Cornell Law Review

Volume 54
Issue 1 *November 1968*

Article 1

Role of the Supreme Court in a Democratic Society -Judicial Activism or Restraint

J. Skelly Wright

CORNELL
LAW REVIEW

Volume 54 November 1968 Number 1

THE ROLE OF THE SUPREME COURT IN A DEMOCRATIC SOCIETY—JUDICIAL ACTIVISM OR RESTRAINT?

J. Skelly Wright†

One of the Warren Court's severest critics tells us that during the Chief Justice's tenure the Supreme Court has "wrought more fundamental changes in the political and legal structure of the United States than during any similar span of time since the Marshall Court had the unique opportunity to express itself on a [clean slate]."[1] This has distressed those who counsel judicial restraint.

Remembering that certain past Supreme Courts, particularly those of the twenties and early thirties, also tried to play an active role in shaping our society, the apostles of restraint warn that even though we may approve the results that the Warren Court has decreed, we still must chastise the Court for assuming an activist role.[2] For even if the changes are desirable, they say the Court is not the proper institution to initiate them. Rather, the sorts of judgments the Court has made are the province of the legislatures; and, of course, the Court must not legislate. After all, it was the illicit role of a super legislature that the Nine Old Men are said to have assumed.

These critics are particularly upset because, just as many of the ill-fated "activist" decisions of the past were decided by recourse to the open-ended concept of substantive due process,[3] so many of the Warren

† Judge, United States Court of Appeals for the District of Columbia Circuit.

1 Kurland, *The Supreme Court 1963 Term, Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government*, 78 HARV. L. REV. 143 (1964).

2 *See, e.g.*, Freund, *New Vistas in Constitutional Law*, 112 U. PA. L. REV. 631 (1964); Freund, *The Supreme Court Under Attack*, 25 U. PITT. L. REV. 1 (1963).

3 *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S.

Court's path-breaking decisions have been rendered pursuant to the equally open-ended concepts of equal protection and procedural due process.[4] It is into these generalized constitutional commands that the Justices are most likely to read their own personal predilections and thus render ad hoc justice. Consequently, both the old Court and the Warren Court are criticized for much the same reasons.

There is, however, an obvious difference between the two Courts. The Nine Old Men were trying to halt a revolution in the role of government as a social instrument,[5] while the Warren Court is obviously furthering that effort. Its most significant pronouncements have decreed change in the status quo, not its preservation.[6] Rather than invalidate legislative efforts at social progress, its decisions have ordered alteration of widespread and long accepted practices, including many which had not been legislatively sanctioned in the first place. In Professor Berle's phrase, the Warren Court has functioned as a "revolutionary committee."[7]

---

45 (1905). For a discussion of the Court's retreat from this area, see McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and A Reburial*, 1962 SUP. CT. REV. 34, 36-45.

4 *See, e.g.*, Harper v. Virginia Bd. of Elec., 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Schneider v. Rusk, 377 U.S. 163 (1964); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Brown v. Board of Educ., 347 U.S. 483 (1954). *See also* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963), all of which, though couched in terms of fifth and six amendment guarantees, have strong equal protection overtones. *See* Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in Y. KAMISAR, F. INBAU & T. ARNOLD, CRIMINAL JUSTICE IN OUR TIMES 69 (A. Howard ed. 1965).

5 Surely one of the hallmarks of the old Court was the frequency with which it struck down recently enacted legislation, both state and federal. Hammer v. Dagenhart, 247 U.S. 251 (1918), struck down the Child Labor Act which had been passed in 1916. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922), invalidated the Child Labor Tax Act, passed only three years before in a legislative effort to circumvent the results of *Dagenhart*. In Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), the Court scuttled the National Industrial Recovery Act, passed only two years before, and in Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Bituminous Coal Conservation Act of 1935, enacted the previous year, met a similar fate. The Agricultural Adjustment Act of 1933, was almost as short-lived when it was killed by United States v. Butler, 297 U.S. 1 (1936). Furthermore, while the Court was busy saving the states from a federal government which it felt was acting beyond its constitutional powers, it also attempted to save the states from themselves. In Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936), for instance, the Court, following its illustrious predecessors that had decided Lochner v. New York, 198 U.S. 45 (1905), and Adkins v. Children's Hospital, 261 U.S. 525 (1923), struck down New York's 1933 minimum wage law for women as violative of substantive due process.

