

MODERN LIBRARY CHRONICLES

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LAWRENCE M. FRIEDMAN

LAW IN AMERICA

A Short History



A MODERN LIBRARY CHRONICLES BOOK

THE MODERN LIBRARY

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SIX

THE TWENTIETH
CENTURY AND
THE MODERN
ADMINISTRATIVE
WELFARE STATE

One of the most obvious and salient features of American law in the twentieth century has been the rise of the administrative-welfare state. This means, essentially, a huge expansion in the kinds of things government does, and the way it does them. Government, at all levels, manages the economy, monitors and patrols the behavior of businesses, provides a package of benefits for poor people—or for everybody—and guards the public health and safety. Government, to do all these things, has developed an insatiable appetite for tax dollars. The present income tax was enacted by Congress in 1913. The Supreme Court had declared an earlier version unconstitutional in 1895; the Sixteenth Amendment (ratified in 1913) undid this decision and paved the way for the tax.¹ The rates under this first income tax law were very modest, and only applied to rich people. Only about 2 percent of the population had to file or pay anything at all. During the Second World War, the rates skyrocketed because of the enormous expenses of running a war; now the whole middle class owed income tax. The government began to withhold tax money from the paycheck of ordinary workers. In any event, even when the war was over, what people wanted from government grew and grew; and some way had to be found to pay for all of it: Social Security, a huge army and navy, atomic bombs, national parks, and everything else. Taxes rose dramatically at the state level, too. How else could the schools and the roads get paid for? Most states had income tax laws; and some cities as well.

Nineteenth-century government, as we saw, was (to us, looking backward) small and weak. The federal government was particularly impotent. Washington, D.C., was a town of no great significance; the financial and cultural centers were

elsewhere. The states jealously guarded their privileges. What changed the situation, and created a stronger central government, was the rise of a *national* economy. A national economy meant national problems—at any rate, problems defined as national. Congress passed the Interstate Commerce Commission Act in 1887, in response to demands for control over the giant railroad nets.² Farmers and small merchants felt they were at the mercy of the big, bad railroads; state regulation was a pitiful failure, because the railroads were beyond the control of any particular state. Only a federal agency had any chance to be effective. The act set up an Interstate Commerce Commission to administer the law. What the ICC accomplished is another story. The railroads were themselves powerful political actors; and they had a tremendous influence over the way the ICC actually operated. But the act was incoherent from the start: it reflected, as all great pieces of legislation tend to do, a compromise between squabbling and contending interest groups; and the result was a farrago of inconsistent aims.³ Nonetheless, the ICC act was a significant milestone.

Another landmark was the Sherman Anti-Trust Act (1890).⁴ This, too, was a reaction to the rise of big business and the threat it seemed to pose to small people everywhere. The archetypal trust was the Standard Oil Company, John D. Rockefeller's huge and monstrous empire of oil. But there were lesser "trusts," in markets as different from each other as whiskey, sugar, and binder twine. Here, too, consumers and little businesses feared and hated the great industrial combines; they had far too much influence on American society and government; they were monopolies, squeezing huge, unjustified profits out of the public; they ruthlessly drove competitors to the wall. The Sherman Act, however, was in a way mostly symbolic. It was a short, bland, empty statement of principle; it declared that "monopoly" and "restraint of trade"

were illegal; but the act made no attempt to define these terms, and set up no agency to administer the provisions of the law. "Trust-busting" was left to the tender mercies of the administration (and the courts). At first, nothing much happened. The courts were hostile to the act, and cut it down to size; the federal government was inert. Only in the twentieth century did the act begin to show some teeth and take on powerful adversaries—Standard Oil, American Tobacco; and, much later on, IBM, AT&T, and Microsoft.

Another important new law was the federal Food and Drug Act (first passed in 1906). Its history is instructive. The states, for a long time, had had laws banning bad food and adulterated drugs. In Minnesota, for example, early in the twentieth century, there were laws about the quality of dairy products, vinegar, jams and jellies, honey, candy, and lard, among other things; and a general law against the sale of any food that was "injurious" or contained any "filthy or decomposed substance," or had a "preservative" added to "conceal the taste, odor or other evidence of putrefaction."⁵ But the individual states were just as impotent with regard to products sold all over the country, as they were powerless to control the interstate railroad nets. Federal legislation seemed to be the answer; but business lobbies were far too strong for this to happen easily. Even such incidents as the "embalmed beef" scandal, during the Spanish-American War—rotten meat for the men in uniform—did not succeed in breaking the stalemate. Into this situation came a young writer named Upton Sinclair. His powerful novel *The Jungle* painted a horrific picture of life in Chicago's meat-packing district. Sinclair was a political radical. He wanted to stir up the dormant conscience of the country. He wanted to show that big businesses were vicious and cruel to their workers, that poor families struggled against overwhelming odds to make a decent life, in the teeth of capitalist oppression. The novel followed the tragic

fate of a family of Lithuanian immigrants in Chicago. It was also an incredible indictment of the meat-packing industry of Chicago, "hog butcher to the world." The packers sold foul, rat-infested goods, made under appalling sanitary conditions. In one particularly gross scene, a worker fell into a giant vat, and his body was consumed by acid and processed as lard. The book set off a tremendous uproar. Sales of meat dropped precipitously. Even the president, Theodore Roosevelt, became involved. A Food and Drug Act now sailed through Congress, as the opposition melted away. The companies themselves realized that something had to be done to restore public confidence in food products.⁶

The law created a new agency, the Food and Drug Administration, to administer the provisions of the act. But Sinclair was disappointed with this outcome; he had aimed, he said, at the country's heart; but, instead, he hit it in the stomach.⁷ Perhaps this was what might have been expected. Scandal and incidents are powerful lawmakers; but they work best when they arouse the passions and above all the self-interest of the vast middle class. The country was not about to buy socialism, or anything truly radical; and there was no chance that Congress would enact deep, thorough reforms of conditions of labor. Wholesome food was another story altogether. Mr. and Mrs. America did not relish the thought that their food was poisoning them; and the idea of unconscious cannibalism was distinctly unappealing.

Another noxious scandal produced the next major reform of the Food and Drug Administration, in 1938. This scandal concerned the newly discovered wonder drugs—the antibiotics. The first of these to come on the market were the sulfa drugs. They were sold as pills. The S. E. Massengill company searched for a way to market sulfa as an "elixir," that is, in liquid form, which people preferred to pills. Their chief chemist (a man with a high school education) found just the

right device. But he made one slight misstep: 70 percent of the liquid consisted of diethylglycol, which happened to be a deadly poison. When people started dying in droves, the FDA pulled the elixir off the market; but by then, over a hundred lives had been lost, including thirty-four children. The scandal led Congress to make an important change, strengthening the FDA. Up to that point, the agency had had the power to seize dangerous drugs and get them *off* the market; from then on, no new drug could even go *on* the market unless it had been tested and had the approval of the FDA.⁸

The history of the FDA illustrates many themes that are characteristic of the way American law has developed in the twentieth century: centralization (the shifting of power toward Washington); lawmaking and enforcement by boards, agencies, administrative bodies; and the influence of scandals and incidents—and of the media and public opinion—on lawmaking. All of these trends became stronger and stronger in the course of the century.

