defender of the New Deal before the jaundiced audience of the Nine Old Men. The tide began to turn in 1937 when the retirement of Justice Willis Van Devanter and his replacement by New Deal loyalist Senator Hugo H. Black broke the back of the conservative opposition. In January 1938, another member of the obscurantist forces, Justice George Sutherland, gave up the fight. It was altogether fitting that Solicitor General Reed should succeed him. In Professor Rodell's apt words, Reed's "thanks for his work before the high bench was a seat behind it."[5]

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2. Watts, *William Moody*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1801 (L. Friedman & F. Israel eds. 1969).

3. *See, e.g.*, N.Y. Times, Apr. 4, 1980, § A, at 23, col. 1.

4. In order of appointment they were:

1. Hugo L. Black was appointed in August 1937, retired in September 1971, and died in September 1971.
2. Stanley Reed was appointed in January 1938, retired in February 1957, and died in April 1980.
3. Felix Frankfurter was appointed in January 1939, retired in August 1962, and died in February 1965.
4. William O. Douglas was appointed in April 1939, retired in November 1975, and died in January 1980.
5. Frank Murphy was appointed in January 1940, and died in July 1949.
6. Harlan F. Stone was promoted from Associate Justice to Chief Justice in June 1941, and died in April 1946.
7. James F. Byrnes was appointed in June 1941, resigned in October 1942, and died in April 1972.
8. Robert H. Jackson was appointed in June 1941, and died in October 1954.
9. Wiley B. Rutledge was appointed in January 1943, and died in September 1949.

5. F. RODELL, NINE MEN 267 (1955).

Justice Reed stayed on the Court for nineteen years. During this period, he participated in decisions dealing with war and peace,[6] the nature and extent of presidential power,[7] the anti-communism of the Cold War era,[8] the allocation of authority between the states and the federal government,[9] the abolition of *de jure* segregation,[10] and the increasingly delicate and vital area of civil liberties.[11]

History has not been overly appreciative of Justice Reed's efforts. The contemporary consensus during his tenure saddled him with the image of an amiable but inert mediocrity.[12] A recent survey by law professors and historians rated him as no more than an "average" member of the Supreme Court in terms of his impact and importance.[13] He seems almost lost among the Justices with

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6. *E.g.*, Reid v. Covert, 351 U.S. 487 (1956); Kinsella v. Krueger, 351 U.S. 470 (1956); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Madsen v. Kinsella, 343 U.S. 341 (1952); Ludecke v. Watkins, 335 U.S. 160 (1948); Lichter v. United States, 334 U.S. 742 (1948); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947); Duncan v. Kahanamoku, 327 U.S. 304 (1946); *Ex parte* Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Bowles v. Willingham, 321 U.S. 503 (1944); Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943); United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942).

7. *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Johnson v. Eisentrager, 339 U.S. 763 (1950); Hirota v. MacArthur, 338 U.S. 197 (1949); Propper v. Clark, 337 U.S. 472 (1949); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); *In re* Yamashita, 327 U.S. 1 (1946); Steuart & Bros. v. Bowles, 322 U.S. 398 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); *Ex parte* Quirin, 317 U.S. 1 (1942); United States v. Pink, 315 U.S. 203 (1942); United States v. George S. Bush & Co., 310 U.S. 371 (1940).

8. *E.g.*, Cole v. Young, 351 U.S. 536 (1956); Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115 (1956); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Peters v. Hobby, 349 U.S. 331 (1955); Barsky v. Board of Regents, 347 U.S. 442 (1954); Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Dennis v. United States, 341 U.S. 494 (1951); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

9. *E.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956); United States v. Texas, 339 U.S. 707 (1950); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); United States v. California, 332 U.S. 19 (1947); Clark v. Allen, 331 U.S. 503 (1947); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); New York v. United States, 326 U.S. 572 (1946); Parker v. Brown, 317 U.S. 341 (1943); Wickard v. Filburn, 317 U.S. 111 (1942); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); Hines v. Davidowitz, 312 U.S. 52 (1941); United States v. Darby, 312 U.S. 100 (1941); United States v. Rock Royal Coop., 307 U.S. 533 (1939).

10. *See* note 93 *infra*.

11. *See* note 43 *infra*.

12. W. McCune, The Nine Young Men 267-68 (1947); F. Rodell, *supra* note 5, at 266; Schlesinger, *The Supreme Court: 1947*, Fortune, Jan. 1947, at 78.

13. Blaustein & Mersky, *Rating Supreme Court Justices*, 58 A.B.A.J. 1183, 1187

whom he served who have attracted greater attention—Hughes, Brandeis, Stone, Black, Frankfurter, Douglas, Jackson and Warren—and who are esteemed as jurists of more considerable parts.

This focus is, in part, misplaced. It is no detraction from the acclaim awarded the great and the near great to acknowledge that these men achieved their fame by virtue of their membership in a body whose importance, prestige and strength derives from its institutional identity. The Supreme Court is accorded an almost sacerdotal reverence because it alone of the three branches of government is perceived as an entity divorced from party and parochial concerns.[14] The judiciary is the sole branch where alienation of duty and personality is not only expected, it is demanded. The American public retains a passionate attachment to Blackstone's conception of judges as impersonal oracles of the law,[15] despite the fact that this theory has passed from favor among the legal *cognoscenti.*[16] This popular image explains the public's impatience with and incomprehension of disagreement on the Supreme Court.

Reverence is given the dissenter with the prophetic courage to speak for the future,[17] or when, in Cardozo's words, "he is the gladiator making a last stand against the lions."[18] But the work of the Court is accomplished as an institution. *E Pluribus Unum* is not only the national motto, it is also the formula for the Court's success. The predicate for the effective discharge of the Court's obligations is the reasonable subordination of the individual impulse to the institutional need for collective and concerted action. Stanley Reed conducted his career conscious of and responsive to this need. It is from this perspective that his life and work deserve to be judged.

(1972).

14. L. LUSKY, BY WHAT RIGHT? 28 (1975).

15. Judges, said Blackstone, "are the depositaries [sic] of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land." W. BLACKSTONE, COMMENTARIES *69. The connection between the Supreme Court and the Constitution was noted by another Briton, James Viscount Bryce, 150 years after Blackstone: "The Supreme Court is the living voice of the Constitution—that is, of the will of the people expressed in the fundamental law they have enacted." 1 J. BRYCE, THE AMERICAN COMMONWEALTH 266 (1889).

16. *E.g.*, T. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 42-43 (1956); G. WHITE, THE AMERICAN JUDICIAL TRADITION, 196-99, 252, 371 (1976).

17. *E.g.*, Beth, *Justice Harlan and the Uses of Dissent*, 49 AM. POL. SCI. REV. 1085 (1955).