6 *See* cases cited note 4 *supra*. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

7 A. BERLE, THE THREE FACES OF POWER vii (1967).

Simply to say, however, that the Warren Court has frequently ordered change while the old Court tried to halt it does not itself establish that the one has done a good job and the other a bad one. Nor does it establish that either Court should have acted at all. It is my contention that the Warren Court has not simply decreed the right results, but also that it was right to have decreed them. Its active role in shaping our society has been a necessary and proper one. It is, then, necessary to distinguish its performance from that of certain "activist" Courts of the past whose performances were certainly injudicious. In order to do this, the sort of arguments that are made to support the doctrine of judicial restraint will be examined briefly, and both their validity and their bearing on an assessment of the work of the Warren Court must be considered.

I

THE ARGUMENTS FOR RESTRAINT

Three types of arguments are made against the courts playing an active role in shaping our society. One stresses the illegitimacy of the courts so acting, another emphasizes the adverse effects on democratic processes when the court so acts, while the third denies the ability of the courts to do it well. The last argument will be considered first.

A. *Limitations of Institutional Competency*

The stress here is not on the illegitimacy of the Court's behaving like a legislature, but on its incapacity to do so effectively. To begin with, we are told that the Court cannot act until a case is brought to it, and that anything said in the course of the opinion that is not crucial to the decision itself is mere dictum and without the force of law. Moreover, the judgment in a particular case binds only the parties. Consequently, the Court can never confront a broad social issue or solve it in a comprehensive fashion.[8] In addition, the Court does not have the requisite fact-finding machinery and therefore cannot acquire the pertinent knowledge upon which intelligent social action must be based.[9]

Moreover, judicial review is a blunt instrument. The Court cannot make the subtle, delicate, and in a sense arbitrary, distinctions and discriminations which the legislature can, and frequently must, make.

[8] *See* Mr. Justice Holmes' statement on this point in Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917).

[9] *See* Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966).

If, for instance, the Court had held discrimination in public accommodations to be unconstitutional, it could not very well have exempted, as the Civil Rights Act of 1964 does, owner-occupied rooming houses with fewer than five boarders.[10] Furthermore, it could never have undertaken the temporal and geographical line-drawing that characterizes the Voting Rights Act of 1965.[11] Similarly, it was long believed that the Court could not decree that its constitutional judgment, like most legislation, be given only prospective effect. Most important of all, perhaps, is the fact that the Court, having the power neither of the purse nor the sword, must rely on the legislative and executive branches of government to enforce its directives.[12]

These considerations are, of course, very persuasive arguments for judicial restraint. We have seen the consequences of their disregard. For instance, without any fact-finding machinery whatever, the old Court in *Lochner v. New York* felt confident in surmising that there was "*no* reasonable foundation for holding [a state statute limiting the hours of work for bakers to sixty hours a week] to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker."[13] Indeed, virtually all the old economic due process cases holding federal and state statutes unconstitutional resulted, at least in part, from the Court's fact-finding incapacity.

Moreover, these considerations of institutional incapacity may apply with particular force where the Court is itself decreeing broad changes in the status quo. For the Court not only faces its usual fact-gathering disabilities involved in making its initial judgment; it must also be prepared to oversee and administer the operation of the decree itself. And the Court's affirmative mandate may require the state to expend money which the legislature is unwilling to appropriate.[14]

In certain areas the Court has tried to surmount these obstacles. It has, for instance, tried to inform itself more fully by requesting amicus briefs and, on occasion, such as in the second *Brown v. Board of Education* case,[15] it has invited the Attorney General to file a brief

---

10 42 U.S.C. § 2000a(b)(1) (1964).

11 42 U.S.C. § 1973 (Supp. I 1965).

12 *See* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 186 (1968).

13 198 U.S. 45, 58 (1905) (emphasis added).

14 *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *See also* State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966).

15 349 U.S. 294 (1955).

even though the United States was not a party to the case.[16] It has also limited several of its constitutional decisions in the criminal law area to prospective effect only.[17] In *Miranda v. Arizona*[18] it tried to deal with an issue at wholesale by establishing a veritable constitutional code of police procedure. And it has delegated the administrative responsibility for enforcing *Brown* and the reapportionment cases to the lower federal courts.[19] These courts have in turn looked to experts for guidance. The Fifth Circuit in the *Jefferson County* school integration case, for instance, judicially adopted the HEW desegregation guidelines.[20]

Interestingly, many of the critics who point out that the Court is not institutionally competent to make "legislative" determinations become even less sanguine when the Court tries to overcome its institutional limitations. The critics, however, cannot have it both ways—criticizing the Court for making legislative judgments in the guise of adjudication because it cannot legislate wisely, then becoming even more scornful when the Court legislates more candidly in order to do so more effectively.[21]

But whatever one may think of the Court's attempts to mitigate the effects of its institutional incapacities, what is clear about these incapacities is that, where relevant, they counsel deference to the legis-

---

16 The Court also invited the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on the question of relief. Brown v. Board of Educ., 347 U.S. 483, 495-96 (1954).