THE LIABILITY EXPLOSION

The nineteenth century built up a body of tort law that tilted toward enterprise; the judges constructed a network of rules that, in essence, put limits on damages for accidents, at work, on trains, or anywhere. The job of the twentieth century consisted of dismantling this tottering structure; companies became liable for harms done in ways and to a degree that would have horrified Lemuel Shaw and most other nineteenth-century judges.

Product liability is a prominent example. Any discussion of this aspect of tort law has to begin with the great case of *MacPherson v. Buick*,⁹ decided in 1916 by the highest court of New York. The opinion was written by Benjamin Nathan

Cardozo. A man bought a Buick car from a dealer; the car had a defective wheel; there was an accident; MacPherson was injured; he sued the car company. Under an older rule (the "privity" doctrine) MacPherson should have sued the dealer—the company that actually sold him the car—and not the company that *made* the car. But in a subtle and crafty decision, Cardozo effectively undermined the old rule: if a product was dangerous, and caused harm, the victim must be able to sue the manufacturer directly. Other states fell into line with *MacPherson*. Suing the manufacturer is now taken for granted. This rule, of course, makes perfect sense in an age of advertising, brand names, and mass production; we buy Buicks, we buy Campbell's soup, we buy IBM computers, and we expect the manufacturer to stand behind his product. Moreover, over the course of the years, the extent of the liability has increased. The maker's liability has become more and more "strict," that is, in many cases, it is no longer necessary to try to show some sort of "negligence" or carelessness. The doctrines are complicated, and the states each have their own version of tort law; but the direction of the trend is unmistakable.

Product liability is only one example of the liability explosion; medical malpractice suits are another. It was always true, in theory, that a doctor, like anybody else, could be held responsible for a careless mistake. But lawsuits against doctors were in fact rare until the middle of the twentieth century. People seemed to be reluctant to sue the kindly old family doctor. Doctors, for their part, seemed to be reluctant to testify against other doctors. But in the course of time, the practice of medicine became more impersonal—and more technological. People *expected* more of doctors; they expected miracles. Or at least they expected cures. The culture of high responsibility, the ethos of "total justice," began to tell against doctors whose patients had bad outcomes. And, as many stud-

ies show, doctors do make mistakes—and quite a few of them. Sometimes these mistakes are catastrophic. Another important development in malpractice law was the concept of "informed consent." It is risky for a doctor not to warn his patient that (say) an operation for kidney stones fails every once in a while; or that a certain vaccine has a few rare side effects. If a doctor does not tell all, and get "informed consent" to a treatment or procedure, the doctor can be held liable, even if he or she was otherwise extremely careful, and the failure of the treatment or procedure, and its bad consequences, was nobody's fault.

In the nineteenth century, as we saw, the fellow servant rule effectively choked off the rights of workers to get compensation in cases of industrial accidents. As the country industrialized, the number of these accidents increased enormously. By the end of the century, the toll of deaths and injuries in factories, railroad yards, in mines, and on construction sites was truly dreadful. Organized labor, naturally, despised the fellow servant rule. The courts began to nibble away at the rule, which became cumbersome and riddled with exceptions. Legislatures, too, got into the act; some of them passed laws limiting the scope of the rule, in one way or another.

In the twentieth century, the rule was abandoned entirely. In 1908, the Federal Employers Liability Act eliminated it for interstate railway workers.¹⁰ A later act removed the rule for maritime workers. And in the states, a radically different system, workers' compensation, was put in place roughly at the time of the First World War.

The workers' compensation system was based on an English model, which in turn had been influenced by legislation in Bismarck's Germany. Workers' compensation was a no-fault system. If a worker was injured on the job, he or she had a right to compensation. Fault or negligence was not an issue.

The worker did not have to show that anybody was careless; and it did not matter that he himself was careless. In one notable Wisconsin case, a truck driver's helper tried to urinate off the side of a moving truck—not a wise thing to do. He fell, and was injured; a court held that he was entitled to compensation.¹¹ Basically, the system covered all job-related injuries. The catch was that compensation was limited. A worker who was totally disabled could recover a certain percentage of salary for so many weeks or so many years. A worker who was partially disabled recovered under another statutory formula. The statutes also typically contained a kind of grisly catalogue of body parts: if you lost an arm, or a leg, or an eye, or a thumb, you recovered so many weeks at such and such a rate: for example, under the current Arkansas statute, an arm amputated at the elbow is worth 244 weeks of compensation; a lost thumb, 73 weeks, a toe ("other than the great toe") 11 weeks; one testicle, 53 weeks; both testicles, 158 weeks.¹²

Thus, in an important sense, this new system was a compromise. The employer lost its defenses—basically, the employer had to pay compensation whenever a worker was injured on the job. But the employer was now immune from ordinary lawsuits. No money for pain and suffering. No jury trials. No chance of some staggering recovery.

Like the law of torts, workers' compensation, once in force, had a kind of life of its own; it also expanded, and in the direction of more coverage, more liability. The early statutes were rather restrictive in some ways: they stayed closer to the classical picture of an industrial accident, and the dangerous world of the factory or mine. The Oklahoma statute, in fact, specifically limited coverage to "dangerous" occupations: blast furnaces, logging, lumbering, and others on a statutory list.¹³ The early statutes, too, hardly covered occupational diseases—these, after all, were not "accidents" in the popular

sense. Workers who got sick on the job, and from the job, often collected nothing. This was the case of the "radium girls," young women hired to paint luminous dials on wristwatches. They began dying of cancer in the 1920s, but most of them never collected from their companies.¹⁴ The later statutes were much more comprehensive; New Jersey, where many of these girls had lived, amended its law in 1949, to cover "all diseases arising out of and in the course of employment." Workers also began to recover for such things as heart attacks on the job. At first, the courts more or less insisted that the heart attack had to be the result of something special, different, stressful, or unusual—a plain old heart attack was not enough. Some states still insist on this;¹⁵ but the decisions, over time, have become more and more favorable to employees and their families. By the end of the century, it would not be too much of an exaggeration to say that almost anything on the job that disabled or impaired a worker would give rise to a claim. Unlike some European countries, the welfare system of the United States is full of gaps and holes. Tort law, for all its crudity, together with the expanded workers' compensation laws, plugs at least some of these gaps or holes. It is, in a way, irrational that a man who has a heart attack on Sunday, watching a football game, has no claim against anyone; but the same heart attack, on Monday, at lunch at the office, or while sitting at his desk, might give him the right to collect from the boss. But nobody ever claimed that the legal system (or society) had to be totally coherent, totally rational, totally consistent.