18. B. CARDOZO, LAW AND LITERATURE 34 (1931).

I. Pre-Court Career

Stanley Forman Reed was born on December 31, 1884, in eastern Kentucky. He received two Bachelor of Arts degrees, the first from Kentucky Wesleyan in 1902, the second from Yale in 1906. He began the study of law at the University of Virginia, but he transferred after his first year to Columbia, from which he received his LL.B in 1909. He completed his education with a year in Paris at the Sorbonne.

Reed returned to the place of his birth and spent two years in the general practice of law. He then devoted four years to active politics as a member of the lower house of the Kentucky legislature, where he specialized in reforming labor conditions. After chairing an organization working for Woodrow Wilson's re-election, he returned to private practice in 1916.

Tobacco played an important role in the Kentucky economy; it also was indirectly responsible for starting Reed on his path to the Supreme Court. Lawyer Reed counseled a local tobacco cooperative in marketing its crop surpluses. His expertise brought him to the attention of the Republican administration, which in turn brought Democrat Reed to Washington as General Counsel for the Federal Farm Board in December 1929. Three years later, he assumed the same position at the Reconstruction Finance Corporation, the Hoover agency set up to combat the effects of the Great Depression. Retained by the incoming Roosevelt, Reed won the New Deal's first important test before the Supreme Court when he defended the Government's right and power to go off the gold standard.[19]

Reed's success in *The Gold Clause Cases*[20] led to his appointment as Solicitor General in 1935, just as the crest of the New Deal's wave of innovative legislation reached the Court. As Solicitor General, Reed occupied a position of pivotal importance. He defended measures deemed crucial by both the President and the Congress to alleviate the unprecedented economic distress. In an era when all we had to fear was fear itself, the maintenance of public confidence in government was an imperative and abiding concern. The appearance of action was almost as important as the re-

19. Perry v. United States, 294 U.S. 330 (1935); Nortz v. United States, 294 U.S. 317 (1935); Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935).

20. *Id.*

ality. But novel experiments found an unsympathetic reception before a Supreme Court resolutely looking backwards to Thomas Cooley and Herbert Spencer.

In short order, a majority of the Justices rejected Reed's arguments on a variety of fronts. They overthrew laws looking to rehabilitate economic conditions in general[21] as well as legislation targetting particular sectors of the economy for reform.[22] Congress was denied power to regulate wages and prices in industries suffering acute economic dislocation.[23] Even when the Court declined to rule on constitutionality, it took a dim view of the administrative machinery and procedures established to implement statutory objectives.[24] Reed's only notable victory in the area of economic regulation prior to 1937 was the validation of the Tennessee Valley Authority.[25]

The record was not entirely bleak. Solicitor General Reed participated in several landmark decisions sustaining presidential authority. In the area of foreign affairs, the Court laid down the broad ukase that "the President alone has the power to speak or listen as a representative of the nation."[26] The Court also ratified presidential power to conclude executive agreements concerning foreign affairs and granted the executive the sole authority to accord diplomatic recognition to foreign governments.[27] However, the Court balked at approving inherent executive license to remove summarily and without cause a member of the Federal Trade

21. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

22. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936)(Bituminous Coal Conservation Act of 1935); United States v. Butler, 297 U.S. 1 (1936) (Agricultural Adjustment Act of 1933).

23. Carter v. Carter Coal Co., 298 U.S. 238 (1936). *See also* Adkins v. Children's Hosp., 261 U.S. 529 (1923). A like prohibition on setting minimum wages was laid upon the states. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

24. *See* Jones v. S.E.C., 298 U.S. 1 (1936)(agency denied power to compel witness to produce business records). One expression of the Court's hostility to the burgeoning federal bureaucracy of the New Deal was the rather short-lived doctrine that Congress could not delegate its lawmaking functions to the President and/or agencies under his authority. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). *Cf.* Carter v. Carter Coal Co., 298 U.S. 238, 310-11 (1936).

25. Ashwander v. T.V.A., 297 U.S. 288 (1936). Reed also successfully defended the Government's power to make grants for the creation of municipal power systems. *See* Duke Power Co. v. Greenwood County, 302 U.S. 485 (1938); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

26. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

27. United States v. Belmont, 301 U.S. 324 (1937).

Commission.[28]

But these victories were limited achievements in areas peripheral to the issue of burning concern—the restoration of economic strength and stability. They could not offset the constricting if not disabling effect of the Court's trend of decisions regarding governmental power. For President Roosevelt, fresh from his electoral triumph in the 1936 election, matters had reached an intolerable state.

Once the President had decided to act, Solicitor General Reed was one of the few members of the administration Roosevelt consulted during the formulation of his plan to reorganize the Supreme Court.[29] The reason for this selection was obvious: as Solicitor General, Reed had been the spokesman for the federal government while it was subjected to the most intense and persistent pummeling ever dealt out by the Supreme Court. The duality of his position as both member of the administration and officer of the Court forced Stanley Reed to walk a tightrope between personal belief and professional propriety. While he may have felt a personal motivation to reverse the Court's direction, his professional loyalty to the institutional integrity of the Court denied him—unlike others in the administration[30]—the unseemly satisfaction of publicly castigating the Court. Instead, and because intemperate attacks on basic institutions such as the Court were not in

28. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935). This case is interesting from several angles. It was the first argued by Reed as Solicitor General. Traditionally, the maiden appearance is reserved for a case which presents an issue that is either simple and well settled or of special interest to the new man. According to the general interpretation of the most relevant precedent, Myers v. United States, 272 U.S. 52 (1926), the President's power of removal was thought clearly adequate to cover the case of Mr. Humphrey. That the Supreme Court held otherwise caused considerable dismay at the White House, and, in light of later events, may have had profound ramifications. This is Robert Jackson's evaluation of the impact upon the President: "I really think the decision that made Roosevelt madder at the Court than any other decision was that damn little case of *Humphrey's Executor v. United States.* The President thought they went out of their way to spite him personally and they were giving him a different kind of deal than they were giving Taft." E. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 99 (1958) (footnote omitted).

29. W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932-1968, at 58, 88 (1970). *Accord,* E. GERHART, *supra* note 28, at 107; Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan,* 1966 SUP. CT. REV. 347, 382, 387. *Contra,* W. MCCUNE, *supra* note 12, at 61. *See generally* L. BAKER, BACK TO BACK (1967).

30. *See, e.g., Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Comm. on the Judiciary, United States Senate,* 75th Cong., 1st Sess. (pt. 1) 37-64 (1937)(remarks of Assistant Attorney General Robert H. Jackson).

his nature, Reed became the administration's link to the American bar. He urged this audience to change basic attitudes regarding the scope and allocation of governmental responsibilities under the Constitution. Power had accumulated in Washington not by conspiratorial design but out of necessity, and the existing framework of state-federal relations could contain its exercise.[31] This change could be accomplished if the Constitution was viewed as a flexible document, one which was not synonymous with a static conception of society.[32]

Whether the Court-packing plan frightened the Court into submission remains an open question.[33] Nevertheless, an incontrovertible and seismic change had occurred in the Court's posture, and without a change in the Court's membership. The Court crossed the Rubicon in *NLRB v. Jones & Laughlin Steel Corp.*,[34] when it upheld the Wagner Act[35] and the Government's power to undertake the extensive task of modulating relations between labor and management.[36] Here was proof that the President may have

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31. Reed, *The State Today*, 15 TENN. L. REV. 52, 54, 69 (1937).