17 Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

18 384 U.S. 436 (1966).

19 Bluntly, litigation in these fields has reached the point where, in many cases, the Supreme Court lays down the principle but sends the case itself back to a district or a state court with instruction to draw an appropriate decree . . . .

A. BERLE, *supra* note 7, at 53.

20 United States v. Jefferson Co. Bd. of Educ., 372 F.2d 836 (5th Cir. 1966). *See* N.Y. Times, Mar. 11, 1967, at 24, col. 2.

21 The point is somewhat analogous to one made in a recent article by Professor Deutsch:

> If the difficulty with entrusting political decisions to the Court is its political unresponsiveness, ought we not welcome a "greater sensitivity to . . . shifts in the political temper?" If, on the other hand, we distrust decisions based on transitory shifts in the electorate's mood, is not the solution precisely an institution "unresponsive to the democratic process?" What we cannot do—once we agree that judicial review involves a duty to render decisions that necessarily entail political consequences—is to have it both ways, simultaneously denying legitimacy to decisions of a politically unresponsive institution and to decisions of one that responds to shifts in political sentiment.

Deutsch, *supra* note 12, at 187.

lature but do not require it. Where the choice is between the Court struggling alone with a social issue and the legislature dealing with it expertly, legislative action is to be preferred. All too often, however, the practical choice has been between the Court doing the job as best it can and no one doing it at all.[22] Faced with these alternatives, the Court must assume the legislature's responsibility. If the legislature simply cannot or does not act to correct an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so. For "nature abhors a political vacuum as much as any other kind,"[23] and if the legislatures do not live up to their constitutional responsibilities, the Court must act to fill the vacuum.

B. *Adverse Effects on Popular Responsibility*

An altogether different argument for judicial restraint is based on the presumed tendency of judicial review to weaken the democratic processes. Here the emphasis is not on the ineffectiveness of judicial action, but on the debilitating side effects such action is likely to have on the other branches of government. For if the Court steps in to correct the constitutional errors of the legislative and the executive branches of government, those institutions will come to rely on it to do so and will cease to discharge their own responsibilities to remain within the boundaries of the Constitution.

James Bradley Thayer laid the keystone for this argument over sixty-five years ago:

> [L]egislatures are growing accustomed to this [judicial] distrust and more and more readily inclined to justify it, and to shed the considerations of constitutional restraints . . . turning that subject over to the courts . . . . The people, all this while, become careless as to whom they send to the legislature . . . [and come to depend on] these few wiser gentlemen on the bench . . . to protect them against their more immediate representatives. . . . [T]he [consequent exercise of the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside,

---

22 It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance.

Hobson v. Hansen, 269 F. Supp. 401, 517 (D.D.C. 1967). *See also* Cox, *The Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 122 (1966).

23 D. BROGAN, THE CRISES OF AMERICAN FEDERALISM 43 (1944).

> and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.[24]

Despite the insight of Thayer's observation, in the last analysis his advice is mistaken. When the Court is asked to review a statute it can do one of three things: find it constitutional, find it unconstitutional, or, one way or another, avoid dealing with the constitutional question altogether. Leaving aside the last possibility, Thayer seems to say that, except in a compelling case,[25] the Court should uphold the statute's constitutionality and hope for its repeal by a more enlightened legislature.

As Professor Black has perceptively observed, however, when the Court upholds a statute's constitutionality it "legitimates" it.[26] When a statute expresses the most enlightened sentiments of the community, this legitimating function may serve the important and creative purpose of adding impetus and dignity to measures hesitantly enacted. But unfortunately the Court's seal of constitutional approval has the same effect where the statute is a repressive one. When the Court validates such a statute, it adds moral fuel to the political fire and makes a legislative repeal even less likely. Of course lawyers know that, theoretically at least, the Court's finding a statute constitutional implies nothing about its wisdom. Nevertheless, until the Supreme Court validates it, the opposition's argument that it is unconstitutional, or simply unwise, may induce the majority to take a second look. Once the Supreme Court warrants the statute, the opposition is undercut.