It would have been inconceivable, in the early days of workers' compensation, for a worker to claim a right to payments on the grounds that the job had driven him crazy, or thrown him into a deep depression. Or that a worker went into a compensable funk on being told she was fired or transferred to a different job. But these claims began to sprout

like weeds in the last part of the century; and many of them were successful. Employers were, to say the least, alarmed; and they ran in panic to the legislatures, begging for relief. Many of the legislatures were receptive; they cut back substantially on the right of workers to make claims for psychological injury. The Arkansas statute, for example, was amended in 1993, so that now a "mental injury or illness is not . . . compensable . . . unless it is caused by physical injury to the employee's body."¹⁶ Something similar—a wave of backlash—took place, as we shall see, with regard to tort law in general.

THE WELFARE-REGULATORY STATE

The New Deal—the presidency of Franklin D. Roosevelt—was a great watershed in the history of the United States, and a great watershed, too, in legal history. There is debate about just how much of Roosevelt's program was a genuine break with the past—how new, in other words, the New Deal really was. No doubt precedents can be found for every aspect of it; after all, as Ecclesiastes put it, there is nothing new under the sun. Nor was President Herbert Hoover—Roosevelt's unlucky predecessor—as inert and uncaring as he has been pictured. But in the aggregate, the New Deal *was* different; and it brought about big changes both in the substance and the culture of American law. Power had been trickling, then flowing in the direction of Washington, D.C.; now it poured in, in a mighty torrent. The states were bankrupt and prostrate. The country cried out for national leadership; and with Roosevelt, it got it.

The New Deal was hardly a single, comprehensive, coherent program. Roosevelt tried this and tried that, sometimes quite inconsistently. The NIRA—the National Industrial

Recovery Act—and the early New Deal in general, took a strongly corporatist approach toward ending the depression. The idea behind the NIRA was to get companies in all sorts of industries to come together, draft codes, cut production, raise prices and wages. Many industries did draft these codes, although the process was bumbling and chaotic. But in the "sick chicken" case—*Schechter Poultry Corp. v. United States* (1935)¹⁷—the Supreme Court unanimously held that the NIRA scheme was unconstitutional. The statute had given too much power to industry groups; it had, in effect, handed them the right to make laws, binding on millions of people. This was "delegation run riot"; and, in the Court's opinion, a violation of fundamental law.

This was not the only New Deal landmark that the Supreme Court struck down. In *United States v. Butler* (1936),¹⁸ for example, the Supreme Court ended the life of the Agricultural Adjustment Act of 1933. This law aimed at lifting farm prices out of their slump, by paying farmers to grow less and produce less. After losing a whole series of cases, the president became outraged and impatient. The "nine old men" were frustrating the will of the people (and his will, too). Roosevelt was reelected, in 1936, in a landslide. He then came up with a cunning scheme to neutralize the Court. Essentially, he asked Congress to allow him to increase the size of the Court, to give him power to appoint New Deal judges. Perhaps to his surprise, the "court-packing plan" set off a firestorm of protest. Roosevelt had overstepped himself; somehow, he was seen as desecrating a national shrine. The plan went down to ignominious defeat.¹⁹

But Roosevelt had his way in the end. He was elected four times; he outlasted the "nine old men"; and as the years went by, he was able to appoint justices who saw things the New Deal way. Even before this happened, there were signs the justices (or a majority of them) were growing more sympa-

thetic to the New Deal programs. The later programs all passed the judicial test.

In the aggregate, the New Deal legislation made a real difference in society. The New Deal left a permanent mark on the banking system. It created a system of deposit insurance, to discourage runs on the banks; the government guaranteed the safety of people's deposits. The Securities and Exchange Act tamed the bulls and the bears of Wall Street. Companies that floated stock had to tell the truth about their financial condition. The Securities and Exchange Commission became an important watchdog; investors were much less at the mercy of the robber barons. The New Deal also altered labor law fundamentally. The Wagner Act put the federal stamp of approval on the union movement, and created an agency, the National Labor Relations Board, to make sure employers let workers organize, and played fair during union elections. The Tennessee Valley Authority brought electricity to one of the poorest, most backward sections of the country. Massive public works and conservation programs gave jobs to millions of unemployed people. Works Progress Administration workers built trails, painted murals in post offices, raked leaves, put on plays—but most fundamentally, earned paychecks for tens of thousands of families otherwise on the brink of disaster.

In this economic crisis, a huge segment of the population fell out of the middle class into poverty and distress. Relief and welfare were no longer matters solely for a class of the habitually wretched and forlorn. The federal government responded to the cries of what we might call the submerged middle class. One responsive program was to build public housing—an idea that perhaps would have horrified Hoover. But in some ways the keystone of New Deal policy was the Social Security Act of 1935. No statute in the twentieth century has been more important. This complex law was, in part, a conventional poor relief law; it also set up a program of un-

employment compensation, funded by taxes. Most significantly, it created a system of old-age pensions, to be financed partly by employers, partly by workers through payroll deductions. At retirement age, the retired worker would receive a pension. The pension depended, in part, on how much he or she had paid in. It depended in no way on poverty or need; it would go to both rich and poor. These old-age pensions would kill two birds with one stone. Old people who no longer worked would get a check from the government, to keep the wolf from their door. And the prospect of a pension would encourage them, in a time of heavy unemployment, to leave work and make way for younger workers.

Roosevelt's Democratic party had swept the country in 1932 and 1936; but in the American system, losing parties learn to accommodate themselves, and they eventually bounce back. Harry Truman followed Roosevelt; but when he left office, the country turned to a popular war hero (and Republican), Dwight D. Eisenhower. The war had put an end to the Great Depression, and to the depression mentality. The country was much more prosperous; prosperous people, on the whole, tend to be fairly conservative. The Republicans in office left the core of the New Deal intact—they had to. In labor law, and a few other fields, they made some attempt to restore "balance" in public policy. But nobody dared touch Social Security.

Indeed, during the presidency of Lyndon Johnson, in the 1960s, there was a new burst of legislative energy, and a huge new expansion of the welfare state. Johnson announced his Great Society program, and declared a "war on poverty." The "war on poverty" was as hard to win as his other war, the war in Vietnam—which was Johnson's downfall—but Johnson did leave behind him a permanent legacy. He pushed through a bold cluster of statutes—very notably, he created Medicare, which provided free hospital insurance for people over sixty-

five.²⁰ This, like Social Security itself, not only helped them; it helped the next generation. Middle-aged people no longer had to worry about grandma's operation and its drain on their resources. Medicare is now firmly in the pantheon of untouchable programs, along with Social Security itself. Johnson also rammed a great Civil Rights Act through Congress.

