



# CONSTITUTIONAL BIRTH PAINS

*Richard A. Paschal*

Reviewing

WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION:  
THE UNITED STATES SUPREME COURT, 1941-1953*  
(Cambridge 2006)

**O**LIVER WENDELL HOLMES MAY NOT BE TURNING OVER in his grave, but his ghost is surely somewhat confounded by the fact that William Wiecek has produced this volume in the *Oliver Wendell Holmes Devise History of the Supreme Court* in less than fifteen years without handing off the assignment to someone else and without shuffling off this mortal coil. Given the annals of the Holmes Devise, this is no small feat.

When Holmes died in 1935, his will contained numerous bequests but the residuary clause left all remaining assets to the United States.<sup>1</sup> The devise was worth approximately \$263,000 in 1935 which, in today's dollars, would total over \$3.7 million. If this

---

*Richard Paschal teaches courses in constitutional law and politics at Georgetown University.*

<sup>1</sup> Last Will and Testament of Oliver Wendell Holmes, Jr., quoted in *Holmes Left Half of Fortune to U.S.*, N.Y. Times, Mar. 10, 1935, § 1 at 1 (“All the rest, residue and remainder of my property of whatsoever nature, wheresoever situated ... I give, devise and bequeath to the United States of America.”).

sounds odd or like poor estate planning, it was not for Holmes. After all, in an 1884 speech, Holmes implored his audience “to recall what our country has done for each of us, and to ask ourselves what we can do for our country in return.”<sup>2</sup> At the time, this devise was the largest unrestricted gift ever to the United States and President Franklin Roosevelt stated that it should be used for a noble purpose in honor of the man who gave it.<sup>3</sup> Congress soon enacted statutes to create a committee to address this question, to publish a memorial volume of Justice Holmes’ writings, and to establish a memorial garden in the District of Columbia. But nothing happened for twenty years. So begins the story of lassitude and delay.

In 1955, Congress renewed its call for some salutary use of the bequest by passing a statute to establish the Oliver Wendell Holmes Devise Fund and to create the Permanent Committee of the Oliver Wendell Holmes Devise.<sup>4</sup> The statute directed that the Permanent Committee prepare a history of the Supreme Court. Although it sounds ludicrous, given the subsequent history, to contemplate a single author for such a comprehensive history of the Court, Congress thankfully and with great prescience allowed the Committee the discretion to hire “a single scholar to carry the work to completion, or a number or succession of scholars to complete it.”

Following upon the heels of this congressional mandate, there was a brief flurry of activity. The Permanent Committee was formed in 1956 and, although he was not a member, Justice Felix Frankfurter both prodded Paul Freund to become editor in chief of the history volumes and solicited most of the scholars who originally agreed to sign on to the project. The volumes were to cover the history of the Supreme Court up through the end of Chief Justice Charles Evans Hughes’ tenure in 1941 and were to be organized around the tenures of the Court’s Chief Justices. With the exception

---

<sup>2</sup> Memorial Day Address (May 30, 1884), in 3 *The Collected Works of Justice Holmes* 462, 462 (Sheldon M. Novick ed., 1995).

<sup>3</sup> David Margolick, *Justice Holmes’ 1935 Bequest Remains Unfulfilled*, N.Y. Times, May 3, 1983, at D26.

<sup>4</sup> Pub. L. No. 84-246, 69 Stat. 533 (1955).

## *Constitutional Birth Pains*

of political scientist Carl Swisher, the pioneers on the project were all law professors: Alexander Bickel, Charles Fairman, Paul Freund, Julius Goebel, Gerald Gunther, George Haskins, and Phil Neal. All were established legal scholars, but Goebel, Haskins, and Swisher were the only ones who possessed Ph.D.s. Because of this and, more significantly, the fact that legal history and scholarship in 1956 was a more narrowly conceived enterprise than it became in subsequent decades, the Holmes Devise history was affected in two ways. First, with the exception of the Ph.D.s, most of the authors had never worked on monograph-length studies of the type contemplated – history projects which could draw a scholar into a virtually infinite number of primary and secondary materials. Second, the constricted intellectual focus of that generation of scholars was evident: “[W]riters whose primary vocation was law teaching in the 1950s were likely to focus on the Court itself, on case law, and to take what would now be described as an ‘internalist’ view of the history of the Court.”<sup>5</sup>