It is perhaps instructive to notice that even where the Court has expressed moral disapproval of a statute, while upholding its constitutionality, the legislature has often vigorously asserted its acknowledged prerogative and has paid scant attention to the Court's attempt at moral suasion. For instance, after the Court reluctantly upheld the compulsory flag salute rule in *Minersville School District v. Gobitis*,[27] the West

---

24 J. THAYER, JOHN MARSHALL 103-04, 106-07 (1901), *as discussed in* A. BICKEL, THE LEAST DANGEROUS BRANCH 21-22 (1962).

25 "[The Court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational qnestion." Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). Few such compelling cases exist. For an analysis of Thayer's rule of the "clear mistake," see A. BICKEL, *supra* note 24, at 35-46.

26 C. BLACK, THE PEOPLE AND THE COURT 34-86 (1960).

27 310 U.S. 586 (1940).

Virginia legislature enacted a comparable statute for the state as a whole, and other states quickly joined the repressive band wagon. Finally the Court was forced to reverse this trend by reversing itself and overruling *Gobitis* three years later in *West Virginia State Board of Education v. Barnette*.[28]

Although Thayer did not stress the alternative of avoidance, Professor Bickel has suggested, not that the Court validate such unconstitutional statutes, but that, in part for the reasons Thayer canvassed, it stay its hand and avoid a constitutional determination altogether.[29] By avoiding decision on the constitutional merits, the Court gives the representative branches a chance to correct their own constitutional mistakes. Of course, when the Court avoids review and thus denies the claim of a valid constitutional right, the moving party's right goes unvindicated. But perhaps Professor Bickel is right to the extent that where the moving party's claims, although perhaps valid, are less than overpowering, avoidance by the Supreme Court is the lesser of two evils.[30]

Furthermore, Bickel's advice may be particularly meaningful when the Court contemplates the recognition of a constitutional duty rather than the invalidation of a particular statute. To begin with, whether such a duty has come to exist in our society—whether, in other words, the status quo is now unconstitutional—may be a judgment more difficult to make than declaring a specific statute unconstitutional. In addition, it would be a very serious matter for the people to come to rely on the Court as the most important force for change in our society. That the legislature might come to enact laws without adequately considering their constitutionality, leaving it to the Court to correct its mistakes, would be very unfortunate; but if the people and the legislatures were to come to expect the Court to do their work for them, it

---

28 319 U.S. 624 (1943).

29 A. BICKEL, *supra* note 24, at 69-72, 110-98. *See* Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

30 [T]he equities on the side of the moving party will vary in intensity. . . . This is not an argument relevant to the issue of principle itself. It can only make more palatable the use of a device of avoidance that works against the moving party. . . . There are crucial differences . . . between the role of the Supreme Court in constitutional cases and the function of courts of general jurisdiction. The latter sit as primary agencies for the peaceful settlement of disputes. . . . They must, indeed, resolve all controversies within their jurisdiction, because the alternative is chaos. [By contrast, the Supreme Court's] interventions are . . . exceptional and limited, and they occur, not to forestall chaos, but to revise a pre-existing order that is otherwise viable and was itself arrived at by more normal processes. Fixation on an individual right to judgment by the Supreme Court is, therefore, . . . question-begging.

A. BICKEL, *supra* note 24, at 173.

would be far worse. Finally, as previously mentioned, the Court may be institutionally ill-equipped to decree and oversee substantial social reform.

In the last analysis, however, these considerations again simply require that the Court not act precipitately. If substantial rights are at stake which the legislative process cannot or will not vindicate, the task of doing so unfortunately, but inevitably, passes to the courts. It is this task which the Warren Court has reluctantly, but properly, assumed with respect to the implementation of our constitutional ideal of equality.

C. *The Court as an Undemocratic Institution*

A final argument for judicial restraint goes neither to the Court's efficiency nor to the effect of judicial review on other branches of government, but rather to the Court's legitimacy as a policy maker in a democratic society. Here the Court's required self-restraint is said to follow from its undemocratic structure. The syllogism goes something like this: Ours is an essentially democratic society. The Supreme Court, in its reviewing capacity, is an undemocratic, "inherently oligarchic,"[31] and "deviant institution in the American democracy."[32] Therefore, except in the most compelling situations, it should allow the representative bodies to act, or not act, as they choose.[33]

There are at least two things that should be said about this argument. First, both of its premises are shaky. It is, to begin with, unclear just what is meant by a "democratic society." Perhaps we can agree on this familiar definition:

> [A] democratic political system is one in which public policies are made, on a majority basis, by representatives subject to effective popular control at periodic elections which are conducted on the principle of political equality and under conditions of political freedom.[34]

31 *See* AFL v. American Sash & Door Co., 335 U.S. 538, 555 (1949) (Frankfurter, J., concurring).

