Panel Discussion - John Anderson’s Presentation
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ANTHONY CHASE: Thank you very much, John. All of our special guests are given the opportunity to amend their remarks for the record or enlarge upon them in any way they like before these proceedings are published. But what you provided us is more than sufficiently stimulating for a brief discussion.

One of the nice things about having legislators, judges, prosecutors, and people from the real world into law school is that their comments have a tendency to force the parameters outward from our normal discussion of constitutionalism. Your distinction, John, between formalism and functionalism, a separation or dichotomy which has been given many different meanings in modern legal culture, is one of those that is very helpful. If we have a formalistic approach to American politics, for example, on the surface we will see only Democrats versus Republicans. But, as you point out, the split in American politics is increasingly one between the executive and legislative branches of government which, in some ways, displaces the party oppositional dichotomy. We need only recall the Presidency of Lyndon Johnson in the period of the Vietnam War to see how readily Democrats play the role of the party of the executive, or to see that perhaps the functions of executive versus legislative run deeper than those of the political parties’ ideology. A formalistic analysis of British politics isolates the Labour Party versus the Conservative Party, but as the most recent elections made transparent, a functionalist analysis suggests that it is increasingly London and the Southeast of England versus Scotland, Wales, and the Mining Country of the North. It is a very different view than one gets from the surface of politics. In Latin America and in Africa there are also surface formalistic analyses, but a deeper functional analysis might reveal opposition based on class, race, and a host of other factors.

I just offer this comment. How do you recognize, let alone recon-

* The panelists included Anthony Chase, Professor of Law, Nova Center for the Study of Law; Steven Wisotsky, Professor of Law, Nova Center for the Study of Law; Scott Mager, attorney, the Law Offices of Scott Mager, P.A.; Jerry Sessions, II, associate, Ullman & Ullman, P.A.; John B. Anderson, Distinguished Visiting Professor, Nova University Law Center; and John T. Noonan Jr., Judge United States Court of Appeals for the Ninth Circuit.
icle, forces pitted against each other, revealed by a functionalist analysis, yet still within the structure of a formalist apparatus for processing politics—for example, constitutionalism? Recall that there is nothing in the United States Constitution about political parties. Creativity, perhaps the kind you suggest in outline, is not encouraged—we might even regard all politics as an act of creation.

STEVEN WISOTSKY: It is a privilege to follow John Anderson, whose public career I have long admired. John, I do not know if I told you this, but in 1980 I was actually of voting age, and I am, believe it or not, one of the six million who voted for you.

Let me give you a different perspective. Now please understand that this comes spontaneously without preparation, as a result of my instructions. John has outlined the tension between the executive branch and Congress. I would like to offer you a different perspective—a lawyer's perspective—which focuses more on the conflict between the executive branch and the courts. What I would call the dark side of the doctrine of separation of powers often leads courts into finding that something which was arguably wrong, committed by a member of the executive branch, is nonetheless outside the scope of judicial review. In other words, there is a wrong without a remedy. I can draw here on my personal experience to give you an example.

Let me tell you a little story. This went into the courts and ran into this doctrine of separation of powers. This is the story of Shirley Mae West, who came to me in the early 1970s when I was an attorney in the law reform unit of Legal Services of Greater Miami. Shirley Mae West was a young, articulate, intelligent black woman from very modest circumstances. She had served a tour of duty in the military and received an honorable discharge. She then spent some time in civilian life and realized that for her there was really no opportunity equivalent to what the military could offer. She went back to the military to re-enlist. Being experienced and having received an honorable discharge, you would think she would be even more attractive to a recruiter. But something had happened in the meantime to make her ineligible under military regulations. She had had a baby, and she was not married. Military regulations excluded single parents from enlistment. Even though she had made adequate arrangements for the care of her child with her own mother, the military said she could not re-enlist.

So she came to me, and I thought that this was a constitutional violation. As law students, many of you are taking constitutional law, and if you have a client whom you will soon come to the privacy case of the abortion case, Roe v. Wade, the contraception cases, Griswold and Eisenstadt v. Baird, and the family unit case, Moore v. City of East Cleveland, which along with Meyer v. Nebraska, guarantees the right of a parent to control the education and upbringing of children. Synthesizing those cases, you can say that the constitutional right to privacy guarantees that parents can make decisions about how the child is going to be brought up while she goes into the military for a period of service. The regulation prohibiting single parents from serving in the military would therefore be unconstitutional—unless the government could show that it was justified by a compelling interest because the right of privacy is a fundamental right.