The Permanent Committee set its sights high in 1956. It was hoped that the volumes could be completed in four years and, in any event, by the 1965 contract deadline with the publisher, Macmillan & Company. The Permanent Committee intended for the multi-volume history to be “comprehensive, authoritative, and interpretive” as well as “self-contained and form an integrated whole.” Moreover, it anticipated that the monographs would focus on “the totality of the Court’s business” and that this would require “investigations [that] will reach far into collateral fields” which would educate readers on “the interactions between the Court and its cultural environment.”<sup>6</sup>

To say that none of these goals were achieved is an understatement, at least for the early volumes in the series. It is a twice- and thrice-told tale. None of the manuscripts were completed within

---

<sup>5</sup> Stanley N. Katz, *Official History: The Holmes Devise History of the Supreme Court*, 141 *Proc. Am. Phil. Soc’y* 297, 299 (1997).

<sup>6</sup> Annual Report of the Permanent Committee for the Oliver Wendell Holmes Devise 9 (1957).

four years and the first two published volumes did not appear until 1971.<sup>7</sup> Carl Swisher had completed his manuscript in 1964 but because of the “abject failure”<sup>8</sup> of Paul Freund to edit the work, the book did not come out until six years after Swisher’s death.<sup>9</sup> Stanley Katz, who was appointed to the Permanent Committee in 1976, was then selected to be a co-editor of the history in order to help speed up the process and to give Freund time to work on his own neglected volume. By the late 1970s, the delays had become so intolerable for a number of individuals that drastic steps were contemplated or taken. Alexander Bickel’s widow briefly considered filing a lawsuit to speed up the process and Daniel Boorstin, Librarian of Congress and ex officio chairman of the Permanent Committee, threw down the gauntlet by demanding that the authors submit what they had written, no matter what shape it was in. This action led to the withdrawal of Gerald Gunther and Phil Neal from the project. Paul Freund at one point claimed that he would be finished with his volume on the Hughes Court by 1986. But Freund died before he completed the task and the much-too-young Alexander Bickel died before he could finish the second volume assigned to him. That volume, on the Taft Court, has had a particularly unfortunate history. After Bickel died, it was passed to Benno Schmidt and then to Robert Cover, who also died at a much-too-young age, and, finally, to Robert Post. Despite the fact that 2006 is the fiftieth anniversary of the formation of the Permanent Committee, two volumes from the original plan have still not appeared on bookshelves.

As for the Permanent Committee’s goals for the multi-volume history to be interpretive, form an integrated whole, and elucidate the interactions between the Court and American culture, the re-

---

<sup>7</sup> Charles Fairman, *Reconstruction and Reunion, 1864-88, Part One* (1971); Julius Goebel, Jr., *Antecedents and Beginnings to 1801* (1971).

<sup>8</sup> Sanford Levinson, Book Review, 75 Va. L. Rev. 1429, 1430 n.2 (1989).

<sup>9</sup> Carl B. Swisher, *The Taney Period, 1836-64* (1974). In addition to these myriad delays and problems, there were special problems with the publisher about its pricing and distribution policies. Levinson, *supra* note 8, at 1430 n.2 & 1460.

## *Constitutional Birth Pains*

sults have been underwhelming. Given the fact that these volumes are part of the Holmes Devise and are stamped with the seal of the Supreme Court, many of the authors were overly (but understandably) burdened by a perception that they were writing “the” history of the Court and that such a history should not omit any detail. Putting to one side the idea that “the” history even exists for a given institution or time period, the authors of the early volumes favored encyclopedic treatments which were long on coverage and sources and yet short on synthesis and analysis. As reference works, they were valuable additions to the literature. But as interpretive works of legal history, most were sterile and bland. However, a change came with the participation of Boorstin, Katz, and new members on the Permanent Committee so that when the delinquent volumes were reassigned starting in the late 1970s, the directions given to the new authors were to write “reasonably sized, readable works organized around strong themes.”<sup>10</sup> The first of these, G. Edward White’s volume on the second half of John Marshall’s tenure, was an unqualified success in historical scholarship because it situated the Marshall Court culturally and contextually.<sup>11</sup> It was an externalist history of the legal and intellectual culture of the time rather than a narrow history of the cases and explication of the opinions found within the covers of the *United States Reports*.