32. Reed articulated his concept of the organic Constitution in these words: "Its authors intended it as a statement of principles upon which the Government should operate into the indefinite future, not a code of laws written to meet the needs of an existing and well understood condition.

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" . . . [s]uccess would not have been achieved without an interpretation of our organic law which treated its grants and limitations, as indicating the course of government, rather than the boundaries of its powers.

. . . .

" . . . Regretfully but inevitably we must adjust our lives and our government to modern needs and find, in a Constitution written for a simpler era, guidance for the problems of our present age.

. . . .

"The opportunity and the necessity for Government's service to its people cannot be confined within rigid limits. The Constitution sets no such bounds. It is a living, vital institution whose function is to guide and not to curb necessary governmental processes. So to construe and apply our organic law, to adapt its powers to the great ideal of social justice for the governed, is truly to preserve, to protect and to defend the Constitution of our United States." Reed, *The Constitution of Our United States*, 22 A.B.A.J. 601, 602, 608 (1936).

33. *See, e.g.*, R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 207-13 (1941). Attention has focused primarily upon Justice Roberts as the man whose "switch in time saved nine," a charge the Justice's partisans have labored mightily to refute. 2 M. PUSEY, CHARLES EVANS HUGHES 757 (1951); Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

34. 301 U.S. 1 (1937).

35. Ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. 151-168 (1975 & Supp. 1980)).

36. *Jones & Laughlin's* acceptance of government sanction for collective bargaining proceeded in part from a recent victory by Solicitor General Reed in Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515 (1937), in which the Court upheld amendments to the

lost the battle but won the war. Stanley Reed played an important and prominent role in the campaign.[37]

The victory was consolidated when Hugo Black replaced Willis Van Devanter in the summer of 1937. When George Sutherland—the intellectual heartthrob of the Four Horsemen—retired six months later, Reed's appointment seemed natural. The President installed a proven supporter of his programs and rewarded the man who had defended the New Deal "with a patient passion that had caused him once to faint in the course of argument."[38] And the Court was augmented by a man whose training and temperament for the Court, in contrast to Justice Black, were unchallenged.[39]

II. On The Court

During the nineteen years he was on the Supreme Court, Stanley Reed participated in thousands of cases in many areas and at every level of decision. This article will not attempt to undertake a comprehensive survey of this record in the hope of imposing an articulate coherence. That task is better entrusted to more skillful appraisers, whose analysis has already begun.[40]

Railway Labor Act requiring company negotiations with certified union representatives.

37. W. SWINDLER, *supra* note 29, at 133.

38. F. RODELL, *supra* note 5, at 252.

39. At the time of Reed's appointment, a minor controversy was raging about Justice Black's fitness for the bench and the quality of his performance as a Justice. *See* A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 467-76 (1956).

40. The best treatments of Justice Reed's career are by C. Herman Pritchett and include THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947 (1948)[hereinafter cited as PRITCHETT, *Roosevelt Court*]; CIVIL LIBERTIES AND THE VINSON COURT (1954)[hereinafter cited as PRITCHETT, *Vinson Court*], both of which are excellent segmented studies of Reed's voting patterns; and THE POLITICAL OFFENDER AND THE WARREN COURT (1958), which deals with Reed's final four years on the Court in a less exhaustive manner than Pritchett's earlier works. Pritchett has also written the best overview of Reed's entire career. *Stanley Reed*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2373-89 (L. Friedman & F. Israel eds. 1972). Although brief, this summary adroitly uses broad strokes to sketch the large canvas of Justice Reed's entire judicial service.

Reed was on the Court when the construction of the religion clauses of the First Amendment first came before the Court. His contributions in this area are delineated in F. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT (1958). The first half of Reed's tenure on the Court was analyzed in a useful student note, *Mr. Justice Reed—Swing Man or Not?*, 1 STAN. L. REV. 714 (1949). The best overall study examining the work of the Court during this general period is R. MCCLOSKEY, THE MODERN SUPREME COURT (1972). Also helpful, although less analytical stylistically is W. SWINDLER, *supra* note 29.

In addition to being one vote among nine, a Justice may from time to time assume a role within the Court that advances its success and responsibilities. He may, for example, serve as a leader in the formulation of substantive policy. Conversely, even when others take the lead, the role of the follower of the strategic leader is never unimportant; certainly it is mathematically important, being the role most frequently occupied by any member of the Court. Lastly, a Justice may appoint himself the protector of the Court. As an illustration, he may be the sentinel who sounds the tocsin against a reappearance of the Court's besetting sin—the tendency to overreach its power to the extent of suffering "self-inflicted wounds."[41] The following cameos will demonstrate that Justice Reed fulfilled each of these roles, always to the benefit of the Court.

A. Leader

Stanley Reed does not have the reputation of a firebrand defender of civil liberties.[42] Certainly he does not compare with a Murphy or a Douglas in exhibiting a zealous militancy on behalf of the individual. Although other members of the Court may have been more supportive of claims against the state, it would be unfair and incorrect to characterize Justice Reed as a rubber stamp for any and all governmental measures which impinged upon personal freedom.[43]

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41. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928). Chief Justice Hughes' phrase referred to the extreme expression of public disaffection with one or more of the Supreme Court's decisions. "Self-inflicted wounds" are primarily those missteps by the Court that have necessitated the drastic extra-judicial remedy of constitutional amendment. The term does not apply to the vast number of decisions thought to trespass beyond abstract boundaries of doctrinal propriety or institutional responsibility.

42. *E.g.*, R. MCCLOSKEY, *supra* note 40, at 17, 63; PRITCHETT, *Roosevelt Court, supra* note 40, at 131, 162, 254-60; PRITCHETT, *Vinson Court, supra* note 40, at 190-91, 227-29; F. RODELL, *supra* note 5, at 314.