The New Deal had been primarily concerned with a sick economy. Economic issues were also very salient in the period just after the Second World War. The GI Bill of Rights, a package of benefits for veterans—free schooling; loans to buy homes—was not simply a matter of national gratitude; it was also a plan to sop up unemployment, and to stimulate the economy. The GI Bill revolutionized higher education; and it helped finance the rush to the suburbs. The government, in effect, gave millions of veterans the power to buy their little dream house in the suburbs. A huge road-building program helped the suburban families travel back and forth to their jobs and their houses. The economy of course is still a major focus of national policy; and always will be. But from the 1960s on, more and more national programs concerned other factors as well—lifestyle issues, social issues, issues of safety and health, issues of the environment. The age of unlimited growth, and unlimited resources, seemed finally over. At one time it felt only natural to cut down trees, drain marshes, kill wolves, and drill oil wherever you could find it, whether in the wilderness or in downtown Los Angeles. But now the marshes had become “valuable wetlands,” the wolves were the darlings of the children of mother earth, oil drilling and strip mining were out, historic preservation was in. Not all of this was based on a shift in the nation's aesthetics. In October 1948, the “Donora death fog”—a noxious blanket of deadly air—created darkness at noon in Donora, Pennsylvania, and killed twenty people.²¹ The country woke up to the fact that it might choke to death on its own industrial prosperity and

poison itself with its own polluted drinking water. Clean air and clean water could not be taken for granted. Programs, laws, regulations with teeth were needed.

To every action there seems to be a reaction; to every “advance” a serious backlash. Nobody wants the California condor to fly into extinction; but should we kill a mighty dam for the sake of some miserable little fish, or steal jobs from loggers because of the spotted owl? The social insurance programs seem solid, politically speaking. Nobody talks about abolishing Social Security or Medicare. But there are grave concerns about how to keep them solvent. In the first years of the twenty-first century, plans to “save” Social Security sprouted like weeds. Ordinary welfare has had a different fate. Middle-class people take their own package of subsidies for granted. They feel they earned this money, by God; they paid for it with their sweat and their dollars. Yet many seem to resent deeply any payments to the poor. It did not help that President Reagan and others portrayed people on welfare as parasites and cheats. Millions of people came to feel that welfare mothers were typically lazy and irresponsible, and immoral besides, popping baby after baby from a series of transient lovers, and sucking up the taxpayers' hard-earned money in order to live empty, fraudulent, dissolute lives. These mothers were, moreover, inclined to be black. Some people sincerely felt, no doubt, that welfare did more harm than good; that it sapped the moral fiber of people who received it, and created a culture of dependence. President Clinton promised to “end welfare as we know it”; and Congress was eager to help him out. Welfare reform had the goal of forcing people off the welfare rolls, and onto the job market. The welfare rolls, not surprisingly, have dropped in state after state; but it is still too early to tell what the ultimate impact will be.

THE CIVIL RIGHTS MOVEMENT

By the end of the nineteenth century, the position of the black population in the south had reached some kind of low point. Most blacks lived in these states, the states of the old Confederacy. Most of them were farmworkers, tenants, or sharecroppers, dependent on white employers. Every southern state had a network of rigid laws segregating blacks from whites—in schools, very notably; but also elsewhere, on trains and buses, and even in prison. These laws expressed a culture of white supremacy. They were part of a social and legal code that made blacks totally subordinate to whites. The Fifteenth Amendment was supposed to guarantee to blacks the right to vote. But the Fifteenth Amendment was a dead letter in the south. In the late nineteenth and early twentieth centuries, the southern states effectively stripped blacks of their right to participate in electoral politics.²² Through a variety of tricks, some legal, some not, they drove blacks off the voters' rolls. In South Carolina, for example, voters had to pay a poll tax, own property (of the value of \$300 or more); and they had to be able to read and write "any section" of South Carolina's constitution. There were tests of this kind in other states, too. Somehow, blacks were never able to pass these tests. If necessary, the southern states used violence to make sure blacks stayed away from the polls. These strategies were—no surprise—extremely effective. In Alabama, in 1906, 85 percent of the male white voters were registered—and 2 percent of adult black males. No blacks held political office. There were no black judges, and only a small handful of black lawyers. All power was in the hands of the white majority.

The criminal justice system was weighted heavily against blacks. Judges, juries, prosecutors were invariably whites.

Blacks accused of certain crimes—rape of a white woman, for example—were practically guaranteed a quick, perfunctory trial; and a verdict of guilty. Justice for blacks was rough, rude, nasty, and deadly. But even tilted justice was not severe enough for many southerners. Lynch law added another layer of terror. Almost three thousand blacks were lynched between 1889 and 1918. Just under 20 percent of these had been accused of raping a white woman (raping a black woman hardly counted). Others were accused of murdering whites, or simply of insolence. Some lynchings were comparatively orderly affairs—if you can call a lynching orderly—but in others, the lynch mob acted with incredible, inhuman brutality, sometimes torturing the victim to death. Luther Holbert and his wife, lynched in Mississippi in 1904, had their fingers chopped off (and distributed as souvenirs), then their ears; before they were burned to death, the mob bored into their flesh with corkscrews. Typically, a coroner's jury either exonerated the lynch mob, or piously proclaimed that the lynchers were unknown—even though lynch mobs usually worked in public, before crowds, and in broad daylight.²³ Rarely was anybody punished for taking part in a lynching.

The federal courts had not been much help to blacks in the south after the end of Reconstruction. Indeed, the Supreme Court had declared one of the key post-Civil War civil rights statutes unconstitutional;²⁴ and in the notorious case of *Plessy v. Ferguson* (1896),²⁵ the Supreme Court put its stamp of approval on segregation itself. This was the "separate but equal" doctrine, which legitimated the American brand of apartheid. The situation began to change, though slowly, in the twentieth century. There had always been, in a way, a civil rights movement; always black leaders who protested against segregation. A key step was the founding of the National Association for the Advancement of Colored People (NAACP). This organization began to pursue a policy that centered on

the courts. After all, there was nothing much to be gained by begging the legislatures and city councils of the south for relief; they were bastions of white supremacy. The federal government was hostile or indifferent—indeed, Woodrow Wilson, a southerner by birth, was an ardent segregationist. The courts looked like the only hope for some kind of relief.