Onto this stage steps William Wiecek and his contribution to the Holmes Devise history. This volume on the Stone and Vinson Courts was not included in the original plan set out by the Permanent Committee in the mid-1950s. The idea for expanding the project beyond the Hughes Court was increasingly tempting as more and more time elapsed. The idea was considered by the Permanent Committee but it was repeatedly rejected for two main reasons. First, the original volumes were so long in coming and in such disarray that Daniel Boorstin rejected any idea of expanding the project until substantial progress was made on them. Second, at least some members of the Permanent Committee were hesitant to commis-

---

<sup>10</sup> Katz, *supra* note 5, at 303.

<sup>11</sup> G. Edward White, *The Marshall Court and Cultural Change, 1815-35* (1988).

sion new volumes because studies on the Stone, Vinson, and Warren Courts were bound to be politically charged.<sup>12</sup> Once progress was made, though, and with the new Librarian of Congress James Billington as chairman of the Permanent Committee, the decision was made to expand the series in the early 1990s and William Wiecek was selected for the present volume. Morton Horwitz was subsequently chosen by the Permanent Committee to write the volume on the Warren Court. No decision has been made on when or if to commission a volume on the Burger Court.

Wiecek, Congdon Professor of Law and Professor of History at Syracuse University, has written an encyclopedic study of the Stone and Vinson Courts that is detailed and intellectually first-rate. While he makes out a convincing case that the Supreme Court in this era was in transition from the dated legal classicism interred between 1937 and 1941 to a more ambitious conception of what the modern Constitution should mean for both individual rights and institutional powers, his study does not seek to reorient or challenge our existing conceptions of the Stone and Vinson Courts. Nevertheless, it gives life to an underappreciated era of Supreme Court history and it is a volume worthy of our attention and continued consultation.



The Supreme Court during the Chief Justiceships of Harlan Fiske Stone and Fred Vinson has been extensively studied but it has often been belittled or even maligned for its contributions (or lack thereof) to American constitutional development. This is so, at least in part, because the Stone and Vinson Courts are overshadowed by the Courts which preceded and followed them.

The Hughes Court stands out in constitutional history both because of its role in the New Deal drama and because of the tentative steps it took in the field of non-economic liberties. On the latter point, the Hughes Court's increasing vigilance over the identification and protection of fundamental rights was exemplified by the

---

<sup>12</sup> E-mail from Stanley N. Katz to Richard A. Paschal (July 20, 2006) (on file with the *Green Bag*).

## *Constitutional Birth Pains*

recognition of rights in Justice Cardozo's *Palko* opinion which are "the very essence of a scheme of ordered liberty,"<sup>13</sup> by the bifurcated review of *Carolene Products*' Footnote 4,<sup>14</sup> and by the fact that the Court was "developing a speech-protective jurisprudence between 1931 and early 1937."<sup>15</sup> But the identification of the Hughes Court as one of the most consequential in American history primarily stems from its obstruction of New Deal programs in 1935-1937 and its eventual withdrawal of that challenge to federal and state regulatory power. For Bruce Ackerman, this was a transformative constitutional moment that accounted for constitutional change outside the formal amendment process set out in Article V and, as such, is one of only three in all of American history.<sup>16</sup>

Likewise, the Warren Court was "a historically unique Court operating during a historically unique era."<sup>17</sup> No other Court in the last century truly compares to the Warren Court's panoply of decisions, which provided for desegregated public schools, the reapportionment of legislative districts, breathing space for criticism of public officials, and protections for the accused in criminal proceedings. If the Warren Court is the point for comparison, it is not surprising that its predecessors look meek and irresolute in that light. As Wiecek suggests, the Stone and Vinson Courts' reputations have fared so poorly "in part because of a tradition of liberal historiography that has explained and legitimated the activism of the Warren Court by contrasting it with its predecessors." (p. 402)

The Stone and Vinson Courts are also frequently disparaged by observers who believe that opportunities for doctrinal growth during that era were never realized because of infighting among the Justices that the two weak and ineffective Chief Justices were unable to suppress. Even Chief Justice Stone's relatively sympathetic biographer concluded that "[h]e was totally unprepared to cope with the

---

<sup>13</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>14</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>15</sup> G. Edward White, *The Constitution and the New Deal* 163 (2000).

<sup>16</sup> Bruce Ackerman, *We the People: Foundations* 22-40 (1991).