43. If anything, the cases where Justice Reed voted for the individual and against the government read like a litany of the Bill of Rights. Here is a partial list: Lovell v. Griffin, 303 U.S. 444 (1938); Hague v. C.I.O., 307 U.S. 496 (1939); Schneider v. New Jersey, 308 U.S. 147 (1939); Chambers v. Florida, 309 U.S. 227 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940); Edwards v. California, 314 U.S. 160 (1941); Bridges v. California, 314 U.S. 252 (1941); Skinner v. Oklahoma, 316 U.S. 535 (1942); Schneiderman v. United States, 320 U.S. 118 (1943); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Hannegan v. Esquire, Inc., 327 U.S. 146 (1946); Duncan v. Kahanamoku, 327 U.S. 304 (1946); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Winters v. New York, 333 U.S. 507 (1948); Terminiello v. Chicago, 337 U.S. 1 (1949); Kunz v. New York, 340 U.S. 290 (1951); Rochin v. California, 342 U.S. 165 (1952); Beauhar-

One of the more popular recent innovations of the Supreme Court has been the constitutional right of privacy.[44] Although Justice Reed was not on the Court when the privacy doctrine came into its own, it is ironic that the man scorned as the insensitive Elmer Fudd of the Roosevelt appointees[45] played a dominant role in the early privacy cases.

It was a long struggle, which began as part of the legal offensive launched by the Jehovah's Witnesses in the 1940's. In 1943, the Court divided five-to-four in a quartet of cases dealing with the circumstances in which residential solicitation could be regulated by government. Three of the cases[46] involved municipal ordinances which required door-to-door peddlers and canvassers to procure a license from city authorities and to pay a license tax. The major case, *Murdock v. Pennsylvania,*[47] struck down these laws because they could be used to tax the exercise of the Witnesses' constitutional rights of free speech, press and religion. Such legislation was voided because it threatened to become "a new device for the suppression of religious minorities"[48] "as potent as the power of censorship."[49] Justice Reed dissented in these cases for himself and Justices Roberts, Frankfurter and Jackson, because he believed the taxes to be within the traditional scope of governmental power.[50]

The fourth case, *Martin v. Struthers,*[51] presented a qualitatively different problem. The city of Struthers, Ohio, had enacted an ordinance which flatly prohibited

> any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing.[52]

Speaking for the majority, Justice Black found the law consti-

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nais v. Illinois, 343 U.S. 250, 277 (1952)(Reed, J., dissenting); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Wieman v. Updegraff, 344 U.S. 183 (1952).

44. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

45. R. KLUGER, SIMPLE JUSTICE 538 (1976); F. RODELL, *supra* note 5, at 266.

46. Douglas v. Jeannette, 319 U.S. 157 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. City of Opelika, 319 U.S. 103 (1943), *reversing* 316 U.S. 584 (1942).

47. 319 U.S. 105 (1943).

48. *Id.* at 115.

49. *Id.* at 113.

50. *Id.* at 133 (Reed, Roberts, Frankfurter & Jackson, JJ., dissenting).

51. 319 U.S. 141 (1943).

52. *Id.* at 142.

tutionally infirm because it presumed residents would be annoyed by these activities. The city could not exercise this paternalistic power consistent with the intent of the Framers of the First Amendment, who anticipated that the communication of "novel and unconventional ideas might disturb the complacent."[53] Periodic summonses were often no more disruptive than numerous environmental factors, such as factories, which were accepted as a matter of course. Justice Black believed the method chosen by the city to protect against inconvenience was excessively overbroad, given the threat of discouraging the practice of door-to-door canvassing then common in political campaigns: "The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."[54] The recurring theme of the majority opinion was that the First Amendment forbade any attempt to substitute "the judgment of the community for the judgment of the individual householder."[55]

Justice Reed dissented for himself and Justices Roberts and Jackson. His opinion disclosed the same underlying concept of organic constitutionalism he had espoused as Solicitor General.[56] Justice Reed thought the ordinance valid because "[c]hanging conditions have begotten modification by law of many practices once deemed a part of the individual's liberty."[57] While the practice of front porch solicitation had been tolerated if not welcomed by a sparsely populated and largely rural society, it could become burdensome to a nation composed of millions of city dwellers. Noting that Struthers was a community where many citizens worked at night and slept during the day, Justice Reed looked past antiquity and saw only a city council seeking to give its residents an "assurance of privacy."[58] The Constitution defined the parameters of his inquiry. While the majority focused on the potential for abuse, Justice Reed confined himself to that instrument's language, whose "limitations . . . are not maxims of social wisdom but definite con-

53. *Id.* at 143.
54. *Id.* at 147.
55. *Id.* at 144.
56. *See* note 32 and accompanying text *supra.*
57. 319 U.S. at 157 (Reed, J., dissenting).
58. *Id.*

trols on the legislative process. We are dealing with power, not its abuse."[59] The city had foreclosed one mode of communication but not all. It had struck the balance in favor of the privacy of its citizens. Justice Reed did not think the First Amendment hobbled governmental power to insure domestic tranquility. But the Court did not yet agree.

Nor was it persuaded three years later when the controversy shifted from the porch to the street. In *Marsh v. Alabama,*[60] the Court expanded the principle of *Murdock* to prevent company towns from excluding Witnesses who proselytized on a sidewalk that was technically private property.[61] Since the corporate owner had in effect dedicated the premises to public use, the Court held that it could not reclaim its dominion over the property at will when the property was used by members of the public in the exercise of their constitutional rights. The central thesis of the opinion mirrored that of *Struthers*—no one other than each member of the intended audience could determine what could be communicated.[62]

Dissenting for himself, Chief Justice Vinson and Justice Burton, Justice Reed believed the Court was enforcing a priority among rights, a hierarchy not established by the Constitution: "The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech."[63] As was the case in *Struthers,* the chilling effect on speech was slight; the Witness could have moved thirty feet and continued undisturbed. Justice Reed conceded the importance of the right of free speech. But if the Court's decision compelled the state to protect this right under compulsion of the First Amendment, the ruling also disabled the Government's power to safeguard citizens from intrusions into their privacy. Henceforth, the state "must commandeer, without compensation, the private property of other citizens to carry out that obligation."[64]

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59. Murdock v. Pennsylvania, 319 U.S. at 133 (1943)(Reed. J., dissenting).
60. 326 U.S. 501 (1946).
61. *Id. Accord,* Tucker v. Texas, 326 U.S. 517 (1946).
62. 326 U.S. at 509.
63. *Id.* at 516 (Reed, J., dissenting).
64. *Id.* at 515. Reed characterized the decision as constitutionalizing the proposition "that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views." *Id.* at 512.

Saia v. New York[65] concerned a Jehovah's Witness who had chosen to spread his message by sound truck in a public park without a license. The five-man majority found the law under which he had been convicted to be unconstitutional because it vested an official with the unbridled discretion to grant or deny a permit. Justice Reed did not deliver a dissent of his own; instead he joined Justice Frankfurter's opinion. Frankfurter's remarks generally tracked his colleague's earlier objections. The law represented an attempt not to ban speech but to minimize the inconveniences attending its exercise. Justice Frankfurter also focused on the issue of the state's power to reduce the "easy, too easy, opportunities for aural aggression. . . . into cherished privacy."[66]

The tide began to turn in 1949, one year following *Saia. Kovacs v. Cooper*[67] involved a municipal ordinance which denied the use of the public streets to any vehicle employing amplifying devices to emit "loud and raucous noises." While the Court attempted to distinguish *Saia,* the similarity of the two statutes cast *Kovacs* as a *sub silentio* overruling of the earlier decision.[68] Chief Justice Vinson not surprisingly selected the man who had been the most persistent defender of privacy laws, Stanley Reed, to write the first opinion upholding them.

