the criticism that as the American Government functions today, its branches are not coordinate with each other but that the Legislature and Executive are really subordinate to the Supreme Court. Whether one approves of this relation or not, it is demonstrable that it holds as a fact of logical structure. Congress and President check each other and both are responsible to the electorate. The Supreme Court can check Congress and/or the Executive and is not responsible to the electorate. There is, to be sure, the process of Constitutional amendment. But even if one does not altogether agree with Morris R. Cohen in his devastating critique of the whole conception of judicial review under which the Court can read any meaning it pleases into any amendment (*vide* what it did to the Eleventh and Fourteenth amendments), it still remains true that since a minority of states can prevent passage of a Constitutional amendment, this gives the Court a disproportionate power over the other branches of government, which in effect makes it a superior legislative body as well.

This brings us to Professor Black's fourth line of argument, which is that there is nothing inconsistent with political democracy in the Court's power to nullify the laws passed by those who are responsible to the people. He offers several reasons for this belief, one of them that the people really want the Court to have this power. And how does he know this? By the simple fact that the power has sustained itself. Logically this is worthless as an argument and would justify the claim that every abuse enjoys popular support: otherwise it would have been abolished. This type of apologetics has been used in the past to fictionalize popular support for the worst tyrannies.

Here again we must distinguish between the facts and our evaluation of them. A democracy may exist either with or, as in England, without the power of the Court to nullify legislative authority. The question is whether or not *the particular feature of judicial review* is democratic and whether a government is more or less democratic when it is present. The question is *not* whether this feature makes a government morally better or more efficient. A politically democratic government is not necessarily a morally better one.

Space does not permit proper exploration of the argument. But the level of Professor Black's discussion may be inferred from the fact that part of his case for the democratic nature of judicial review rests on his contention that the Justices are subjected to an inexorable control even though they sit for life on the bench. They are controlled by death! This is a macabre irrelevancy. Death may strike down a Justice. It does not strike down his decision. Death may strike down the bloodiest of tyrants. That does not make it an instrument of democratic control—for, unfortunately, Death is no respector of democrats either.

The weakness of Professor Black's position, which logically gives the court *carte blanche* to set aside any Congressional legislation that is challenged before it, does not by itself establish the validity of the view he is arguing against. But one thing seems clear. Even if judicial review is regarded as necessary or desirable, so long as the concept of democracy entails the notion of consent and control by the governed, to speak of the democratic character of judicial review is to perpetrate unnecessary semantic confusion.

Professor Black has done a disservice to his own position by the violently partisan spirit with which he has defended it.

2. *An Evolving Body of Basic Beliefs*

By Alan F. Westin

SINCE the mid-1950s, a lively national conversation has been under way concerning the proper role for the Supreme Court in American government. Like the conversation of the 1930s, the entrance of the Court into popular attention has been occasioned by the pinch of the Court's fingers on the stately rumps of the majority-will institutions of our political system—Congress, the Presidency, and the states—and almost as directly upon the groups whose interests were being served at the moment by those institutions. Whether the Court should have its hand slapped for impertinence or held high as a symbol of tyranny-tweaking is the heart of the debate, as it has been since the era of the Chief Justice whom Jefferson angrily branded as "Black Jack" Marshall.

In "Law as Large as Life," the late Charles P. Curtis, a practising lawyer and *littérateur* from Boston and the author of "Lions Under the Throne," an urbane earlier essay on judicial review, contributes to this conversation in the elegant phrases that he spun so well. Half of Curtis's book is an argument that there is and must be a natural law to govern American politics. This is neither the religious standard of a St. Thomas nor the rationalist variety of a Jefferson, but rather an ever-evolving body of basic beliefs which are "common knowledge," as well perceived by the ploughman as the professor, the jury as the judge. In a perceptive sampling of cases involving state criminal procedure, cruel and unusual punishment, naturalization of aliens, racial segregation, and state jurisdiction over persons in civil affairs, Curtis shows that the "fallout of natural law" showers all of the great questions of Constitutional law and dominates the intra-Court debates. We have a natural law standard, Curtis concluded, because we cannot live in liberty-under-law without one.

If natural law needs a prophet, however, Curtis felt that it should not be the Supreme Court but Congress. Congress should exercise its power under grants such as the Fourteenth Amendment and the Commerce Clause and cease leaving so many issues to the Justices. Congress should have struck down racial segregation in the schools. Congress should eliminate cruel treatment by state officials of arrested persons by adopting as a rule binding on the states the American Law Institute's Model Code covering police detentions. Congress should state more clearly which types of interstate commercial activities can be taxed or regulated by various states and which require one national rule. Curtis would transfer to Congress the responsibility for providing the moral fervor which Supreme Court rulings on civil liberty now give the nation—similar to the "moral fervor of the 39th Congress," which enacted the great guarantees of the Fourteenth Amendment.