<sup>17</sup> Lucas A. Powe, Jr., *The Warren Court and American Politics* 485 (2000).

petty bickering and personal conflict in which his Court became engulfed.”<sup>18</sup> And Chief Justice Vinson has generally been portrayed as ineffectual and intellectually over his head on the Court.<sup>19</sup> Indeed, after analyzing a typology of Chief Justices based on both task and social leadership, Wiecek suggests that “[t]o a great extent, the story of the Stone and Vinson Courts can be explained by the circumstance that both men were weak in both categories.” (p. 59)

This thesis is not new and it is not without support, but I remain unconvinced that the failings of Stone and Vinson as Chief Justices explain the divisions and deficiencies of the Supreme Court during this period. Moreover, I think Wiecek engages in a bit of hyperbole in the above quotation because at other points in the book he acknowledges that it was simply Stone and Vinson’s misfortunes to assume leadership over a group of opinionated individuals who were already on the Court and who would most likely not acquiesce or yield an inch to any Chief Justice. (pp. 61 & 399) It is certainly true that dissents and divided opinions flourished during this period, even when compared to the polarized Hughes Court in the 1930s. (p. 63) But the fissures were the result of the prickly people who occupied the seats on the Court as well as the novel and complex issues which were coming before them. The New Deal ushered in a new mindset where people looked to the federal government for assistance and protection from many of society’s ills and this unquestionably had an impact on the cases which made their way to the Court.<sup>20</sup> Those issues arrived at the Court’s doorstep precisely because they were intractable. In a legal universe where the implications of the bifurcated review suggested by Footnote 4 in *Carolene Products* were being confronted by the Justices and where the First Amendment’s Free Exercise and Establishment Clauses were before the Court essentially for the first time, it is unsurprising that there were razor-thin majorities, numerous dissents, and even changes of

---

<sup>18</sup> Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* 795 (1956).

<sup>19</sup> Roger K. Newman, *Hugo Black: A Biography* 366 (2d ed. 1997).

<sup>20</sup> William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940*, at 330-35 (1963).



## Constitutional Birth Pains

heart over time in cases like *Gobitis*, *Jones v. Opelika*, *Barnette*, *Everson*, and *Zorach v. Clauson*.<sup>21</sup>

It is against this background that Wiecek is writing. Although he asserts that the Supreme Court during this era failed to articulate a thoroughgoing rationale for the exercise of judicial power, Wiecek concludes that the transition from a fixed, static constitutionalism to the modern Constitution's preferred freedoms and institutional orderings took place between 1941 and 1953.

The starting point for this study is Footnote 4 of *Carolene Products*. It was the lodestar for the Justices during this era in the Court's attempt to explain its role in the American polity now that it had disavowed energetic review of economic policies. The ongoing debates on the Court over Footnote 4 were about whether there was any legitimate way to distinguish judicial review of economic regulation from judicial review of non-economic individual rights. For a Court that did not want to retreat on civil liberties, how to justify bifurcated review? The first paragraph of Footnote 4 suggests that the presumption of constitutionality given to many types of legislation may not be warranted "when legislation appears on its face to be within a specific prohibition of the Constitution."<sup>22</sup> This is the origin of the "preferred position" for rights contained in the first ten amendments which are, unlike liberty of contract, textually based. Their protection, thus, would seemingly be a more legitimate enterprise for the Court. Footnote 4's second paragraph suggests a role for the Court as a champion of the democratic process, while Paragraph 3 suggests a more aggressive posture for the judiciary in policing discrimination against disfavored minorities who might never be able to gain protection through the majoritarian political process.

---

<sup>21</sup> *Zorach v. Clauson*, 343 U.S. 306 (1952); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Jones v. Opelika*, 316 U.S. 584 (1942); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>22</sup> *Carolene Products*, 304 U.S. at 152 n.4.