Justice Reed zeroed in immediately on the core issue, the power of government to enact such a law rather than its potential abuses.[69] He construed this aspect of state power broadly: "The police power of a state extends beyond health, morals and safety,

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65. 334 U.S. 558 (1948).

66. *Id.* at 563 (Frankfurter, Reed & Burton, JJ., dissenting). "Surely there is not a constitutional right to force unwilling people to listen. . . . And so I cannot agree that we must deny the right of a State to control these broadcasting devices so as to safeguard the rights of others not to be assailed by intrusive noise but to be free to put their freedom of mind and attention to uses of their own choice." *Id.* at 563-64 (citation omitted). Justice Jackson also dissented in a separate opinion.

67. 336 U.S. 77 (1949).

68. This was the interpretation of three of the dissenters and at least one member of the majority. *Id.* at 101-02 (Black, Douglas & Rutledge, JJ., dissenting); *id.* at 97-98 (Jackson, J., concurring). Justice Murphy dissented without opinion.

69. "The question is whether or not there is a *real* abridgment of the rights of free speech." *Id.* at 85 (emphasis added). *Accord,* text at note 59 *supra. Cf.* United States v. Lee, 106 U.S. 196 (1882):

"Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depends the rights of the individual or of the Government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail." *Id.* at 217.

and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people."[70] This power had benign and beneficial uses. It had been deployed on behalf of homeowners to protect and preserve the privacy of those who could not protect themselves—not to curtail freedom of expression. The individualized approach of *Struthers* and *Marsh* would not function in situations where the intrusion could not be turned away by a closed door. Justice Reed perceived a new reality that differed from these prior cases: homeowners had become a captive audience "at the mercy of advocates of particular religious, social or political persuasions."[71] In this setting, the city had to act or privacy would be imperiled.[72] The ordinance represented the accommodation struck by the city between the rights of free speech and residential privacy. It was within the scope of the government's power. Justice Reed was on the Supreme Court to advance, not to frustrate, this commendable and constitutionally permissable objective.

Kovacs was only a partial victory for Justice Reed. His opinion articulated only the judgment of the Court, in a plurality rather than a majority opinion. This deficiency was remedied in 1951, when the capstone to this progression was laid. Reed's opinion in *Breard v. Alexandria*[73] was the opinion of the Court representing the views of a solid six-man majority undiluted by concurrences. The city of Alexandria, Louisiana, had made it a misdemeanor to conduct unrequested solicitations for commercial reasons in and upon private residences. Breard, a solicitor of magazine subscriptions, appealed his conviction under this law on the grounds that it violated the commerce clause, the due process clause of the Fourteenth Amendment, and the free speech and press clauses of the First Amendment.

Justice Reed's twenty-one page opinion sustaining the law was a labor of love, perhaps the finest he ever wrote. It began with a magisterial statement establishing the purpose of the inquiry and

70. 336 U.S. at 83 (footnote omitted). For recent statements in the same vein, *see* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59-60 (1973).

71. 336 U.S. at 87.

72. "In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality." *Id.*

73. 341 U.S. 622 (1951).

the problem in its resolution:

> All declare for liberty and proceed to disagree among themselves as to its true meaning. There is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose. This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place. Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all.[74]

Breard's commerce and due process arguments were rejected, but not before the Court in the process disclosed its deferential attitude toward governmental actions taken under the necessity of protecting privacy:

> To the city council falls the duty of protecting its citizens against the practices deemed subversive of privacy and of quiet. A householder depends for protection on his city board rather than churlishly guarding his entrances with orders forbidding the entrance of solicitors. . . . Changing living conditions or variations in the experiences or habits of different communities may well call for different legislative regulations as to methods and manners of doing business. Powers of municipalities are subject to control by the states. Their judgment of local needs is made from a more intimate knowledge of local conditions than that of any other legislative body.[75]

Concerning the First Amendment contentions, Justice Reed reiterated his conception of an organic Constitution. Because the Constitution has an evolutionary capacity to readjust to new and old factors, no component, including the First Amendment, could have an immutable meaning or effect. Each case turned on its own merits, and the same facts could produce differing results according to their factual settings. Therefore, *Breard* was not controlled by *Struthers,* because the statute in *Breard* applied only to solicitations for commercial transactions[76] and did not threaten religious

74. *Id.* at 625-26.

75. *Id.* at 640-41. The Court's isolation from these conditions was discussed in Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 406 (1941).

76. At the time *Breard* was decided, the First Amendment did not protect commercial speech. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

solicitations.[77] Nor was *Marsh* dispositive, because Breard had not trespassed upon land partaking of a public use by reason of a private dedication.[78]

The equation not being foreclosed by these precedents, the Court was free to accept the city's arguments that its law acted *in loco personam.* Any other decision would "make a state or a city impotent to guard its citizens against the annoyances of life."[79] On consideration of all these facts, the Court felt "[i]t . . . would be a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents."[80]

At first blush, Justice Reed's intransigence in the early privacy cases seems poorly calculated to serve the best interests of the Court. After all, it only emphasized internal division, and this weakens the Court. There were, however, several factors that justified Reed's perseverance. First, the issue was an important one and almost certain to return to the Court. Second, the split in the Court was a close one and likely to be of short duration, given a change in personnel. Given the favorable prospects for a modification of the Court's trend, Reed held his ground and refused to accede to the *Struthers-Marsh* philosophy. Gradually he built a consensus around his position and saw it vindicated.[81] The new position represented a judicious compromise that preserved the essence of both competing values. Reed's *Breard* opinion protected the Court's interests in two ways. Strategically, it saved the Court from becoming enmeshed in a guerrilla conflict with local authorities and their constituents, a clash that would probably have intensified with time and urbanization. Tactically, the Court accomplished the shift without overtly displacing recent precedents, something that seldom benefits the Court's public and professional

77. 341 U.S. at 642-43.

78. *Id.* at 643.

79. *Id.* at 632.

80. *Id.* at 645.

81. Reed followed this practice unremittingly no matter how seductive the side-issues. For example, in Adamson v. California, 332 U.S. 46 (1947), he clung tenaciously to the issue presented and went no further. While Justices Black and Frankfurter debated the nature of due process and began their duel over incorporation of the Bill of Rights, Justice Reed labored to preserve a majority decision as to whether the Fifth Amendment's prohibition against self-incrimination was compatible with a California statute permitting a prosecutor to comment on an accused's silence at trial.

standing.[82]

B. Follower

The essence of the judicial function is choice.[83] Every member of the Supreme Court is continually confronted with the necessity of choosing between principles. Initially, he must choose between the principles proffered by competing litigants. Except in those increasingly infrequent instances where the Court is unanimous, he must then choose among the variegated panoply of principles governing the disposition and presentation once a decision as to the merits has been reached. At both of these stages, the personal impulse to preserve and record an individual position must be balanced against the diminution that attaches to a decision the further it recedes from unanimity, for it is an unhappy fact that a decision is more often judged by arithmetical rather than logical criteria.