The litigation strategy, under the leadership of Charles Houston and then of Thurgood Marshall, slowly produced results. The Supreme Court began to back away from *Plessy v. Ferguson*. In *Buchanan v. Warley* (1917),²⁶ the Supreme Court struck down an ordinance of Louisville, Kentucky, that made it illegal for a black family to live on a block inhabited mostly by white folks; and vice versa. The Court also began to trim the edges of school segregation. In *Missouri ex rel. Gaines v. Canada* (1938),²⁷ a black man, Lloyd L. Gaines, tried to get into the law school of the University of Missouri; the university refused to admit him, and the state courts affirmed this decision. The Supreme Court reversed—here of course the state could not even pretend that the facilities were separate but equal; they offered to pay Gaines's tuition in some other state, but this, the Court felt, was not an adequate response. There were other cases in which black plaintiffs won, but the Court did not have to address the *Plessy* rule directly. For example, in *McLaurin v. Oklahoma State Regents* (1950)²⁸ the black plaintiff, George McLaurin, was admitted to the state university, but had to sit in a separate row, eat at a separate table in the cafeteria, sit in a special place in the library. This was hardly treatment "equal" to what white students got. But it was not until *Brown v. Board of Education* (1954)²⁹ that the Supreme Court took the decisive step of declaring that *all* school segregation violated the Fourteenth Amendment. It was a unanimous opinion, written by the new chief justice, Earl Warren. In some regards, this was a cautious decision: the Court did not order an immediate end to segregation in the

schools; indeed, it ordered new argument on the issue of how to implement the decision. In the second *Brown* case³⁰ the NAACP argued for a sharp, bold order to get rid of segregation; but the Court instead ordered desegregation to proceed "with all deliberate speed," an odd turn of phrase, and essentially dumped the matter into the lap of the lower federal courts.

Brown itself was cautious in yet another way: it confined itself to education. It said nothing about segregation in other areas of southern life. But the Court soon made clear that the principle of *Brown* went far beyond school segregation. In a series of cases, the Supreme Court struck down every instance of official apartheid that came before it: parks, swimming pools, public facilities in general. And, perhaps most dramatically, the Supreme Court in 1967 unanimously voided all existing miscegenation laws, in *Loving v. Virginia*.³¹ Loving was a black man who had married a white woman: the ultimate offense to white supremacy. At one time, most states had forbidden interracial marriage; but by the 1960s, these statutes survived mostly in the southern states. After *Loving*, they vanished entirely from the law.

Between 1950 and 2000, race relations in the United States were totally revolutionized. There seems little question that the federal courts played a role in the process. The Supreme Court unleashed powerful forces, and laid the *legal* foundations for a multiracial society. But how crucial in fact was the role of the federal courts? Scholars do not agree. A judicial decision does not arise in a vacuum; it comes out of a context. The years of the Warren Court were also the years of Martin Luther King and a militant civil rights movement. These were also the years of the Cold War; the racial habits of the south were a national embarrassment. The Second World War had been in part a struggle against a racist (Nazi) regime. The old colonial empires were breaking apart after the war; African,

Asian, and Caribbean states became independent. American apartheid was a public relations disaster; when a foreign black ambassador or journalist was insulted in a hotel or restaurant, the United States suffered in the eyes of the world—and the gleeful Soviets won a point in the propaganda game.³² Meanwhile, blacks had been moving north, where they voted, and had a measure of political influence. White opinion in the north was changing, slowly but surely, in the direction of greater racial equality. President Truman ordered the armed forces desegregated in 1948. Blacks entered major league baseball; they sang at the Metropolitan Opera.

The Supreme Court has no army, no way to force its dictates on society. Whether its decisions “stick,” or dissipate in empty air, depends on the reaction of society. The southern states, as a matter of fact, simply refused to obey the dictates of *Brown*; for years, almost no black children went to school with whites in Mississippi or Alabama. The governor of Arkansas, Orval Faubus, openly refused to obey a court order admitting black children into a Little Rock high school. At this point, the president (Dwight D. Eisenhower) reluctantly brought in the troops—he could not allow federal power to be so visibly defied. But the southern states disobeyed as long as they could—and often quite successfully. They dithered and delayed; they fought back in court, they used violence and dirty tricks. In the end, they failed. The forces allied against them proved, at last, too strong.

The role of the courts is open to debate; but the Civil Rights Act of 1964 clearly did make a difference. This act outlawed race discrimination in housing, education, employment, public accommodations. It created a federal agency to enforce the dictates of the law. It opened the courts to lawsuits by people who felt the sting of prejudice. Some aspects of the law were immediately and almost totally successful. Hotels and restaurants could no longer turn away black cus-

tomers. Housing and employment were stickier subjects; but the act definitely cut down on discrimination, and, at the very least, drove prejudice underground.

The Voting Rights Act of 1965 was also extremely important. Of course, blacks in the south had always had the right to vote—on paper. They lost the right, in practice, as we have seen, through a series of legal maneuvers, dirty tricks, and violence. Since that time, the fight for black suffrage had been carried on slowly, county by county, lawsuit by lawsuit—an almost impossible job. The act of 1965 tried to cut through the technicalities with a bold and novel maneuver. The act contained a “trigger” mechanism: if statistics suggested that a county was not allowing blacks to vote, then the federal government stepped in and guaranteed blacks the right to register and vote. This statute was a death blow to political white supremacy. By the end of the twentieth century, there were black legislators, congressmen and congresswomen, black mayors and city officials, all over the south; and Virginia had even elected a black governor.

DEFENDANTS' RIGHTS

The Warren Court also expanded the rights of criminal defendants—not a terribly popular group, in any period. In *Gideon v. Wainwright* (1963),³³ Clarence Gideon, a Florida drifter, had been convicted of breaking into a pool hall and stealing. Gideon insisted, at the trial, that he had a right to a lawyer. He did, of course—but only if he could pay for it. Gideon had no money, and Florida law made no provision to give him one for free. Gideon was forced to fend for himself. He was convicted. On appeal, the Supreme Court reversed the case, unanimously. The state was obliged, constitutionally, to provide lawyers for defendants who were on trial for seri-

ous crimes. Gideon had the right to a new trial—and a free lawyer. This time, ably defended, he won an acquittal.

Equally famous was *Miranda v. Arizona* (1966).³⁴ Ernesto Miranda, poor, young, uneducated, was accused of rape. The police arrested him, and took him to an “interrogation room,” where they questioned him sharply. Miranda claimed he was innocent; but after hours of grilling, he signed a written confession. The judge allowed the confession into evidence at trial and—no surprise—Miranda was convicted.

The Supreme Court overturned his conviction, though by a narrow (5–4) margin. People arrested for crimes had a right to resist police pressure and coercion. The opinion is subtle and in some ways confusing; in practice, it came to mean that the police, after arresting a person, had to give that person what everyone now calls the “Miranda warning.” This usually involved some formula such as: “You have the right to remain silent. Anything you say can be used against you. You have the right to talk to a lawyer at any time. If you can’t afford a lawyer, the state will provide you with one.”