Wiecek also focuses on Footnote 4 because it marked the main doctrinal cleavage among the Justices, a “divisive force among the Brethren, driving a wedge between Frankfurter and Jackson, who repudiated it, and the Stone-Black-Douglas group.” (p. 124) Although Justice Black originally refused to sign on to Footnote 4, he soon accepted its logic and the idea of a preferred position crept into his reasoning and later became explicit. (pp. 158 & 243) Frankfurter, on the other hand, regarded its talk of presumptions as little more than the mechanical jurisprudence of a bygone era. Presumptions and the preferred position removed the judge’s ability to balance interests, thus oversimplifying “the delicate discretionary process of choosing among values and balancing legislative power against the claims of individual freedom.” (p. 135)

While these debates among the Justices, especially between Black and Frankfurter, have been detailed in other studies – often for the rhetorical fireworks rather than any particular light they shed on the Court – Wiecek uses them to elucidate doctrinal and jurisprudential divisions on the Court. The cases which especially benefit from this approach are *Bridges v. California* (pp. 155-59), *Beauharnais v. Illinois* (pp. 189-93), the *Flag Salute Cases* (pp. 221-36), *Everson v. Board of Education* (pp. 261-73), the Willie Francis Case (pp. 498-511), and, of course, *Adamson v. California* (pp. 511-23).<sup>23</sup>

The specter of war loomed large throughout the period. Wiecek’s review of World War II cases on issues such as naturalization, the definition of treason, the status of conscientious objectors, and First Amendment rights of association and speech leads him to conclude that “in the clash of arms, the laws often spoke out eloquently.” (p. 287) But he rightly notes the glaring exception – the internment of Japanese-Americans – and the bungled handling of *Ex parte Quirin*.<sup>24</sup> He also does a fine job in recounting the racism infect-

---

<sup>23</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Adamson v. California*, 332 U.S. 46 (1947); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Louisiana ex rel. Francis v. Resweber* (the Willie Francis Case), 329 U.S. 459 (1947); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Bridges v. California*, 314 U.S. 252 (1941); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>24</sup> 317 U.S. 1 (1942).

## Constitutional Birth Pains

ing the decision makers with regard to the internment of the Nisei, and the government's dishonest and despicable tactics in representations made to and withheld from the courts. The chapters on the Cold War are especially strong as he documents how the "fires of anticommunism" (p. 546) overwhelmed constitutional protections and values. The *Dennis* case brought the linear development of First Amendment speech doctrine to a standstill through its return to the bad tendency test. Wiecek pays particular attention to the vagaries of the Vinson and Frankfurter opinions: "Both were equivocal and ambivalent, arguing both sides of the street without much apparent awareness of the conflicts and tensions that generated." (p. 572)

The last chapters focus on equal protection doctrine and civil rights. Wiecek reminds us how involved and far-sighted the Court was in the years before *Brown v. Board of Education*, recalling the white primary cases, the difficulties posed by state action in *Screws v. United States*,<sup>25</sup> *Shelley v. Kraemer*,<sup>26</sup> and the higher education segregation decisions. These chapters helpfully integrate discussions of Fourteenth Amendment history, the different opinions within the NAACP on tactics, and even the intellectual value of Tussman and tenBroek's too-little-remembered article on equal protection.<sup>27</sup>

One strength of the book worth mentioning is its balance of history and doctrinal analysis. As a lawyer and a historian, Wiecek brings both skills to bear in his dissection of the Justices' reasoning and in providing a historical context for each subject. For many of the chapters on doctrine, Wiecek helpfully devotes at least a few pages to the history, for example, of the First Amendment's speech protections or the history of incorporation leading up to *Adamson* or equal protection from the Civil War to the 1940s.

Given that this book is, at over 700 pages, thorough in its coverage of doctrine, it might be the height of folly to take the author to task for subjects left out or slighted. However, one area is worth

---

<sup>25</sup> 325 U.S. 91 (1945).

<sup>26</sup> 334 U.S. 1 (1948).

<sup>27</sup> Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949).

mentioning: administrative law. While Wiecek has not completely ignored the subject – he does profile Frankfurter’s confidence in administrative expertise (p. 484-85) – it strikes me that this potentially fertile ground has not been exploited to its fullest. Administrative agencies became common during this period and at this time the general view of them – one shared by Frankfurter, as Wiecek points out – was that they were run by neutral experts untainted by political considerations. In the 1940s, the Court continually limited the ability of the courts to review administrative decisions<sup>28</sup> and, after the 1946 enactment of the Administrative Procedure Act, the Court similarly narrowed its own ability to question appellate courts’ review of factual determinations made by administrative agencies.<sup>29</sup> The assumptions and implications of administrative law for the Court as a whole may have merited more attention precisely because the subject highlights the institutional role of the Court in the years after 1937.