When a Justice finds himself at odds with his brothers, the antinomies of tenacity and submission are activated. Fundamental convictions are not and should not be yielded lightly. The Court is the palladium of unorthodoxy, especially within itself. Its members have often stressed the institutional benefits that accrue to principled dissent.[84] But the demands of conscience are subjective unto the holder. They may be offset and overborne. The democratic principle that the validity of a policy is measured by the level of support it commands extends to the conference room. Submission to the collective opinion of colleagues is a homeostatic canon that benefits the Court, its reputation, and its effectiveness. It cannot be otherwise, lest an institution atomize into the unconnected and ineffectual fragments of its membership. At some point, the descent into anarchy must be arrested. Every member of the Court struggles to discover the harmonious median between the Scylla of pointless obstinacy and the Charybdis of needlessly sacrificing deeply-held beliefs. The line of demarcation is seldom clear and

82. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 215-19. *Accord*, C. HUGHES, *supra* note 41, at 52.

83. *See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

84. C. HUGHES, *supra* note 41, at 67-68; Beth, *supra* note 17, at 1086; Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation*, 37 A.B.A.J. 801, 863 (1951). *Contra*, Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904)(Holmes, J., dissenting).

often treacherous. The mental calculus is rarely static, even in ordinary cases. When the case is a "great" one and when one judge resists all his colleagues, the pressures for conformity are enormous. A Justice's response in such a situation is quite often the measure of the man.

By any standard, *Brown v. Board of Education*[85] was a great case. It took three years to reach the Supreme Court, where its manifold implications and importance caused it to be held over and reargued, so uneasy were the Justices over the fateful step they were about to take. A preliminary vote showed a bare majority in favor of overruling *Plessy v. Ferguson*[86] and its doctrine of "separate but equal" in public education. At this point, several Justices, Reed among them,[87] were reluctant to undertake this momentous course. Their threat to dissent was not an empty one.

The looming split galvanized the energies of the newly-appointed Chief Justice Earl Warren, who meant to have the Court united and unanimous when it declared that "in the field of public education the doctrine of 'separate but equal' has no place."[88] His labors to this end, and his ultimate success have been fully and movingly recounted.[89] One by one, the putative dissenters yielded to the array of arguments deployed by the Chief Justice. The last to capitulate was Stanley Reed.

The role of the sole dissenter was not unknown to Justice Reed,[90] but it was uncomfortable. Agonizing over his increasing isolation, he instructed his clerks to marshall every possible support for his stand.[91] The pressure for conformity mounted. Eventually, unanimity was achieved. Fully aware that he was participating in a death-blow to much of the culture that had nurtured him, Justice Reed submitted to the needs of the Court. He knew, as did his colleagues, that a premium attaches to a unanimous decision. For a case as important as *Brown*, the entire Court was painfully aware that opponents of the decision would seize upon the slightest hint of a break in the Court's monolithic front to justify and foment

85. 347 U.S. 483 (1954).
86. 163 U.S. 537 (1896).
87. R. KLUGER, *supra* note 45, at 595-96, 680.
88. 347 U.S. at 495.
89. R. KLUGER, *supra* note 45.
90. *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203, 238 (1948) (Reed, J., dissenting); McNabb v. United States, 318 U.S. 332, 347 (1943)(Reed, J., dissenting).
91. R. KLUGER, *supra* note 45, at 655-56, 691-93.

resistance. Every member of the Court knew that the silence produced by Reed's acquiescence was the sound of a moral and psychological weight shifting on its fulcrum and that the Court would be the beneficiary.

"For the good of the country, he put aside his own basis for dissent."[92] This was the eloquent observation of one of Justice Reed's clerks. It summarized Reed's evolution and the dilemma of a Justice in similar situations. Here a deeply held belief had surrendered to the demands for unity. But his acquiescence was a principled submission made not for base reasons of insecurity or bigotry,[93] but for the collective good of the Court and the nation.

C. Protector

Because the Supreme Court is the source of each Justice's authority, every member of the Court has a vested interest in preserving its strength and reputation. This imperative does not mean he must tamely and invariably submit to either precedent or a majority of his colleagues. To the contrary, the Court's history is replete with instances where one or more Justices have disproven the judicial equivalent of the maxim *vox populi, vox dei.*[94] Although dissent is the most common mode of expression for this impulse, a Justice who concurs as to ends but differs only as to means can use his greater area of agreement with the majority as leverage to persuade them to modify their collective posture.

Qualified acquiescence may only compound the confusion and further debase the currency of judicial decision. Justice Reed's sen-

92. *Id.* at 698.

93. Such a charge cannot be leveled against Justice Reed, who had joined the Court's demarché against segregation in public education, McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938), systematic exclusion of blacks from jury service, Avery v. Georgia, 345 U.S. 559 (1953); Cassell v. Texas, 339 U.S. 282 (1950); Patton v. Mississippi, 332 U.S. 463 (1947); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940), from the political process, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Lane v. Wilson, 307 U.S. 268 (1939), or discrimination in the incidents of interstate commerce, Henderson v. United States, 339 U.S. 816 (1950); Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948); Morgan v. Virginia, 328 U.S. 373 (1946); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944); Mitchell v. United States, 313 U.S. 80 (1941); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

94. "The voice of the people is the voice of God."

sitivity to the Court's institutional needs made him chary of such efforts. While on the Court, Reed wrote only 20 concurrences, less than 6% of the 339 opinions he authored. So the occasions when he publicly declared himself to be with the majority but not of them were reserved for the extraordinary case. The decision Justice Harlan F. Stone deemed "the most important opinion"[95] during his tenure provided such an occasion. The case was all the more remarkable because it arose only two weeks after Solicitor General Reed was sworn in as Mr. Justice Reed.

When the Erie Railroad Company asked the Supreme Court to review the favorable judgment secured by Harry Tompkins after he brought an action for negligence, it furnished the opportunity for Justice Brandeis to dismantle one of the most venerable but hotly disputed monuments of federal practice. The result of *Erie Railroad Co. v. Tompkins*[96] was that henceforth "in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written."[97] The Court thus overruled *Swift v. Tyson,*[98] which had held that the Federal Judiciary Act of 1789[99] did not encompass the decisions of state courts within the state "laws" which federal courts were bound to apply.[100]

The ground for the decision rather than the result is important here. Justice Brandeis could have decided the case on any of three possible grounds: (1) that *Swift v. Tyson* misconstrued the Judiciary Act, (2) that *Congress* had acted unconstitutionally in attempting to specify the substantive law applicable in federal courts, or (3) that the *Court* had acted unconstitutionally in ignoring the legitimate scope of state power. Justice Brandeis eliminated the second alternative,[101] leaving only the first and third courses. Put to a decision, Justice Brandeis chose the third, placing

95. A. MASON, *supra* note 39, at 476. Justice Black was even more expansive, terming it "one of the most important cases at law in American legal history." Black, *Address,* 13 Mo. B.J. 173, 174 (1942).