The *Miranda* case was controversial from the start. Nobody questions *Gideon* anymore; but *Miranda* is another story. There were shouts and cries that it tied the hands of the police; that it coddled criminals, at the expense of victims and the public. There were, and are, demands that the case should be overruled. But the case has survived, to this point. *Has* it crippled the police? *Has* it in fact let dangerous criminals loose? There are those who say yes; but the evidence is murky and conflicting. There are signs that the police have learned to live with it—that it has become part of their culture. Or—which may be part of the same phenomenon—that the “Miranda warning” has become merely a verbal formula, something mumbled routinely, at an arrest; and that the police still have their ways to overawe and manipulate those who fall into their web.

ONE PERSON, ONE VOTE

The Warren Court also acted boldly in an area that touched on the very shape of the political system, in a series of cases on the issue of legislative reapportionment. The first shot was fired in *Baker v. Carr* (1962).³⁵ The case came out of Tennessee. People who lived in the cities—Memphis, Nashville, Knoxville—complained that the General Assembly was dominated by rural interests; and that the legislature refused to reapportion itself to give city voters their fair share of the seats. The defense was very simple: these were “political questions” and none of the Court’s business; indeed, the Court had in the past been reluctant to intervene in such “political questions.” But this was a different Court; and in *Baker v. Carr*, the Court jumped in feet first. The case did not actually change the makeup of the Tennessee legislature; the Court simply said that the courts should not duck, weave, and dodge—they had a right to hear and decide. Within a year, lawsuits were filed in most of the states, complaining about methods of districting. Eventually, the Supreme Court expanded and explained what it was doing; it overturned house after house, legislature after legislature, and applied a bold doctrine that is often summed up (a bit misleadingly) as “one man, one vote.” Both houses of the legislature, in all the states, must be more or less fairly apportioned.

THE AGE OF PLURAL EQUALITY

The Warren Court thus made many dramatic moves during the 1950s and 1960s. If we put them together, we see definite patterns. This was an age that expanded the very concept of

equality. This had always been an important American idea—that all men are created equal. But “equal” did not apply to everybody—certainly not to blacks; nor to women as well. And “equality” meant, at best, freedom within a country that was in a way owned and run by and for a single dominant group: white Protestant males.

In the year 2001, it is hard to write a phrase like “white Protestant males” without an implied sneer, or, at the least, the notion that something was wrong, that “white Protestant males” were oppressors, men who ran a regime of domination and hypocrisy. But in some respects this is a bit unfair. Certainly, compared to the tyrannies, past and present, especially those that crept out of the sewers of the twentieth century like so many venomous snakes, the country *was* democratic. It *tolerated* minority religions; there was freedom of speech, and there were no political prisoners to speak of. Part of the reason that the “white Protestant males” of the past have fallen into disrepute is that the late twentieth century made obsolete, and went beyond, their notion of equality. The new age demanded an end to domination by a single moral or ideological system, a single race, gender, language, and way of life, even though much of the domination was cultural, not physical; symbolic, not instrumental. The new notion, which we might call “plural equality,” meant power-sharing—both with respect to power in the literal sense, and in the symbolic and cultural senses as well.

Race was the most shining example of plural equality in action—blacks led the civil rights movement, then Hispanics, Asians, and Native Americans joined the parade. With regard to each of these, the American record had been dismal, to say the least. There is no worse blot on American history. The most notorious case, of course, was black slavery, and the virtual slavery of the post-Reconstruction south. But there was rank discrimination against Hispanics throughout the south-

west. The Chinese were the object of intense hatred in California; and the first immigration restrictions were directed against the Chinese. The attack on race discrimination benefited all minority races. The treatment of Native Americans verged at times on outright genocide. But now law (and society) came to respect the religions and languages of, say, the Cherokee and Navajo. Gone are the infamous boarding schools, and the attempts to stamp out native cultures because they were pagan and “primitive.” The tribes now enjoy a great deal of actual autonomy. White supremacy, in general, has gone underground; and what was once orthodox doctrine throughout the south is now confined to a lunatic fringe holed up in cabins in Idaho and Montana. Racism, to be sure, is far from dead; it is a wounded snake whose fangs are still deadly, as it thrashes about in (what we hope are) the agonies of death.

As important, perhaps, as the movement to equalize races was the movement to equalize the rights and positions of women and men. The Civil Rights Act of 1964 outlawed discrimination against women in the workplace. The story (or legend) is that southerners, bitterly opposed to the law, smuggled sex discrimination into the text; *this*, they thought, would kill the whole idea. If this was their aim, it backfired; the law passed with sex discrimination part of its primal language. But the women’s movement did not rise and fall on such accidents of time and place. Gender relations were in process of volcanic change. Women at work, the pill, the success of the civil rights movement—whatever the underlying bases, the effect on society, on family life, on the economy, was stark and dramatic; and the effect on the legal order, necessarily, was of equally dramatic scope.

In 1971, the Supreme Court, as if awakening from a long sleep, “discovered” gender discrimination as a forbidden act, under the Fourteenth Amendment to the Constitution—an idea that would have surprised the men (and they were all

men) who drafted the text. The occasion was an obscure case out of Idaho, *Reed v. Reed*,³⁶ and the issue was a law that gave males preference over females in handling estates of people who died without a will. The case itself probably affected at most a few dozen people; but the principle was revolutionary. The court followed up with case after case that, on the whole, hammered home the principle that men and women had to be equally treated under law. The courts outlawed overt discrimination; and they also got rid of "protective" laws, which feminists considered, with considerable logic, to be (as the phrase went) less a pedestal than a cage. Two generations earlier, most women, and most progressives, cheered when the Supreme Court upheld some of these laws: those, for example, that ordered minimum wages and maximum hours for women.³⁷ Today, these laws would be out of the question; and their language, all about the delicacy of women, their need for protection, and the glories of motherhood, make the modern reader wince.