I filed a lawsuit on those theories and some others. The suit was dismissed by the United States District Court. When I appealed to the Fifth Circuit Court of Appeals, the court affirmed on the grounds of Gilligan v. Morgan. That case involved a suit against the National Guard arising from the Kent State anti-war demonstrations in the 1970s in which several students were killed. The parents and survivors filed suit against the National Guard. Their theory was that the case was that the National Guard had not been properly trained in the use of deadly force. If the National Guard had been the State Highway Patrol or local police, that suit would have been fine in terms of the theory and in terms of the possibility of recovery. However, because the suit was brought against a department of the United States, controlled by the executive branch, and not against a state or local police force, that suit was held to be non-justiciable. That precedent was stretched, I thought, given the very different facts: the use of deadly force in Gilligan and the question of eligibility to enlist in the military in West's case. This is not to say that the regulation was valid or invalid, since there was no ruling on the merits. Rather, the court ducked the issue on the grounds of the separation of powers.

And so, as lawyers, you may well have to confront this issue. This
cite, forces pitted against each other, revealed by a functionalist analysis, yet still within the structure of a formalist apparatus for processing politics—for example, constitutionalism? Recall that there is nothing in the United States Constitution about political parties. Creativity, perhaps the kind you suggest in outline, is not encouraged—we might even regard all politics as an act of creation.

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the abortion case, Roe v. Wade,1 the contraception cases, Griswold2 and Eisenstadt v. Baird,3 and the family unit case, Moore v. City of East Cleveland,4 which along with Meyer v. Nebraska,5 guarantees the right of a parent to control the education and upbringing of children. Synthesizing those cases, you can say that the constitutional right to privacy guarantees that parents can make decisions about how the child is going to be brought up while she goes into the military for a period of service. The regulation prohibiting single parents from serving in the military would therefore be unconstitutional—unless the government could show that it was justified by a compelling interest, because the right of privacy is a fundamental right.

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dark side of the separation of powers means, in practical effect, that
things that are clearly wrong (or at least arguably wrong) under the
Constitution or other provisions of law may not be remediable in court.
I ask you to consider whether that is excessive deference by the courts
to the executive branch of government. So with these brief remarks, I
put that question out on the floor for John’s comments.

JOHN ANDERSON: Thank you Steve. The part of my prepared talk
that I omitted actually dealt with the problem that you have alluded
to—the political question. As a matter of fact, I was going to refer you
to four cases that have been decided in the last five years in which
courts have turned down efforts by members of Congress to raise cer-
tain matters involving Central America, Nicaragua, Honduras, and so
on. By invoking the political question doctrine, the courts have said
that it is not up to us to be an arbiter of disputes on matters of foreign
policy between the Congress and the President. These cases instruct us
to use the political process—resort to the Choper design of relying
on the political process and not the courts. I have not got the time to go
into the details and the facts of all of those cases, but some of them, I
think, were probably correctly decided. You would not want to burden
the judiciary with every case where half a dozen Congressmen, or even
fewer, somehow believe that the law is not being properly executed,
implemented, or carried out and seek standing to sue. I think the courts
should probably turn down most of those invitations.

But there are certainly different situations where individual rights
are involved. In such cases, I hope that the courts would not invoke this
very formal view, or be so overly impressed by the fact that the Presi-
dent is the Commander in Chief and therefore controls the National
Guard, that they cannot adjudicate a question which clearly involves
individual human rights under our Constitution.

SCOTT MAGER: I would like to speak to you about something I have
an interest in—in the functionalist/formalist sense—a real modern-day
application of this separation of powers doctrine in Florida. In 1973, a
truck hit another person and killed him. There was some question as to
fault. The trial court found that the plaintiff was only slightly at fault
but awarded his estate nothing. This seemingly result occurred
because the applicable law of contributory negligence required that if a
plaintiff contributed in any manner to his injuries, the plaintiff was
barred from any recovery.