96. 304 U.S. 64 (1938).

97. *Id.* at 72-73.

98. 41 U.S. (16 Pet.) 1 (1842).

99. Ch. 20, 1 Stat. 92 (current version at 28 U.S.C. § 1652 (1977)).

100. The background, subsequent evolution, and difficulties of *Erie* are ably discussed in C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS 249-86 (3d ed. 1976).

101. 304 U.S. at 79-80.

the onus squarely on the Court.[102] Justice Brandeis condemned almost one hundred years of decisions as a course of conduct founded upon " 'an unconstitutional assumption of powers by courts of the United States.' "[103]

Justice Reed agreed that *Swift v. Tyson* deserved to be overruled, but he differed with the manner adopted by the majority to achieve this result. Merely announcing a new interpretation of the Judiciary Act would have been sufficient for him. This could have been done by admitting that the rule of *Swift*, whatever its abstract merit, had proved unworkable and therefore should be set aside. Alternatively, the Court could have proclaimed that it had belatedly discovered the "correct" construction of the Act originally intended by Congress. Whatever the rationale of statutory construction selected, Justice Reed thought it "unnecessary to go further and declare that the 'course pursued' was 'unconstitutional,' instead of merely erroneous."[104]

Although Justice Reed was much too polite to blazon it forth in the *United States Reports*, he had caught Justice Brandeis violating the most important of the Court's unofficial canons for avoiding constitutional issues, namely, that the currency of judicial and constitutional authority will be precisely calibrated to the minimum necessary for deciding a case. Justice Brandeis himself had given the rule its most famous expression only two years before he wrote the *Erie* opinion:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule

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102. "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." *Id.* at 77-78.

"Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers *by courts* of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' In disapproving that doctrine we . . . merely declare that in applying the doctrine *this Court and the lower courts* have invaded rights which in our opinion are reserved by the Constitution to the several States." *Id.* at 79-80 (footnote omitted)(emphasis added).

103. *Id.* at 79 (quoting Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1928)(Holmes, J., dissenting)).

104. 304 U.S. at 91 (Reed, J., concurring). This concern was not a transitory impulse. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 318 (1946)(Frankfurter & Reed, JJ., concurring).

> has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide *only* the latter.[105]

Erie presented the ironic spectacle of the most junior member of the Court reminding one of the most senior of his obligations to the Court. What was remarkable was the speed with which Justice Reed shed the perspective of an advocate and adopted that of a judge. Fresh from the trauma of the Court-packing debacle, this New Deal appointee was urging the Court to avoid the damage that would follow a self-flagellating admission that it had breached its responsibilities by pursuing an unconstitutional course of conduct for a century. Whatever the sincerity or accuracy of this public *mea culpa,* such a confession would only diminish public confidence, taint the Court's decisions during its "unconstitutional" period, and needlessly jeopardize the Court's future authority and effectiveness. The tenor of Justice Reed's *Erie* opinion reflected the perspective of one sensitive to, and cognizant of, the institutional needs and traditions of the Court.[106]

III. Off The Court

Scant attention was paid to Stanley Reed's retirement from the Supreme Court on February 25, 1957.[107] Most commentators focused on the field of likely successors and their respective philosophical orientations.[108] One person who did take notice was President Eisenhower, who offered to name Reed chairman of the Civil Rights Commission. Justice Reed declined because he had retained his judicial commission and the possible appearance of a conflict of interests between the two positions might, in his words, "lower re-

105. Ashwander v. T.V.A., 297 U.S. 288, 347 (1936)(Brandeis, J., concurring)(emphasis added). Justice Reed had particular reason to recall this decision. *See* text accompanying note 25 *supra.*

106. As a postscript, Justice Reed subsequently became one of the Court's leading authorities on the *Erie* doctrine. *See generally* Griffin v. McCoach, 313 U.S. 498 (1941); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Vandenbark v. Owen-Illinois Glass Co., 311 U.S. 538 (1941); Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938).

107. A notable exception was the sympathetic and perceptive column by Reed's longtime friend Arthur Krock. N.Y. Times, Feb. 3, 1957, § B, at 3, col. 1.

108. *E.g.,* N.Y. Times, Feb. 1, 1957, § L, at 12, col. 5. This situation replicated that of Justice Sherman Minton, who had retired from the Court five months before Reed, correctly prophesizing "There will be more interest in who will succeed me than in my passing." NEWSWEEK, Sept. 17, 1956, at 38.

spect for the impartiality of the Federal judiciary."[109] His caution was well founded, because he did continue his judicial service. Eventually, he heard more than sixty cases over the next decade while on temporary assignments to the District of Columbia Circuit Court of Appeals and the Court of Claims. Where there could be no hint of conflicting loyalties, such as with the Import-Export Bank and the Federal Board of Hospitalization, he was glad to serve.

During the twenty-three remaining years of his life, Justice Reed was a model of decorum. Unlike others retired from the Court, he refrained from attacks upon the Court, its work, or his former colleagues.[110] Nor did he attempt to influence them from the sidelines.[111] After his increasingly frail health ended his periodic stints in the lower courts, he and his wife moved to Huntington, New York, to be closer to his two attorney sons and their families. He died there on April 3, 1980.

IV. Judgment

The public prominence achieved by a Justice during his lifetime may be a deceptive indicator of his importance within the Court.[112] So it is with Stanley Reed. Lacking the restless curiosity

109. N.Y. Times, Apr. 4, 1980, § A, at 23, col. 1. This attention to the judicial proprieties was the product of several episodes touching Justice Reed's experiences when he stepped outside the judicial arena. Soon after he was appointed to the Court, Reed chaired a commission charged with the responsibility for making recommendations for civil service reform. The presence of Justices Frankfurter and Murphy preserved the appearance of rectitude. But it was after this service was completed and the final report submitted, see REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL SERVICE IMPROVEMENT, H.R. DOC. No. 118, 77th Cong., 1st Sess. (1941), that Justice Reed modified his willingness to undertake nonjudicial duties. This was partly the result of his being exposed to the well-publicized hostility of Chief Justice Stone to such extra-judicial assignments; A. MASON, *supra* note 39, at 705-15, 719-20; and partly to the controversy surrounding Justice Jackson's service as Chief United States Prosecutor at the Nuremburg war crimes trial. The change was apparent when Reed had to be subpoenaed to testify for Alger Hiss when his former subordinate was tried for perjury. Unlike some of his colleagues, Reed was scrupulous in avoiding personal contact with President Roosevelt once he was on the Court. W. SWINDLER, *supra* note 29, at 97.