In his discussion of the judiciary, Curtis gives a fine performance, contributing insights which make his pages admirable. But it is often true that someone with a complete grasp of the strengths and weaknesses of one institution can endorse, as its replacement, an institution that he trusts greatly because he does not know it as well. The sad fact is that Curtis does not display in this book very much understanding of why Congress has not done what he wished it to in the past and why it could not be expected to do so.

Congress did not strike down segregation because the system of elections and intra-Congressional organization placed Congress under the control (or at the very least, under the veto power) of a Southern Democratic-"states-rights" Republican coalition. To expect a Congress of the 1940s, or of the 1960s, to be the Congress of 1868 (which buttressed its "moral fervor" with the goals of defending Northern industrial expansion and tying Negro voters to

the GOP) overlooks how atypical of Congress the one-party Reconstruction Era was. Nor will Congress lay down a code of criminal procedure, as Curtis desired; sympathy in Congress runs far more to the "beleaguered" prosecutor than to prisoners, and there is a pervasive "states-rights" ideology within Congress on this issue.

In short, contrary to Curtis's assumptions, Congress is the most susceptible of our three national institutions to the antilibertarian urges of our population; "moral fervor" in Congress runs more to harsh internal-security programs than to enlargements of freedom; nothing in the legislator's training or Congressional role prepares him to act as a prophet of a "modern natural law"; and if someone beside the Court is to be our prophet, twentieth-century realities have bestowed that role on the President, who has already achieved *legislative* supremacy in the Government.

Undoubtedly, Curtis, whose tragic accidental death took place late last December, would have had pungent replies to make to these comments. But his book contains much on the judiciary, virtually nothing in detail on Congress, and concludes that we should trust to Congress and not the Courts. Yet in other places, Curtis wrote that he would have the Court defend the "democratic process" even against Congressional enactments. And he concluded by bestowing on the Court the mantle of "minor prophet." I think that most careful readers will be left confused by this backing and filling, despite the incisiveness of individual comments and the high literary charm of the book.

—*Bettmann Archive.*

Daumier drawing of a courtroom procedure.

3. *Keeping in Tempo with the Times*

By John R. Schmidhauser

IN THE years since *Brown* v. *Board of Education*, the Warren Court has endured not only the violent attacks of its avowed enemies but the heavy-handed ministrations of its academic friends. The fashion for playing like a Justice was set many years ago by men possessing the intellectual sensitivity and rapierlike wit of the late Thomas Reed Powell. In recent years the New Scholasticism decrees that among legal commentators Everyman may be a Justice. One suspects that there have been fleeting moments when the weary members of the Warren Court have preferred the wild swings of Senators Eastland and Jenner to the ostensibly helpful scholastic attempts at teaching the Justices how to write "neutral" opinions in cases involving highly combustible social issues. It is indeed refreshing to discover that Alpheus T. Mason and William M. Beaney have eschewed such a role.

In addition to the virtue of academic self-restraint, "The Supreme Court in a Free Society" possesses a number of positive attributes which mark it as a notable analytical contribution. The authors set themselves the task of appraising the contemporary role of the Warren Court in the context of the historical evolution of the judicial power in America. Focusing their attention upon the historic eras in which Federal judicial authority was subjected to the greatest stresses, they created a concise and realistic conception of the interplay of the factors at work in American society which have influenced Constitutional interpretation. In this connection the work effectively combines an historical account of the development of interpretative doctrine with an appraisal of the shifts in theoretical viewpoints concerning the modes of rendering decisions. For example, the authors make abundantly clear that controversy over whether judges "make" or "discover" law has often been intimately related to clashes over substantive interpretation.

As a vehicle of Constitutional history, "The Supreme Court in a Free Society" embodies a modern appraisal based on the discriminating use of the contributions of men like Edward Corwin, Herman Pritchett, Carl Swisher, and Benjamin Twiss, as well as the substantial earlier works in judicial biography and doctrinal interpretation of the authors. Despite the fact that developmental analysis is undertaken primarily to provide a meaningful frame of reference for contemporary evaluation of the Warren Court, the tasks of historical interpretation are taken quite seriously. To be sure, one might argue that while the contention that "Roger Brooke Taney . . . redefined federalism in terms more favorable to state power and so as to enhance the role of the judiciary" is basically sound, it is subject to serious and important qualifications. But here, as in a few additional instances, the differences in emphasis relate to questions which have divided scholars in the field for many years. The single occasion in which the authors make an historical slip is in their passing reference to Benjamin Curtis as the Justice who "fashioned a new formula" in the Cooley decision. While Curtis undoubtedly deserves credit for what very likely was a decisive role as mediator in conference, Justice Levi Woodbury, several years earlier, had stated the doctrine which was ultimately adopted in Cooley.

Perhaps a true measure of the sensitivity that the authors brought to the task is provided by their treatment of the evolutionary changes in the judicial issues of substantive due process. Their discussion of the origins of the substantive as distinguished from the traditional procedural applications of due process serve, on one hand, as a corrective to the frequently held notion that the invention of legal doctrine is largely the contribution of the national Supreme Court. Drawing upon the classic articles of Corwin, the relation-

(*Continued on page* 35)