There was an appeal to the Fourth District Court of Appeal, and a
very young, activist appellate judge Gerald Mager, to whom I have
the pleasure and privilege of being related, was faced with the dilemma
that the case’s outcome was not fair, even though it was legal. The
doctrine of contributory negligence had been established in 1886 in
Butlerfield v. Forrester and had remained in force for almost three-
quarters of a century, with only limited comments on this apparently
clear injustice. Judge Mager applied a theory simply requiring a com-
parison of the respective harms of each party and a reduction of the
plaintiff’s judgment by his percentage of fault. Judge Mager thus at-
tempted for the first time to judicially embrace the concept of compara-
tive negligence, one of the single most influential doctrines of our
times. It seemed like a beautiful solution to a difficult and unfair doc-
trine. But Judge Mager had a problem. He was an appellate court
judge. Despite its antiquated and unfair nature, the state of the law
was contributory negligence and that was the way it was to continue
until the Florida Supreme Court decided otherwise. In short, he was
altering the law, or at least stretching “interpretation” to its furthest
reaches. Who was he to be so bold as to “change” the law? But it did
not seem fair; so, in order to avoid immediate reversal by usurping
power granted only to the Supreme Court, he had to find precedent to
put forth this concept. He used cases such as Gates v. Foley, which
permitted a wife to maintain a cause of action for loss of consortium,
and Gilliam v. Stewart, which attempted to abolish the infamous
“impact rule,” requiring a party to be actually “touched” to recover for
emotional distress. But at the same time, Judge Mager had to over-

9. Jones v. Hoffman, 272 So. 2d 529 (Fla. 4th Dist. Ct. App. 1973), aff’d, Hoff-
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comparative negligence without any reliance on the legislature. This decision was later
adopted by the Florida Supreme Court.
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come a tremendous obstacle; this formalism about blindly following the law as it exists, about robot-like application of the doctrines of law without regard to their effect on the citizenry of Florida. He convinced fellow Judge Russell Morrow that changing the system was a wonderful idea. The third judge (now a Florida Supreme Court judge) strongly dissented, stating, in essence, "Who are you? The law is the law; you follow the law; if you don't like it, you certify it to the Florida Supreme Court, but you follow the law." 18

As expected, there was an appeal to the Florida Supreme Court, and that court reiterated the 'formalistic' doctrine of following the law, arguing both that the concept of stare decisis would be destroyed and that an appellate judge has no right to rule in any way that would have the effect of changing the law in Florida. After a page asking, in essence, "Who do you think you are?" the conclusion of the opinion accepted the concept of comparative negligence in toto, obviously because the court also thought it was a wonderful idea.

The true meaning of this functionalism versus formalism debate is exemplified when we ask: how much different was what the Florida Supreme Court did than what the fourth district did? What I am really getting at is the question of whether the functionalistic (activistic) approach is a good idea that should be encouraged. There was unfairness and inequity which permeated the doctrine of contributory negligence. While we may now look back with great twenty-twenty hindsight, we can appreciate that Gerald Magor took the activist approach and "forced" the Supreme Court to take a hard look at an antiquated doctrine and to adopt comparative negligence. This case is a prime example of this functionalist, activist approach.

I leave you with this one rhetorical thought: Is there really any formalism? For those who believe that you can objectively interpret the law, what is objectivity? Is not objectivity the way I interpret it. Is my objectivity subjective—how I think the law should be interpreted, when you think the law should be interpreted, how the justices believe it should be interpreted? Do we really even have this formalistic concept in the application of laws here—the robot-like judges who plug the facts into the law and come out with results? The understanding that formalism is only the perceived goal, but that it is constrained, regardless of society's fear of apparent anarchy in admitting the existence of this harmless and helpful concept, is the genesis of this needed doctrine. In short, I think that this injection of activism and society's eventual cognizance of functionalism is refreshing, progressive, and keeps the law current.

JERRY L. SESSIONS, II: I would like to touch on the source of conflicts in the application of pluralism and functionalism. Formalistic analysis and functionalistic analysis are simply functions of perspective; in truth they exist together and are not mutually exclusive. As John Anderson has stated in his discussion, ideological conflicts, for the most part, constitute the sources of such conflicts.

I ideological conflicts, or differences in ideology, have been the basis for much of the historical infighting between the legislative and executive branches. The ideology of American politics can be traced to the two strands of values on which our system is built. Those strands are the theories of capitalism and democracy. Neither political conservatives nor liberal liberals decline or reject either strand. The question of their application within each ideology centers upon the emphasis and value which each ideology places on each theory.

