CHAPTER 9

SLEEPING GIANT

For much of American history, the Supreme Court was relatively quiescent. After the Revolution, after the failure of the Articles of Confederation, the U.S. Constitution was ratified. The country had a new operating system, dividing power between nation and states, and separating power at the national level among the three coequal branches of government. At the beginning, it was inconceivable that the justices would be the ones to declare new constitutional rights in that system. Until *Marbury v. Madison* in 1803, the Court even lacked authority to strike down acts of Congress, or acts of the president, as unconstitutional. Such authority, though suggested in the Federalist Papers, is nowhere stated in the Constitution. It was a seizure of power that Chief Justice John Marshall took upon himself, based on what he said the Constitution implied, as well as on the example that some state courts had already provided when it came to state statutes. Though not viewed at the time, or since, as especially controversial, Marshall's assertion of "judicial review" remained the most consequential instance of "judicial activism" in the Court's history. It is there that the rhetoric of "judicial supremacy" was born.

The other branches acquiesced in Marshall's power grab. But such assent was based on the expectation that the justices ruled on principle rather than whim. It had to be that way because the Court possessed neither sword nor purse, as Alexander Hamilton had famously written. Nor did the justices have the imprimatur of the ballot box. Securing their authority from principle ideally gave them special constitutional legitimacy—if they used the authority carefully and as long as they seemed to be acting neutrally.

Over the course of most of the 19th century, as the Court went about ascertaining its role, the justices confined their decisions mostly to striking the proper balance between federal power and state sovereignty. In 1810, in *Fletcher v. Peck*, the Court for the first time invoked the Constitution to invalidate a state law. Six years later, the justices ruled they had the power to review state court decisions if they involved federal law. Most important in this run of decisions, in 1819 the Court in *McCulloch v. Maryland* unanimously upheld Congress's power to charter a national bank and declared that states were helpless to tax it. Citing the Necessary and Proper Clause, but reading between the lines of the Constitution in its entirety, Marshall wrote: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

The thrust of the early rulings wasn't about uncovering new substantive rights that were unenumerated in the Constitution, though the Court did make an occasional excursion into that minefield. In *Fletcher*, for example, the issue was whether the State of Georgia could interfere with a private contract. The justices said it could not, in part because the Constitution forbade any state from "impairing the obligation of contracts." But the Court also said "natural law" and "general principles which are common to our free institutions" restrained the state. Although such fuzzy language seemed an invitation to judicial freelancing, the Marshall Court stuck to its two main goals: solidifying the Court's institutional role and establishing federal power in a time of rising sectional fury over slavery.

It was not until the calamitous *Dred Scott v. Sandford* decision in 1857 that the Court veered from refereeing only the boundaries of its own supremacy. Under Chief Justice Roger B. Taney, the Court interposed itself directly into the substance of a political dispute. Since colonial days, the country had struggled with the social, economic, moral and electoral challenges presented by slavery. One key congressional effort to defuse conflict was the Missouri Compromise of 1820, which excluded the spread of slavery to certain American territories. By a 7-to-2 vote, the Court held the compromise unconstitutional—the first time since *Marbury* that it struck down a federal statute. According to Taney, the Missouri Compromise denied slaveholders a personal property right. That, he ruled, was a violation of "due process," even as he also left unquestioned that blacks were "beings of an inferior order, and altogether unfit to associate with the white race."

Universally considered by scholars as the Court's worst decision, *Dred Scott* inflamed abolitionist sentiment; set Abraham Lincoln on a path to his House Divided speech and propelled him to the presidency; and culminated in Fort Sumter four years after the ruling. (The actual ruling was effectively overturned by the Civil War itself, as well as by the passage of the Thirteenth, Fourteenth and Fifteenth Amendments in the five years after Appomattox.) In terms of constitutional doctrine, *Dred Scott* also represented the Court's first embrace of what came to be known as "substantive due process." The Due Process Clause of the Fifth Amendment states that no person may be "deprived of life, liberty or property" by the federal government "without due process of law." After the Civil War, the same open-ended language was added to the Fourteenth Amendment to constrain states. Before *Dred Scott*, it had generally been accepted that due process was procedural in nature—a ban on capriciousness, typically in matters of criminal prosecution. Before individuals could be incarcerated or executed, they were due such protections as notice, opportunity to be heard, and a neutral tribunal.

But that was it. The controlling word in "due process" had been "process." *What* the government could punish, or how it could otherwise treat you—say, by enslavement, or decades later, preventing you from getting an abortion or marrying someone of the same sex—seemed to

have nothing to do with due process. The constitutional inquiry was about permissible means—*how* and *when*—rather than ends. *Dred Scott* began to change that. Now, when the Court determined that fundamental freedoms were implicated, due process could be used to grant substantive rights—even if the Constitution didn't explicitly mention them. There were some "liberties" so basic that no process would suffice to take them away. In *Dred Scott*, due process perversely meant the liberty of Americans to own slaves—surely an oxymoron. "Substantive due process" itself seemed a contradiction in terms—"sort of like green pastel redness," as the 20th-century constitutional scholar John Hart Ely put it.

THUS DELIVERED, SUBSTANTIVE DUE PROCESS remained dormant until the Progressive Era, nearly 50 years later. With the rise of cities and industrialization came laws regulating working conditions. Just after the turn of the century, in *Lochner v. New York*, the justices threw out a state statute setting maximum hours for employees in the baking industry. The owner of the Lochner Home Bakery sued, citing the Fourteenth Amendment's Due Process Clause. A 5-to-4 Court ruled that the law interfered with both an employer's and an employee's "liberty of contract." Only statutes designed to bar contracts to use property "for immoral purposes" or other "unlawful acts" were permissible. "Liberty" was coming to mean far more than protection from arrest and imprisonment; according to the Court, liberty encompassed broader values, which were up to the justices alone to identify and bless.