Wiecek begins and ends with two observations that he repeats and elaborates throughout the book. First, he maintains that the constitutional moment of 1937 signaled the end of classical legal thought. Second, he argues that the Supreme Court’s key failure during these years was its inability to formulate a jurisprudential theory justifying its role and the rule of law in this new era. While these views are certainly tenable, I would suggest that Wiecek has overstated his case in a way that leads to unrealistic expectations about the Court and constitutional theory in our post-Realist world. We should heed Aristotle’s reminder to “look for precision in each class of things just so far as the nature of the subject admits.”

Classical legal thought, as set out by Wiecek, was a comprehensive jurisprudential worldview which legitimated courts and the rule

---

<sup>28</sup> *Board of Trade v. United States*, 314 U.S. 534, 548 (1942) (“We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.”).

<sup>29</sup> *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502-03 (1951); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951).

## *Constitutional Birth Pains*

of law. Legal classicism predominated from the 1890s until the 1930s. It embodied the declaratory theory of law where law was not made but merely discovered by judges. Classical legal thought maintained that “legal rules were determinate, neutral, and apolitical. They were known or could readily be discerned; they were objective, existing ‘out there,’ as it were, innate in the social order.” (p. 14) This belief came under persistent and withering attack from the likes of Holmes and Pound and Brandeis and Cardozo. But it was only with the Great Depression and the Court’s 1936 opinions obstructing government efforts to address the economic and social dislocations of the time that it became clear that legal classicism was simply a cover for certain Justices’ personal beliefs.<sup>30</sup> For Wiecek, the Court’s turn in 1937 signaled the death of legal classicism.

While it is accepted that something changed in 1937, were narrow conceptions of the federal commerce power and the states’ police powers the sum total of classical legal thought? Or were these only parts of a larger theory which might have averted death? Wiecek’s own understanding of legal classicism is quite broad. He argues that it “justif[ied] judicial review and the results of judicial power” (p. 14) and that, moreover, it was the underpinning for the rule of law and “validated law’s claims to obedience.” (p. 442) To the degree that positivism and textualism and even originalism are still with us and claim to avoid value-laden adjudication, I see the remnants of faith in what Wiecek terms legal classicism. But, like many others, I would suggest that the foundations for the rule of law do not come from the Constitution or the Court, but are extra-legal and must be located in an ultimate rule of recognition.<sup>31</sup>

Wiecek’s second theme is the failure of the Stone and Vinson Courts to fill the vacuum left by the death of legal classicism, that is, to delineate a comprehensive theory legitimating the Court’s role in the American polity and to justify the bifurcated review suggested in *Carolene Products*. He concludes that the “Court of 1941-53 was un-

---

<sup>30</sup> See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *U.S. v. Butler*, 297 U.S. 1 (1936).

<sup>31</sup> H.L.A. Hart, *The Concept of Law* 100-23 (2d ed. 1994).

able to identify that source of legitimacy, and in that sense, it failed.” (p. 709) It has been a common criticism.<sup>32</sup>

To maintain that the greatest shortcomings of the Stone and Vinson Courts were the inability to find a “jurisprudential replacement” (p. 440) for classical legal thought and the failure to set out an unsailable theory of judicial review is to expect too much from Justices and the Court. I do not deny that the Court’s inability after 1937 to justify its role was both a near- and long-term failure. However, no one to this day has set out a theory of law or judicial review which is entirely convincing or which can duplicate the success of legal classicism (which succeeded because it went unchallenged for so long). Although Wiecek acknowledges the point (p. 6), why should this ongoing deficiency be placed at the doorstep of the Stone and Vinson Courts? The belief in legal formalism was so complete that its faults were totally obscured. Today, in the post-Realist world, we are all jurisprudential skeptics and it is little wonder that no “replacement of comparable authority” (p. 4) has been found. Legal theory will never again accomplish what it did during the era of legal classicism. For all the momentous successes of the Court between 1941 and 1953, the greatest failures of the Stone and Vinson Courts were not the Justices’ shortcomings on theory but their egregious missteps in the cases involving the internment of Japanese-Americans, the Cold War speech cases such as *Dennis*, and the execution of Willie Francis. There were ample legal theories and doctrines at hand in those cases but the Justices still were not able to navigate their way to sound decisions.



---

<sup>32</sup> See, e.g., Mason, *supra* note 18, at 576; Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969*, at 211 (1972).