32 A. BICKEL, *supra* note 24, at 18.

33 Dennis v. United States, 341 U.S. 494, 555-56 (1951) (Frankfurter, J., concurring). *See generally* A. BICKEL, *supra* note 24, at ch. 1. *But see id.* at 258 (contradicting ch. 1); L. HAND, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY 172 (1952); Choper, *On the Warren Court and Judicial Review*, 17 CATH. U.L. REV. 20, 36-41 (1967); McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUST. L. REV. 354 (1962). *Contra*, C. BLACK, *supra* note 26, at 155-222; E. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 118-21 (1962); Beth, *The Case for Judicial Protection of Civil Liberties*, 17 J. POL. 100 (1955); Mason, *The Supreme Court: Temple and Forum*, 48 YALE REV. 524 (1959); Rostow, *The Democratic Charter of Judicial Review*, 66 HARV. L. REV. 193 (1952).

34 H. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 70 (1960).

Although under this definition the Court is certainly not a democratic institution—staffed as it is by men with lifetime appointments and "hedged about by an unusually intricate impeachment process and an absolute guaranty against diminution of compensation"[35]—it is equally clear that many of our other governmental institutions are also undemocratic. To the extent the definition suggests that policy making should be responsive to majority will, the Senate itself could not qualify, for its composition, whereby the votes of 18,000,000 Californians count no more than those of 180,000 Alaskans, can hardly be said to be conducive to majority rule. And the House, at least before its districts were ordered apportioned by population in *Wesberry v. Sanders*,[36] was not truly representative either.

Moreover, the internal rules of the legislatures make popular—that is to say majority—control even less likely. The enormous power of the committee chairman stems from seniority which is often more the product of the disenfranchisement of the opposition than of ability or even popularity. Or, to take an even more extreme example of minority leverage, consider the Senate's rules of debate. Under these rules, a filibuster can be broken only if two-thirds of the Senate votes to close off debate. And if cloture is not voted, the debated bill will almost certainly not be enacted. Consequently thirty-four Senators representing fewer than 15,000,000 people can kill legislation that may be desired by an overwhelming majority.[37]

These are just a few of the anti-majoritarian features of our most representative bodies. In addition, consider the heads of the administrative agencies who wield tremendous power and are not directly responsible to any electorate.[38] Finally, and most important of all, a thoroughgoing majoritarianism is inconsistent with the very idea of limited —that is to say constitutional—government. For the Constitution itself sets out certain areas as simply beyond the reach of the present majority.[39] Is the Constitution itself then a deviant document in our democracy?

---

35 McGowan, *The Supreme Court in the American Constitutional System, The Problem in Historical Perspective*, 33 NOTRE DAME LAW. 527, 539 (1958).

36 376 U.S. 1 (1964).

37 *See* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 17-34 (1966); Deutsch, *supra* note 12, at 185-86.

38 *See* C. BLACK, *supra* note 26, at 179-80; E. ROSTOW, *supra* note 33, at 152.

39 The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

This argument for judicial restraint not only overplays the Court's deviancy but also overstresses its immunity from democratic processes. To begin with, the Justices are appointed by the President, the one elected official whose constituency is the nation as a whole. On the average a new appointment is made every twenty-two months.[40] And, as Justice Frankfurter reminds us, "Judges are men, not disembodied spirits"[41] who are blind to the political reality around them. Moreover, if the Justices are not themselves sufficiently attuned to the times, Congress can bring reality home to them through its power over the Court's appellate jurisdiction. Indeed, if the Court is too far out of touch with the people, the Congress and the executive can annul its directives simply by refusing to execute them, or the people can do so by constitutional amendment. In sum, although the Court is not politically responsible, it is likely to be politically responsive.[42]

Even more important, however, is the fact that the legitimacy of a particular institution in our society depends not on its intrinsic representational structure, but rather on its institutional authorization from, and acceptance by, the community. As Dean Rostow has said, whatever the intention of the Framers, judicial review

> . . . has been exercised by the Court from the beginning . . . . And it stands now . . . as an integral feature of the living constitution, long since established as a working part of the democratic political life of the nation.[43]
>
> The weight of . . . history is evidence that the people do expect the courts to interpret, declare, adapt and apply these constitutional provisions, as one of their main protections against the possibility of abuse by Presidents and legislatures.[44]

No conclusions can be drawn as to whether the Court should play a vigorous or a subdued role simply because its judgments may not reflect majority will. No one has ever suggested that the Senate should act cautiously for similar reasons, or even that it should defer to its more representative co-chamber, the House. Although the undemocratic, nonrepresentative structure of the Court is not informative as to how the Court should play its role within its proper province, it does tell us something about the limits of the province itself. It is this province that requires definition.