America's foundation rests on the Declaration of Independence and the Constitution, both of which emphasize democratic values. However, our country also arose as a result of Adam Smith's theory of capitalism and his treatise on the invisible hand of the market place.
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Capitalism and democracy are intertwined in America, and form the basis for the values of the American people.

The Republican Party has emerged as the party of political conservatives—those individuals who emphasize capitalist values. This emphasis has translated into a laissez-faire approach to business, a focus on economics as the avenue for societal improvement, and an aversion to big government. The underlying theme of the Republican Party's beliefs and politics is equality of opportunity, and that belief is consistent with each such view of American society and with the role of politics in society.

The Democratic Party has emerged as the party of political liberals. They emphasize democratic values; those emphasizing the value of the individual within the group translate into a general regulation of business, a focus on social problems as the avenue for societal improvement, and the resulting "big government."

Jim Wright's response to President Bush's recent budget proposals calling for more funding for social programs aimed to mollify the poor, the homeless, and the underprivileged illustrates this conflict. George Bush has proposed such budgeting in excess of that implemented by the Reagan administration, as well as that of several other past Presidents. Jim Wright stated that that sounded just like old-time Democratic religion to him. Rather than focusing on the actual effect of such budget proposals, Jim Wright's comment reflects an ideological focus and perspective. Such an ideological perspective and focus is inherent in the American political system.

The American political system rejects the idea of one single party. Therefore, for the American political system to work, we must have at least two parties in operation. These, at least, are grounds for Democrats and Republicans to exist in friendly conflict. No country exists which either party, individually, necessarily supports. The courts, as John Anderson stated earlier, referee this conflict. Ideally, they are the neutral entity of the government, independent of the legislative and executive branches.

I quote from a case, Gordon v. Longest, which was decided shortly after the enactment of the Judiciary Act of 1789: "One great object in the establishment of the Courts of the United States and regulating their jurisdiction, was, to have a tribunal in each state, presumed to be free from local influence and to which all who were non-

residents or aliens might resort for redress." At that time, such local influence presumably referred to powerful individuals in that locality. Today, that local influence could potentially be the influence of a particular judge's political opinions inside that judge's chambers. Hopefully, that statement is as true and effective today as it was then, however much the locality of influence may have changed.

This ideological conflict has arisen, or been exposed, in confrontations between the legislature and the presidency. An extreme example is Franklin D. Roosevelt's proposal to increase the number of justices on the Supreme Court in order to create a Court more sympathetic to his political views. The most recent example of such a conflict is the furor over Reagan's appointments to the Supreme Court. In his two terms, he has appointed Justices O'Connor, Rehnquist, Scalia, and Kennedy, all who stand on the conservative side of the ideological line. President Eisenhower's appointment of Earl Warren to the bench illustrates the dangers and potential result of a presidential appointment to the judiciary based on ideological motivations. Warren, a supposed conservative, became one of the most active, liberal justices ever in the American judiciary, much to Eisenhower's consternation. The preferably neutral Supreme Court became political, but in a way directly contrary to that desired by the appointing president. In each such case, the executive branch attempted to gain leverage over the legislature by ideologically influencing the United States judiciary. In each such case, the legislature resisted.

As John Anderson has said, the danger of this ideological conflict is less accountability, and the danger of the judiciary becoming less than the impartial tribunal that it was intended to be by the first Congress, which created our courts in 1789 by the Act with which this Symposium is concerned.

JOHN NOONAN: I will take the opportunity to make more of a commentary than a question. Congress enacted the Federal Tort Claims Act, claiming the sovereign immunity of the United States when the employees or officers of the United States committed torts. The Supreme Court then interpreted that to mean that when a service person on active duty was injured through the tort of another military service person, the injured person could not have recovery. Now that was a pure judicial invention, a creation by judges of something that Congress never specified. The Supreme Court said Congress could not pos-
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Jim Wright's response to President Bush's recent budget proposals calling for more funding for social programs aimed at the poor, the homeless, and the underprivileged illustrates this conflict. George Bush has proposed such budgeting in excess of that implemented by the Reagan administration, as well as that of several other past Presidents. Jim Wright stated that that sounded just like old-time Democratic religion to him. Rather than focusing on the actual effect of such budget proposals, Jim Wright's comment reflects an ideological focus and perspective. Such an ideological perspective and focus is inherent in the American political system.