The Court played a role in dismantling sex discrimination; but here, too, the Civil Rights Act, in the end, was far more important than any single decision of the Court, and probably more important than all of them together. For one thing, the law created an agency, set up a structure, and opened the door to complainants who felt the sting of discrimination. Thousands of complaints were filed, and continue to be filed, each year. Courts and agencies broke down barrier after barrier: women joined police and fire departments, became baseball umpires and coal miners. The courts and agencies have refused to accept excuses; have sneered at the lame reasons given why women were not suitable for this or that line of work. It was not a one-way street. Airlines were told they had to hire men as well as women for jobs as flight attendants. A nursing school was told it could not turn down an applicant simply because he was male. Another important move was to

define sexual harassment as a kind of sex discrimination. Men who groped or propositioned the women who worked for them, or with them, and companies that allowed this to happen, found themselves in legal difficulty. Women were complaining, too, about "hostile" workplaces: sites where they were insulted or exposed to male crudity and anger.³⁸

Group after group pushed forward to claim its place in the sun. Very notable was the revolt of the so-called sexual minorities—gays and lesbians. Despite savage rearguard action, they made a good deal of progress. A series of dramatic cases opened the door to expansion of the rights of prisoners as well. Federal courts declared whole state systems of prisons unconstitutional, because of filth, neglect, and brutality. There were also cases on students' rights. In *Tinker v. Des Moines Independent Community School District* (1969),³⁹ students in a Des Moines high school wore black armbands to school, to show what they thought of the war in Vietnam. This display was against school policy; the students were sent home and suspended. The Supreme Court sided with the students: young people do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

The Age Discrimination in Employment Act was another product of the 1960s.⁴⁰ It became illegal to discriminate against men and women over forty (and under sixty-five) in hiring, firing, or conditions of work. A later amendment (in 1978) raised the upper age to seventy; a still later amendment (1986) removed the age cap altogether.⁴¹ This, in effect, abolished mandatory retirement. A person able and willing to work at seventy, eighty, ninety, or even one hundred cannot be dismissed from the job simply because of a flat rule that counts the candles on her birthday cake. The Americans with Disabilities Act, passed at the beginning of the 1990s, extended the job rights of those millions of Americans who were blind, deaf, in a wheelchair, or otherwise "handicapped."⁴²

Restaurants and the like were not to discriminate; trains and buses had to be fitted to accommodate these people. Nor was an employer to refuse to hire a person because of disabilities, if she could do the work (no blind cab drivers, of course); and, in addition, an employer was supposed to make "reasonable accommodations" (ramps, for example), so that a disabled person could actually do the job.

These laws are powerful, and to a degree quite effective. Thousands of complaints pour in to the civil rights agencies—federal and state—every year. In real life, race and sex discrimination have certainly declined since the 1950s; but claims show no signs of abating. Most of these claims never get very far, to be sure. But enough of them flow into the various agencies to generate a huge body of rules and decisions; and enough of them, too, spill over into the courts to make this a vibrant, growing field of law.

The Constitution, that ancient document, now flexed its muscles, and spread its wings over every aspect of American life. From the outside, it looked like a judicial revolution: a wildly inventive and proactive court system, intent on imposing its progressive views on the country as a whole. But this is profoundly misleading. The courts followed as much as they led. Before you can have a *Tinker* case, you must have a *Tinker*: you must have rights-conscious, rebellious, feisty human beings who have a sense of what is due to them, and are willing to struggle for their goals. And before you can have these rebels, you must have the right norms, the right zeitgeist. A gay rights movement, or a prisoners' rights movement, or a drive against mandatory retirement, would have been unthinkable, and totally hopeless, in the nineteenth century.

THE RIGHT OF PRIVACY

The so-called right of privacy—at least in its constitutional form—got its start in 1965, in *Griswold v. Connecticut*.⁴³ To be sure, there had been a few hints and suggestions in the case law before that. The issue in *Griswold* was a statute that made it impossible (legally, at least) to sell contraceptives in the state of Connecticut, and even to give family planning advice. The Supreme Court struck down the statute, claiming, in one of its periodic spasms of discovery, that an implicit right of "privacy" was buried somewhere in the text of the Fourteenth Amendment, and in other places in the Constitution. The *Griswold* case talked about the sacredness of marriage, and the possibility that the police could invade its sacred "precincts," looking for evidence of contraception. But later cases made it clear that marriage was not the essential point; personal choices about sex and lifestyle were not a privilege only married people were allowed to enjoy. The climax of the line of privacy cases came in 1973, in the case of *Roe v. Wade*.⁴⁴

The issue in the case was abortion. "Jane Roe" (a pseudonym for a woman named Norma McCorvey) challenged Texas's law, which was extremely restrictive; there was another challenge, to a somewhat more liberal law from Georgia. In the background, of course, was the so-called sexual revolution; and a vibrant and militant women's movement. Illegal abortions were common in many parts of the country; and they often had tragic outcomes. But there was also a larger issue at stake: in her argument before the Supreme Court, Sarah Weddington announced that "one of the purposes of the Constitution was to guarantee to the individual the right to determine the course of their own lives."⁴⁵

Of course, this was not the “legal” issue; nor is it literally true, as a matter of history, that this is what the Constitution was about. But this is how the constitutional *system* had come to be understood by millions of people; and it was the issue that haunted the case, and that led to the 7–2 decision. In essence, the case held that a woman had a constitutional right to have an abortion; to decide to carry a child or not to—at least in the early months of her pregnancy.

The case, of course, has been controversial since the day it was issued by the Supreme Court. Justice Blackmun, who wrote the majority opinion, almost certainly thought he was crafting a compromise—between women’s groups who wanted an absolute right to abortion, up to the moment of birth; and those who considered abortion murder, to be banned in all events. Under *Roe v. Wade*, the absolute right was confined to the first trimester of pregnancy; in the second trimester, the states were allowed to regulate abortion, and in the third trimester (presumably) it could be banned altogether.

No doubt the Court expected controversy. Probably they also expected the furor to die down after a while. *Brown v. Board of Education* was even more revolutionary, and created even more of an uproar—to the point of bloodshed; but by the 1970s *that* uproar had abated, and the case had become sacred, untouchable. *Roe v. Wade* has had a very different fate. Abortion, after all, was also a *religious* issue. It remains an article of faith for millions that abortion is murder; and that, therefore, *Roe v. Wade* is an utter abomination. The Republican party, at one point, declared it to be party policy to get rid of the decision. Congress—and the courts—chipped away at the holding. Federal funding for abortions? No, according to the so-called Hyde Amendment, which barred federal Medicaid funds for abortions, except to save the life of the mother, or in cases of incest or rape. The Supreme Court upheld the

Hyde Amendment, in 1980.⁴⁶ The Supreme Court, in a more conservative mood, began to show grave doubts about its own handiwork. At one point, the case seemed doomed to be overruled; and it was saved by the narrowest of margins.⁴⁷ In 2002 the decision seems secure—for the moment; but two or so appointments of “right-to-lifers” to the highest court might mean the end for this embattled decision.

The court talks about the right to “privacy,” but this is a rather odd use of the word. The older use of the term, “right of privacy,” had quite a different meaning. If a company, for example, used my picture in an ad, without my permission, that would violate my right to privacy. But the *constitutional* right to privacy is not a right to anonymity, to “privacy” in this sense. It is, in some ways, the opposite—or can be. It is the right to make life choices, about sex, marriage, and intimate affairs, without government interference or disapproval. It is related, in other words, to the reform of laws about victimless crimes. It is a product, in part at least, of the so-called sexual revolution.