---

40 *See* Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284-86 (1957).

41 Frankfurter, *Some Observations on the Nature of the Judicial Process of Supreme Court Litigation*, 98 PROC. AMER. PHIL. SOC. 233, 237 (1954).

42 *See* A. BICKEL, *supra* note 24, at 16-19; Deutsch, *supra* note 12, at 169, 186.

43 Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573, 576 (1958).

44 *Id.* at 590.

II

JUDICIAL REVIEW IN A DEMOCRACY

Despite what has just been said, there can of course be no doubt that ours is essentially a society where the exercise of power draws its legitimacy from the consent of the people.[45] Moreover, the sort of society we are going to have is to be determined by the people. Our faith is not simply in our ability to choose wise rulers, but in our ability to rule ourselves wisely. Learned Hand was not alone when he said that he would find it irksome to be ruled by a bevy of platonic guardians even if he knew how to choose them.[46]

The Court, then, is not to function as a nine-man bevy, reviewing legislation from the same, but presumably more enlightened, perspective as the legislature. When the majority, speaking through the legislature, has decided that the legislation is desirable, it is not for the Court to strike it down simply because it thinks otherwise. Yet whenever the Court strikes down legislation, it says to the majority that it may not have its own way. If the Court is to refrain from doing this simply because the Justices find the status quo preferable, when and on what basis is it to strike down legislation? What are the Court's institutional characteristics that enable it to bring to the appraisal of legislation a new and different perspective unavailable to the legislature? How can the Court presume to say to the present majority that it cannot have its own way because its wishes are contrary to its own fundamental principles?

But just as an individual may be untrue to himself, so may society be untrue to itself. The Court's reviewing function, then, can be seen as an attempt to keep the community true to its own fundamental principles. Maintaining these "enduring general values" of the community is a task for which the Court's structure makes it peculiarly well suited. Professor Bickel suggests that judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial to sorting out the enduring values of a society. And it is not something that institutions can do well on occasion, while operating for the most part with a different set of gears.[47]

Moreover, in considering questions of principle, courts are presented with the reality of their application. Statutes deal typically with

45 A. BICKEL, *supra* note 24, at 29-30.

46 L. HAND, THE BILL OF RIGHTS 73-74 (1958).

47 A. BICKEL, *supra* note 24, at 25-26.

abstract or sometimes dimly foreseen problems. Courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone's view. It also provides an extremely salutary proving ground for all abstractions; it is conducive, in a phrase of Holmes, to thinking things, not words, and thus to the evolution of principle by a process that tests as it creates.[48] "Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry."[49] This is what Justice Stone called the opportunity for "the sober second thought."[50] Charles Black put it more concisely when he termed judicial review "the people's institutionalized means of self-control."[51]

This conception of judicial review, casting the Court as the guardian of enduring principle and as a check on overzealous legislatures, depicts the Court as an essentially conservative rather than creative force in our society—hardly the "revolutionary committee" Professor Berle has called the Warren Court.[52] The political and social realities of the twentieth century, however, have required government to essay an affirmative role in its service to its citizens. The Court, as part of government, must participate in that affirmative role.

This, of course, does not minimize the importance of protecting fundamental individual rights from governmental invasion. The original Bill of Rights was essentially negative, putting beyond the reach of government the world of the spirit and raising procedural barriers to governmental intrusion. The definition of these barriers in opinions such as Brandeis's dissent in *Olmstead*[53] or his concurrence in *Whitney*,[54] which have since carried the day, has been crucially important in charting the direction in which our society has moved. But today, as Archibald Cox put it:

> [T]he political theory which acknowledges the duty of government to provide jobs, social security, medical care, and housing extends to the field of human rights and imposes an obligation to promote liberty, equality, and dignity. For a decade and a half recognition of this duty [of the Court] has been the most creative force in constitutional law.[55]

---

48 *Id.*

49 *Id.* at 26.

50 Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

51 C. BLACK, *supra* note 26, at 107.

52 *See* A. BERLE, *supra* note 7.

53 Olmstead v. United States, 277 U.S. 438, 471 (1928) (dissenting opinion).

54 Whitney v. California, 274 U.S. 357, 372 (1927) (concurring opinion).

55 Cox, *supra* note 22, at 93.

The more traditional rationales of judicial review do not quite fit when the Court's role is so utterly different. Yet the specter of the Court ruling the people persists and is, if anything, even more ominous where the Court is telling the government what it must do, not simply what it cannot do. What, then, is the Court's legitimate role in delineating constitutional duties? Again, the legitimacy of the Court's decrees must be derived from the community itself. Just as society may not be true to its enduring principles, so may it not be fully aware of its emerging ones. And just as the Court should maintain the one set of principles, so should it support and encourage the adoption of others.