The American political system rejects the idea of one single party. Therefore, for the American political system to work, we must have at least two parties in operation. These, at least, are grounds for Democrats and Republicans to exist in friendly conflict. No country exists which either party, individually, necessarily supports. The courts, as John Anderson stated earlier, referee this conflict. Ideally, they are the neutral entity of the government, independent of the legislative and executive branches.

I quote from a case, *Gordon v. Longest*, which was decided shortly after the enactment of the Judiciary Act of 1789: "One great object in the establishment of the Courts of the United States and regulating their jurisdiction, was, to have a tribunal in each state, presumed to be free from local influence and to which all who were non-residents or aliens might resort for redress." At that time, such local influence presumably referred to powerful individuals in that locality. Today, that local influence could potentially be the influence of a particular judge's political opinions inside that judge's chambers. Hopefully, that statement is as true and effective today as it was then, however much the locality of influence may have changed.

This ideological conflict has arisen, or been exposed, in confrontations between the legislature and the presidency. An extreme example is Franklin D. Roosevelt's proposal to increase the number of justices on the Supreme Court in order to create a Court more sympathetic to his political views. The most recent example of such a conflict is the favor over Reagan's appointments to the Supreme Court. In his two terms, he has appointed Justices O'Connor, Rehnquist, Scalia, and Kennedy, all who stand on the conservative side of the ideological line. President Eisenhower's appointment of Earl Warren to the bench illustrates the dangers and potential result of a presidential appointment to the judiciary based on ideological motivations. Warren, a supposed conservative, became one of the most active, liberal justices ever in the American judiciary, much to Eisenhower's consternation. The preferably neutral Supreme Court became political, but in a way directly contrary to that desired by the appointing president. In each such case, the executive branch attempted to gain leverage over the legislature by ideologically influencing the United States judiciary. In each such case, the legislature resisted.

As John Anderson has said, the danger of this ideological conflict is less accountability, and the danger of the judiciary becoming less than the impartial tribunal that it was intended to be by the first Congress, which created our courts in 1789 by the Act with which this Symposium is concerned.

JOHN NOONAN: I will take the opportunity to make more of a commentary than a question. Congress enacted the Federal Tort Claims Act, claiming the sovereign immunity of the United States when the employees or officers of the United States committed torts. The Supreme Court then interpreted that to mean that when a service person on active duty was injured through the tort of another military service person, the injured person could not have recovery. Now that was a pure judicial invention, a creation by judges of something that Congress never specified. The Supreme Court said Congress could not pos-

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15. Id. at 104.
sibly have meant to get into the military. So at the urging of the Justice Department and the executive branch, the Supreme Court created a very large barrier to federal tort findings.

We had a case where a pregnant servicewoman went to a military hospital, was negligently treated, and the child died before birth. Rather strikingly, the government settled with the estate of the child. The lawyer said the child had a claim and the government had to pay the child or the child's estate. But the government would not pay the pregnant mother, because she was a servicewoman on active duty when she went into the hospital. Now we could not see any reason in the Supreme Court's rationale for denying benefits to people on active duty. You can see why they did not think that a soldier in active service should have a tort action against the government when he got shot, but here was a person put in a hospital. Why should the military be exempt from civil negligence?

Anyway, we knew that the recent decision of the Supreme Court absolutely precluded liability. So we wrote an opinion sharply criticizing the Supreme Court. But we did not feel that, in a world of hierarchy and order, lower court judges design to go off on their own and create the rules. We may not see the Court's rationale, but we have to observe the rules. I regret to say the Supreme Court did not say that was a wonderful idea and change the rules, they simply denied certiorari. That was the end of it. The most one can do as a responsible judge is not to be silent but to criticize.

That leads me to a second observation which goes to the question of formalism which Tony Chase brought out well, but it is not only labelling as to functions of government, but labelling as to positions. I said something of this yesterday. Here, I will suspect that a large number of judges whom the media would classify as conservatives, would say the conservative stance is to deny liability. I find this mystifying to have a totally "activist" judicial creation added to the act of Congress resulting in the "conservative" decision to uphold immunity. I found that quite often judges who go under the label conservative are all for the sovereign immunity of the government against the claims of the individual. So I think one cannot rely solely on, and thus should not accept, the labelling that the media gives. One should be critical, and that is something that can be accomplished by scholarship, to make you aware that beneath the labels there are very good values operating.

