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YOUR librarian has tried to find escape from political oratory and the summer's heat by rereading Warren's "History of the Supreme Court of the United States."

Since that work appeared in 1923, our Supreme Court has passed through one of the most eventful periods of its history. The Minnesota Moratorium case, the Gold Clause case, the Railroad Pension case, and the N. R. A. and A. A. A. cases have thrown a bright light of publicity upon its work.

One theory that is dinned into the public mind by the current newspapers and magazines, and even by some college professors, is that a study of the politics and personality—yes, even of the comparative personal wealth—of the judges who now sit upon that court is of more importance in predicting their decisions than an examination of the Constitution or of the law governing its interpretation.

This has been called "the breakfast theory of jurisprudence," as though momentous decisions were dependent upon what a judge ate at breakfast. A Freudian touch frequently appears in such analyses of the judge's character. In reply someone has suggested that if this theory prevails, the time may come when Twiss's story of Lord Eldon's senile laughter on seeing his servant girls strive not to show their legs as they descended the ladders during the fire at his castle may, in years to come, be cited on a parity with his judicial opinions.

We hear much of the Baptist parsonage as the background of the Chief Justice's judicial opinions or of the Oriental cast of Judge Cardozo's thought. We hear of "ultra capitalistic leanings," "the predominance of Republicans upon the federal bench;" we hear of liberal judges and conservative judges. We hear that the process of judicial interpretation of the Constitution is legislative rather than judicial, and that expert economists would be better fitted than lawyers to perform it. But we hear little or nothing of the Constitution which is being interpreted or of the great body of constitutional doctrines by which such interpretations are made.

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Warren's "History of the Supreme Court" is an excellent antidote for this mis-emphasis. From it, a devastating brief could be written in opposition to the "breakfast theory." The decisions of men appointed to that bench for political reasons have been a crushing disappointment to their sponsors. The court has been violently nonpartisan, unless one counts partisanship for the Constitution as a fault. Many times its decisions have thwarted the cherished designs of the President who appointed the judge rendering the decision. Many judges have concurred in decisions permitting action contrary to their own deepest political philosophy.

In 1804, at the height of his controversy with the court, Jefferson had his first opportunity to fill a vacancy. Gallatin wrote the President, "The importance of filling this vacancy with a Republican and a man of sufficient talents to be useful is obvious." Jefferson appointed William Johnson, a stalwart Republican.

A few years later, in Jefferson's great battle to enforce the Embargo Act over the fighting protest of the New England states, he instructed the collectors of all ports to detain *all* vessels loaded with provisions regardless of their alleged destination. It was then Mr. Justice Johnson who issued a mandamus to the collector of the port of Charleston to allow clearance of a vessel loaded with rice and bound for Baltimore. Justice Johnson held Jefferson's instructions to the collector to have been illegal and unwarranted by the statute. Warren says:

> "And this young Republican Judge, then only thirty-six years old, and only four years after his appointment on the Supreme Bench by a Republican President, used these notable words of warning from the Judiciary to the President: 'The officers of our government from the highest to the lowest are equally subject to legal restraints.' "

Perhaps the climax of Jefferson's party's war with the court came in *Cohens v. Virginia,* 6 Wheat. 264, on the question of whether in a criminal case the Supreme Court could issue its writ of error in which the Commonwealth of Virginia, at the instance of Cohens, was "cited and admonished to be and appear at the Supreme Court of the United States."

Feeling ran high. The *Richmond Enquirer* said, "The very title of the case is enough to stir one's blood." Mr. Justice Johnson, much to Jefferson's disgust, joined with his brethren on the bench to sustain the jurisdiction of the court. Eleven days later Justice Johnson delivered the opinion in *McClurg v. Tilliman,* 6 Wheat. 598, denying the right of a state court to issue a writ of mandamus to a federal official. The *Richmond Enquirer* then said, "Was this Judge one of those who formerly passed for a Republican? Was he raised to the Bench by Thomas Jefferson on account of his reputed attachment to the principles of '98 and '99?"

And so has it always been. President Jackson appointed five new Justices, including a new Chief Justice. The *Democratic Review* said in 1838, "The late renovation of the constitution of this august body, by the creation of seven of the nine members under the auspices of the present Democratic ascendancy, may be regarded as the closing of an old and the opening of a new era in its history." But no new era opened in the way that the Democrats hoped. The doughty General in the White House was soon sending for his appointees and berating them for their opinions. The new Chief Justice (Taney) rendered the opinion of the court in *Holmes v. Jennison,* 14 Pet. 540, upholding the exclusive authority of the Federal Government in foreign relations and denying the power of a state to surrender to a foreign nation a fugitive criminal. Thereupon, his Democratic brother, James Buchanan, said in the United States Senate, "I must say, and I am sorry in my very heart to say it, that some portions of his opinion in the case are latitudinous and centralizing beyond anything I have ever read in any other judicial opinion."

Again, when Judge Story held the Pennsylvania Fugitive Slave Act unconstitutional in *Prigg v. Pennsylvania,* 16 Peters 539, Warren reports:

> "For his part in the 'ignoble compliance with the slaveholders' will' Judge Story was hotly assailed at the North; but such criticism could not perturb a Judge who had penned to a friend the following noble words: '. . . You know full well that I have ever been opposed to slavery. But I take my standard of duty as a Judge from the Constitution.' "

In the forties a case full of political dynamite came before the new Democratic Court. The Democratic or Loco Foco party enthusiastically supported Thomas W. Dorr of Rhode Island in the Dorr rebellion. In Rhode Island he was convicted and imprisoned for treason. His cause became distinctly a party issue. The Supreme Court, after prolonged argument amidst intense political excitement, refused to interfere. Warren says, "By this decision, the Court . . . proved its determination to withstand appeals to any partisan views which it might be supposed to hold."

Again, in the sixties, President Lincoln appointed a majority of the court—among them his dear personal friend, David Davis. And it was David Davis who delivered the opinion of the court in *Ex Parte Milligan,* 4 Wall. 2, holding Lincoln's military courts illegal and their action void. The *National Intelligencer* said, "The hearts of traitors will be glad by the announcement that treason, vanquished upon the battlefield and hunted from every other retreat, has at last found a secure shelter in the bosom of the Supreme Court."

But are there not decisions of the Supreme Court on strict party lines? Yes. In the eighteen years of Chief Justice Fuller's regime (1892-1910) there was one, and only one, such decision. In that case *(Snyder v. Bettman,* 190 U. S. 249) by a strict party vote the court held that the federal estate tax could be collected on a bequest to the municipality. As Warren points out, the decision will not become of great importance "until the people of the United States have become far more eager to make bequests to municipalities than they are today." Certainly the division on party lines was wholly fortuitous.

Warren summarizes:

> "Time and time again it has been proved—and to the great honor of the profession—that no lawyer, whose character and legal ability would warrant his appointment to that lofty tribunal, would stoop to smirch his own record by submitting his judgment to the political touchstone; and no President has dared to appoint to that Court a lawyer whose character and ability would not meet the test."