In dissent, Oliver Wendell Holmes Jr. ridiculed the Court for enshrining "an economic theory which a large part of the country does not entertain." He chastised his colleagues for encroaching on "the right of a majority to embody their opinions in law." Much as judges might think laws prohibiting commerce on Sunday or usury were "tyrannical," the Constitution didn't require their invalidation. Holmes's complaint wasn't over the results the Court reached—it was that the Court was involved at all.

Years later, Justice Stevens called Holmes's two-paragraph dissent

"the most influential" in the Court's history. While some commentators have tried to defend *Lochner* as nothing more than neutral skepticism about government meddling in the affairs of individuals, the prevailing view remains that *Lochner* reflected the Court's values-laden "capitulation to big business" at the dawn of the modern age. Robert Bork himself called *Lochner* "the symbol, indeed the quintessence, of judicial usurpation of power." In substantive due process, the Court had created a whole new line of reasoning under which the justices could overturn legislation in favor of their own values.

For the next three decades, the Court cited *Lochner* in striking down nearly 200 state and federal laws as violations of "liberty" afforded by due process. Many of the laws were aimed at promoting worker health and safety, including legislation on child labor and minimum wages. Once in a while, the justices also rejected statutes that infringed on personal, rather than economic, rights. The most prominent examples were laws restricting foreign-language education (*Meyer v. Nebraska*) and requiring students to attend public schools (*Pierce v. Society of Sisters*), struck down as violations of substantive process; both, though, could have been decided simply under First Amendment principles protecting religion and expression. But cases like *Meyer* and *Pierce* were the exceptions. It was the laissez-faire capitalism sanctioned by *Lochner* that helped to bring on the Great Depression, beginning in 1929.

FDR's landslide election in 1932 signaled a turning point in the federal government's attitude toward regulation. As part of FDR's New Deal, Congress enacted a wave of laws to boost the economy, to reform the financial system, and to provide relief to the unemployed and the poor. But in its own surge, the Court pushed back, ruling that some of the legislation was an unconstitutional expansion of federal power. In 1935, in *A.L.A. Schechter Poultry Corp. v. United States*, the justices threw out the National Industrial Recovery Act, a centerpiece of the New Deal. Five other times that year and the next, the Court declared unconstitutional other New Deal legislation, along with a New York law on wages.

Roosevelt retaliated by proposing the Judicial Procedures Reform Bill of 1937. Better known as the Court-packing plan, it would have allowed

presidents to appoint a new member of the Court, up to a maximum of six, for each sitting justice over the age of 70½. (The number of justices is set by Congress, not the Constitution.) Bipartisan objections—that the president was threatening the Court's independence, and that the Court hardly needed more manpower—meant the bill went nowhere in Congress.

Within two months, however, Roosevelt's intimidation tactics apparently had worked—not on Capitol Hill but at the Court itself. A group of conservative justices, dubbed by the press the Four Horsemen, had led the resistance to the New Deal. The fifth vote was often provided by Justice Owen Roberts. But in *West Coast Hotel Co. v. Parrish*, upholding a minimum-wage law in Washington State, Roberts reversed course. This was the so-called switch in time that saved nine (though there's no conclusive evidence he did so because of the Court-packing plan, and some evidence the timing was coincidental). The Court had surrendered to the New Deal.

FDR, in office until 1945, ended up getting to fill all but one of the nine seats on the Court—all after he proposed to pack the Court. The *Lochner* era was dead. So, too, was the idea of substantive due process, at least in the realm of business regulation. Liberals exulted. Their victories in the cause for economic justice were secure. No longer would the justices substitute what seemed to be their own policy preferences for those of the people as expressed in legislative majorities. Conservatives despaired they had lost a mechanism by which to accomplish at the Court what had been denied in the ordinary course of politics.

The doctrine of substantive due process wasn't entirely dead. For example, in *Skinner v. Oklahoma*, when the Court in 1942 struck down a state law allowing compulsory sterilization of certain repeat-offender felons, Justice Douglas spoke of "fundamental" freedoms. But ultimately the Court overruled the law because it violated the Equal Protection Clause, since not all three-time felons were subject to sterilization. It wasn't until the 1960s that substantive due process came back in a new form, when the Court used it to scrutinize not legislation on economics but reproductive freedom. In the interim, while the justices by and large

stayed out of the political bog, they twice intervened decisively. One case was notable; the other produced the most epic ruling since *Marbury*. Both were reasonable rulings, but their significance lay not only in the result but in the interventions themselves.

On April 8, 1952, in the middle of the Korean War, President Harry Truman seized control of most of the steel mills in the United States. He did so to avert a nationwide strike of steelworkers, which he had concluded would endanger the war effort. Truman based his executive order not on any specific statute but on authority implied in "the aggregate of his powers" in the Constitution, especially those that made him commander in chief of the armed forces. Two months later—a remarkably short time frame in constitutional litigation—the Court ruled that the president had exceeded his authority and commandeered that of Congress. Seizing private property in wartime "is a job for the nation's lawmakers, not for its military authorities," Justice Hugo Black wrote for the 6-to-3 majority. "In the framework of our Constitution, the president's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."

In a prophetic concurrence, Justice Robert Jackson acknowledged—and warned of—potential congressional timidity in the face of executive "personality" and "prestige." "I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems," he wrote. "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up." In justifying the Court as arbiter, Jackson made clear that the other branches couldn't be left to their own constitutional devices to settle a political clash. For Jackson and others in the majority, the Court had to be the branch to resolve it. (In an analogous case