Finally, it brings me to a third point. Not only are the Republicans and Democrats not the real labels, but my experience in the executive branch was working for the National Security Council. I came from

1989] Discussion — Anderson

law school and I thought: gosh, they are the Republicans, they are in power, and they will be fighting the Democrats in a political battle, just like the kind I had read about in the history books. That was not the situation at all. All the fights were between different agencies of the executive branch. That is where the fighting was. That is where all the action was. It is something you do not get in the media at all, but the real battles over much of what the federal government does are between Treasury, Defense, CIA, and so on. But that is where one has to go through the labels to see where the real questions are.

Audience Questions and Comments

AUDIENCE: What do you think would have to occur to have the Court hear and answer such a question to restrict the executive branch?

ANDERSON: Well of course there are people who worry about the so-called headless fourth branch of government. It seems to me that it has been a necessary concomitant of the fact that as society has evolved, as our problems have become more complex, Congress simply has to delegate power that it cannot otherwise deal with and disburse in a rational manner. I do not think that, in view of the fact that after the Schecter" case the Court set aside the worry about undue delegation of power on the part of the Congress to the President and laid that question aside for almost fifty years, it is really one of the central problems of our time.

Perhaps a facet of the problem that has been raised by your question is the real concern that we ought to have in our polity is about accountability. The Constitution itself, to use Corwin's oft-quoted phrase, is an invitation to struggle in the field of foreign policy and, in many respects, I think that it transfers over to the area of domestic policies as well. Considering the powers given under the Constitution to both the President under article II and the Congress under article I, there is an invitation to struggle, and the court has a very important role.

But there is a very interesting theory in Yale Professor Steven Carter's commentary that simply because a law has been passed does not mean that that is the last word, either as far as the Constitution is concerned or as far as the legislature is concerned. He even goes so far

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as to suggest in his article that every once in a while it is a good thing for the Legislature to fly completely in the face of what the Court has said and pass a law that is in conflict therewith to set the stage for a rehearing—a rethinking perhaps of the proposition. That is what is occurring right now with the kind of statute that was passed by the state of Missouri which may cause the Court to revisit the case of Roe v. Wade.17 Even though I happen to agree with the decision in that case, I agree with the idea that there is a legislative responsibility and a responsibility on the part of an executive who feels strongly about an issue to assert his powers in order to set the stage so that we can have the kind of adjudication that I spoke of.

The Judiciary Act of 1789: Some Personal Reflections

Elizabeth Holtzman*

Since our country's founding over 200 years ago, we have witnessed a major expansion in the concepts of liberty and justice. What role have the courts played in bringing this about? For the first 150 years, the courts played a very small role. The Bill of Rights was added by the Congress and ratified by state legislatures. The thirteenth, fourteenth and fifteenth amendments were the product of a bloody civil war. In a number of cases, the Supreme Court actually reflected the worst kind of prejudice and weighed in on the side of discrimination. Dred Scott v. Sandford,* Plessy v. Ferguson,* the decision barring women from arguing before the Court,* and the Japanese internment cases* make us say "ouch" when we read them.

However, starting in the 1950s, the judiciary began to play a very different role. Look at the Supreme Court's decisions in Miranda v. Arizona,* Gideon v. Wainwright,* Roe v. Wade,* Griswold v. Connecticut,* and Brown v. Board of Education.* These cases profoundly and irrevocably enlarged our notions of individual dignity, justice and human rights.

Most of the scholarly attention paid to the judiciary has focused on the Supreme Court, and properly so. But since the Judiciary Act of 1789 also created a structure of lower federal courts, and since the Supreme Court handles only a relatively small percentage of federal cases, the operation of federal district and appellate courts should not be ignored. This conference is an important opportunity to explore

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1. 60 U.S. (19 How.) 393 (1856) (United States citizenship does not extend to a freed slave).
2. 163 U.S. 357 (1896) (Separate but equal accommodation for different races does not violate equal protection).
8. 381 U.S. 479 (1965).