110. Such attacks have run the gamut from the direct, Brynes, *The Supreme Court Must be Curbed*, U.S. News & World Report, May 18, 1956, at 50, and Whittaker, *A Confusion of Tongues*, 51 A.B.A.J. 27 (1965), to the oblique, O. ROBERTS, THE COURT AND THE CONSTITUTION 95 (1951).

111. Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

112. Justice Van Devanter, who was esteemed within the Court and virtually unknown

of Felix Frankfurter, the epigrammatic brilliance of Robert Jackson, or the inspired dogmatism of Hugo Black, he cast no giant shadow while alive. He does not loom large in retrospect and in death he seems fated to be studied only with reference to the larger personality and doctrinal conflicts on the Court. His probable fate is to be regarded as a mediocre cipher, interesting only as a pawn in the numbers game that constitutes much of the modern scholarship about the Court. Nevertheless, his service was useful in its time, and it retains an exemplary relevance.

Justice Reed's method of judging followed what Justice Frankfurter termed the empiric process.[113] He approached and decided each case according to its merits, without attempting to fit it within a pigeonhole of preconceived predilection. Because circumstances and consequences were weighty considerations, his responses were not predictable and he was never an automatic member of any bloc within the Court.[114]

These were his means. The ends to which they were devoted were a function of his time. If Justice Reed left the Court as he joined it, a "confirmed believer in government power when wielded discerningly in the public interest,"[115] this was because during his formative years government was an undisputed force for good. This orientation was particularly evident when, as in the privacy versus free speech dilemma, the benevolent use of government power could be reconciled with claims of individual liberty. Reed's typology of judging involved primarily synthesizing conflicting values in particular cases, finding the optimal combination of values

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outside it, serves as an example. A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 221 (1965); Frankfurter, *Chief Justices I Have Known,* 39 VA. L. REV. 883, 889 (1953). Justice Douglas may be proof of the converse of this proposition.

113. "[J]udicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable. But that is a very different thing from conceiving the results as *ad hoc* decisions in the opprobrious sense of *ad hoc.* Empiricism implies judgment upon variant situations by the wisdom of experience. *Ad hoc*ness in adjudication means treating a particular case by itself and not in relation to the meaning of a course of decisions and the guides they serve for the future. There is all the difference in the world between disposing of a case as though it were a discrete instance and recognizing it as part of the process of judgment, taking its place in relation to what went before and further cutting a channel for what is to come." Irvine v. California, 347 U.S. 128, 147 (1954)(Frankfurter, J., dissenting).

114. W. MCCUNE, *supra* note 12, at 62. *Accord,* J. HOWARD, MR. JUSTICE MURPHY 268 (1968).

115. R. KLUGER, *supra* note 45, at 211. *See also id.* at 242 for a similar if more emphatic statement of Justice Reed's attitude towards government.

in a given situation.

His talent for harmonization derived from a philosophical attitude that encompassed both the Constitution and the society it served. Like Edmund Burke, Reed found latent wisdom in the mere existence of time-honored practices and institutions. His juristic method included an element of social Darwinism by assuming that the tried and the true have a prescriptive right to continued allegiance. His view of the Constitution as an organic instrument centered on the fact that it does not condemn measures taken for reasons of expediency when combined with equity and utility. The flexibility of the Constitution implicitly recognizes experience as the engine for change and the guide for stable continuity. Expansion and contraction, experiment and conservation, boldness and prudence are the essence of governance. The democratic method of resolving problems is itself organic: the political branches operate as a computing principle to continually reassess and reset the equilibrium between the needs and demands of society. Justice Reed felt that legislative attempts to cope must be tolerated if not fostered by the judiciary unless a specific provision of the Constitution precluded passivity.

Within this framework, the personality of the man impacted on the performance of the judge. Unfailingly polite,[116] Reed was free from any tincture of self-importance or intellectual arrogance.[117] His personal modesty became a professional asset, permitting him to recognize and adopt the perspective of what best promoted the needs of the Court. His personality aided the unity that sustains the Court on two levels. When unanimity was advantageous for the Court, as it was in *Brown*, Reed's vanity was not an impediment to the advancement of the institutional good. This was a steadying force on a Court so divided into tesselated splinterings

116. *See, e.g.*, W. DOUGLAS, GO EAST, YOUNG MAN 303-04 (1974); J. FRANK, THE MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 257 (1958); R. KLUGER, *supra* note 45, at 595, 698; W. SWINDLER, *supra* note 29, at 133.

117. These were traits particularly appreciated by his colleagues; W. DOUGLAS, *supra* note 116, at 458-59; A. MASON, *supra* note 39, at 472, 476; E. GERHART, *supra* note 28, at 85, 133; although some of his Brothers may have tried to take advantage of Reed's non-assertive character. *Id.* at 274 ("Reed is said to be easily influenced and Black terrorizes Reed whenever he can."); R. KLUGER, *supra* note 45, at 585 ("Frankfurter . . . used [Reed] as an intellectual punching bag. . . ."). *Accord*, W. DOUGLAS, *supra* note 116, at 459. Nevertheless, the Frankfurter diaries give hints that Reed had a strong ego and a critical perception of his colleague's flaws. J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 181-82, 205, 270, 286-87 (1975).

and so riven with disagreement that it has come to be known as the Court of the "Wild Horses."[118] On a more prosaic level, he held himself aloof from inflamed tempers and personal disputes within[119] and without[120] the Court, refraining from the exchange of reciprocal billingsgate. Despite these distractions, Justice Reed laboured on, a paragon of dutiful service and "one of the work-horses of the Court."[121]

The Supreme Court works a kind of alchemy. There, small men have become great and great men have become giants. The Court can magnify strengths and weaknesses in a Justice's character, yet it rarely creates them. Stanley Reed did not set out to gain a place on the Supreme Court. He achieved that position by doing well and being content to do his best in whatever position he occupied. The colleagues of Mr. Justice Stanley Reed offered a fitting tribute upon his retirement. They saluted his dedicating "twenty-eight of the best years of [his] life to the nation. More could not be asked of anyone."[122] They were good years and his was a good and productive life.

118. P. JACKSON, DISSENT IN THE SUPREME COURT 221 (1969); A. MASON, *supra* note 39, at 574. The term was coined by Chief Justice Stone. *Id.* at 580.

119. *See* Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 672 (1944)(Black, J., concurring); A. MASON, *supra* note 39, at 765-69 (dispute involving letter of farewell to Justice Roberts).

120. E. GERHART, *supra* note 28, at 235-77 (allegation of misconduct by Justice Black from Justice Jackson).

121. H. ABRAHAM, JUSTICES AND PRESIDENTS 205 (1974).

122. 352 U.S. xiv (1957).