The law need not, as Learned Hand suggested, "be content to lag behind the best inspiration of its time until it feels behind it the weight of such general acceptance as will give sanction to its pretension to unquestioned dictation."[56] Rather, the Court must foster the best inspiration of the time and help it win general acceptance.

Nevertheless, inspiration is "best," not simply because the individual Justices think so, but because it accords with the ideals of the community itself. Today the most important of those ideals is political equality, and the Warren Court is correct in perceiving it as the dominant theme of American political development. The accuracy of this perception gives the Court's equal protection pronouncements their legitimacy.[57]

It was the inaccuracy of the old Court's perception of community ideals that made its performance so bad. For what the Nine Old Men tried to put beyond the reach of government, both state and federal, was "the momentous issue of the welfare state itself"[58]—an issue so political that it cannot and should not be determined by a court.[59] It is certainly not an issue about which there is a consensus in the community, moral or otherwise. It is in fact *the* issue around which politics in this country has generally been divided. "Principles" bearing on the issue, though fervently believed by those professing them, are utterly conflicting. Unlike the ideal of political equality, they represent the creeds of particular political parties, but are not the enduring principles of our society itself. The issue of the welfare state must, and will, be "determined by 'dominant opinion' with or without judicial approval."[60] Yet this was just the issue which the old Court told the people they could not determine for themselves by trying to place the min-

56 L. HAND, *supra* note 33, at 15-16.

57 *See* Cox, *supra* note 22, at 98.

58 McCloskey, *supra* note 3, at 51.

59 Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 345 (1924).

60 McCloskey, *supra* note 3, at 51.

imum wage, the federal income tax, and government price control beyond the majority's reach.

To some critics, the Warren Court's implementation of political equality has also seemed a novel and illegitimate judicial theme.[61] Equality, however, is not a novel ideal at all.[62] It is only that the range of its required application is becoming broader and more evident as the community becomes aware of the extent to which the world of the poor and of the Negro differs from that in which the bulk of the public lives. The apparent novelty of the Court's recent equal protection decisions stems "from the Court's partial recognition, reflecting a new awareness on the part of the public, that the freedom embodied in constitutional guarantees as they have historically been limited is, for the economically and socially disadvantaged, no freedom at all."[63]

In this context, and in the era of positive government, it is incumbent on the Court to protect unpopular minorities not simply from governmental persecution, but from governmental neglect as well. For just as there are certain groups in society that have proved politically advantageous to oppress, so there are others whose interests are consistently bypassed by the political process in the rush toward the great society. This explains the necessity for affirmative decrees.

Because the Warren Court, unlike the old Court, has affirmatively applied the true principles and ideals of our community to protect those whose interests go unprotected elsewhere, it has acted properly. An examination of a few of its more significant decisions demonstrates my point.

III

A Look at Some Cases

A. *The Desegregation Cases*

In *Brown v. Board of Education*[64] and its progeny,[65] the Court was not applying an emerging but unrecognized moral principle; rather, it

---

61 *See especially* Kurland, *supra* note 1, at 144.

62 Kurland's charge of "novelty" is rebutted by Choper, *supra* note 33, at 29. Choper thoroughly approves of the Warren Court's heightened concern for equality before the law. "Contrary to the plaint of hostile critics, I suggest that the Court's recent turn to egalitarianism is a salutary movement, quite properly fulfilling its role in a democratic society." My own analysis of the Court's role draws on Choper's article.

63 Deutsch, *supra* note 12, at 226.

64 347 U.S. 483 (1954).

65 *E.g.*, Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom seating); State Athl. Comm'n v. Dorsey, 359 U.S. 533 (1959) (statute prohibiting integrated athletic competition); Gayle v. Browder, 352 U.S. 903 (1956) (segregation on buses); Holmes v. City of

was enforcing a promise that the nation had made to the Negro in 1868 and had broken nine years later in the Compromise of 1877. Reconstruction had not proved good for business, and when the disputed presidential election put the Northern Republicans to the choice between their humane and their economic ideals, they chose the latter. "[They] abandoned the Negro to protect the tariff, 'hard' national money, the national banking system, and lush business subsidies."[66] This sell-out of the Negro was constitutionalized by the Fuller Court in the *Civil Rights Cases*[67] and *Plessy v. Ferguson*.[68] "Just as the Settlement saved the South from political reconstruction, these decisions saved it from constitutional reconstruction."[69] Thus, the "separate but equal" doctrine of *Plessy*, not the desegregation commanded by *Brown*, was the legislative, unprincipled, non-judicial judgment. Furthermore, the "separate but equal" compromise standard imposed by *Plessy* was an unadministrable, almost meaningless one. The Southern states never lived up to it, and the courts never effectively enforced it.