Roe v. Wade was a kind of high-water mark. The Supreme Court seemed unwilling to take further steps in the direction of expanding the right to other life choices. In *Bowers v. Hardwick* (1986),⁴⁸ the Court considered a Georgia statute that made sodomy a crime—a statute that had analogs in about half the states. The defendant was a gay man, caught in the act. He fought the case all the way up to the Supreme Court. The Supreme Court upheld the statute—by a narrow 5–4 margin. Under the Georgia law, it was a crime to commit “any sexual act involving the sex organs of one person and the mouth or anus of another.” This law applied to both gay and straight sex. The court, however, ignored this fact, and insisted there was no “right of privacy” for “homosexual sodomy.”

In the last decades of the twentieth century, the Supreme

Court, and the federal courts in general, became more cautious about creating new rights and extending the reach of old ones. Twelve years of conservative presidents put a definite stamp on the federal judiciary. This led liberal interest groups to turn more attention to state courts. In some cases, this technique was brilliantly effective. The Supreme Court of Kentucky, in 1993, struck down the Kentucky law against "deviate sexual intercourse."⁴⁹ The defendant in the case, Jeffrey Wasson, had the bad luck to proposition a man in a parking lot who turned out to be an undercover officer. The Kentucky court found the *state* right of privacy broader than the federal right. And, rather ironically, in 1998, the Georgia Supreme Court voided the very same sodomy statute that the Supreme Court had upheld in *Bowers v. Hardwick*.⁵⁰ Though it passed the test of the federal Constitution, it fell afoul of the Georgia constitution—at least according to the Georgia Supreme Court, which, after all, has the final word on this particular subject.

On the whole, however, despite some backing and filling, most of the decisions of the Warren Court have stood the test of time. Warren Burger replaced Earl Warren; President Richard Nixon chose Burger specifically with the notion of tilting the Supreme Court to the right. Nixon also had the chance to put other conservatives on the Court. He was, in the main, successful; and President Carter, the next Democratic president, was one of the few presidents who had no vacancies on the Court to fill. Then came twelve years of conservative hegemony. Still, it was the Burger Court that decided *Roe v. Wade*; and Burger himself was part of the majority in that case. The Rehnquist Court was even more conservative than the Burger Court; and few justices have been as conservative as Rehnquist himself, Antonin Scalia, and Clarence Thomas. Nonetheless, at the end of the twentieth century, the

work of the Warren Court remained standing, bloody but essentially unbowed.

"Conservative" and "liberal," after all, are relative terms. Few justices have been as "conservative" as Clarence Thomas, but Clarence Thomas is black; and black and white conservatives alike are more liberal on some issues (race is one of them) than even the most liberal judges of the nineteenth century were. Thomas is, moreover, a black man married to a white woman—and this would have made both of them felons in the south a generation or so ago. The conservatives would like to turn some power back to the states, and reduce the size of government. But what they can accomplish is strictly limited. Humpty-Dumpty cannot be put together again. The welfare-regulatory state is the product of profound social forces; it is a genie that cannot be wished back into its bottle.

NOTES

1. The case in question was *Pollock v. Farmers' Loan and Trust Company*, 157 U.S. 429, 158 U.S. 601 (1895).
2. 24 Stat. 379 (act of Feb. 4, 1887).
3. On this point, see Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (1982), ch. 5.
4. 26 Stat. 209 (act of July 2, 1890).
5. Minn. Stats. 1905, sec. 1771, p. 356.
6. Lawrence M. Friedman, *American Law in the Twentieth Century* (2002), pp. 60–61. The statute (Food and Drug Act) is 34 Stat. 768 (act of June 30, 1906).
7. Upton Sinclair, *American Outpost: A Book of Reminiscences* (1932), p. 154.
8. See Charles O. Jackson, *Food and Drug Legislation in the New Deal* (1970), chapter eight.

9. 217 N.Y. 383, 111 N.E. 1050 (1916).
10. 35 Stat. 65 (act of Apr. 22, 1908); an earlier act had been declared unconstitutional.
11. *Karlslyst v. Industrial Commission*, 11 N.W. 2d 179 (Wisc., 1943).
12. Ark. Code Ann., sec. 11-90521 (1999).
13. Okla. Comp. Stats. 1926, secs. 7283, 7284, pp. 662-63.
14. See Claudia Clark, *Radium Girls: Women and Industrial Health Reform, 1910-1935* (1997).
15. Thus, the Arkansas statute quoted above makes a heart condition compensable "only if . . . an accident is the major cause." Sec. 11-9-114.
16. Ark. Code Ann. sec. 11-9-113 (1999).
17. 295 U.S. 495 (1935).
18. 297 U.S. 1 (1936).
19. See, on this, William E. Leuchtenberg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995).
20. 79 Stat. 286 (act of July 30, 1965).
21. See Edwin Kiester, Jr., "A Darkness in Donora," *Smithsonian*, Nov. 1, 1999.
22. See, in general, Michael Perman, *Struggle for Mastery: Disfranchisement in the South, 1888-1908* (2001).
23. The material on lynching is taken from chapter six of Leon Litwack's *Trouble in Mind: Black Southerners in the Age of Jim Crow* (1998).
24. In the so-called Civil Rights Cases, 109 U.S. 3 (1883); this case voided the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations.
25. 163 U.S. 537 (1896).
26. 245 U.S. 60 (1917).
27. 305 U.S. 337 (1938).
28. 339 U.S. 637 (1950).
29. 347 U.S. 483 (1954).
30. 349 U.S. 294 (1955).
31. 388 U.S. 1 (1967).

32. See Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (2000).
33. 372 U.S. 335 (1963).
34. 384 U.S. 436 (1966).
35. 369 U.S. 186 (1962).
36. 404 U.S. 71 (1971).
37. One of the most famous of these was *Muller v. Oregon*, 208 U.S. 412 (1908).
38. On these developments, see Friedman, *American Law in the Twentieth Century*, pp. 305-10.
39. 393 U.S. 503 (1969).
40. 81 Stat. 602 (act of Dec. 15, 1967).
41. Interestingly, the effective date this noble law was to go into effect was postponed seven years for university and college teachers; after that they were covered.
42. 104 Stat. 327 (act of July 26, 1990).
43. 381 U.S. 479 (1965).
44. 410 U.S. 113 (1973).
45. Quoted in David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (1994), p. 525.
46. The case was *Harris v. McRae*, 448 U.S. 297 (1980).
47. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
48. 478 U.S. 186 (1986).
49. *Commonwealth v. Wasson*, 842 S.W. 2d 487 (Ky. S. Ct. 1993).
50. *Powell v. State*, 270 Ga. 327, 510 S.E. 2d 18 (1998).