In the almost sixty years between *Plessy* and *Brown* the gap between our ideal of racial equality and our racial practices had widened even more. At the time *Brown* was decided, there was no reason to think Southern legislatures would ever act to narrow the gap. In fact, the Negro was not even a participant in the processes of the Southern states. Nor had the national Congress proved receptive to Negro claims. Despite the express authorization for federal legislation in section 5 of the fourteenth amendment, Congress had not worried about Negro rights for almost seventy-five years. There was little prospect that it was about to become concerned once again. And, of course, it did not until *Brown* awakened the nation's conscience.

It was, then, right and proper that the Court acted in *Brown* to treat our "sweating national shame."[70] The decision made the nation face up to its commitments to the Negro which it had found convenient to ignore. There seems no question that but for *Brown*, legislative response would have been a long time coming.

Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (outlawing segregation in public beaches and bathhouses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (city lease of park facilities).

66 Mendelson, *The Politics of Judicial Supremacy*, 4 LAW & ECON. J. 175, 179 (1961). *See also* V. DESANTIS, REPUBLICANS FACE THE SOUTHERN QUESTION 47-51 (1959); C. WOODWARD, REUNION AND REACTION 12-13 (1956):

67 109 U.S. 3 (1883).

68 163 U.S. 537 (1896).

69 Mendelson, *supra* note 66, at 180.

70 Black, *The Supreme Court 1966 Term, Foreword: "State Action," Equal Protection and California's Proposition* 14, 81 HARV. L. REV. 69 (1967).

Indeed, even the Court's critics applaud the *Brown* decision. Only Professor Wechsler, who thoroughly approves its result,[71] is troubled by it.[72] He does not think that a rationale for *Brown* can be worked out which meets his demand for "neutral principles," a standard of constitutional adjudication he would require in every case.[73]

Although, as Wechsler concedes, the concept of neutral principles is an illusive and enigmatic one,[74] his disquietude with *Brown*, and with the white primary[75] and restrictive covenant[76] cases, seems to be that the claims of Negroes have been singled out for special, kindly treatment. He feels that if comparable claims had been made by members of other groups, the Court would not have vindicated them. Thus, because Negroes receive special treatment, the decisions do not express neutral principles.[77]

Special protection of Negroes' rights, however, is not necessarily a breach of neutrality. So long as the Court would have aided any group comparably situated in our society it acts with the requisite neutrality. Just because no other group, given the appalling history of slavery, black codes and compelled segregation, may in fact be comparably situated does not alter the neutrality. Indeed, the three constitutional amendments required to give the Negro equal legal rights attest to the fact that no other group *is* comparably situated.

In other words, so long as the Court acts to protect any group whose legitimate interests are consistently and shamefully neglected by the political processes, it acts neutrally. The Court, then, protects Negroes not simply because they are Negroes, or because the Justices think them especially worthy people, but because their legitimate interests continue to go unprotected elsewhere.

By the same principle, I submit that compensatory legislation favoring Negroes would not be unconstitutional even though it made

71 Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). These cases, Wechsler feels, "have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years." *Id.* at 27.

72 *Id.* at 31-34. For discussions of Professor Wechsler's article, see Deutsch, *supra* note 12, at 178-98; Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35 (1963); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A.L. REV. 571 (1960); Pollak, *Racial Discrimination and Judiciary Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Brown, Book Review, 62 COLUM. L. REV. 386 (1962).

73 *See* Wechsler, *supra* note 71.

74 *Id.*

75 Smith v. Allwright, 321 U.S. 649 (1944).

76 Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

77 Wechsler, *supra* note 71, at 27-34.

racial classifications and even though similar legislation favoring whites would violate equal protection.[78] As the Supreme Court has taught us, in the racial area "equal protection" does not involve simply the *rationality* of classifications, for even the illicit segregation statutes had conceivable rational bases, such as minimizing tension in the schools. Rather, the function of equal protection here is to shield groups or individuals from stigmatization by government. Whether or not particular legislation stigmatizes is largely a sociological question requiring consideration of the structure and history of our society as well as examination of the statute itself. Legislation favoring Negroes, then, would be constitutional because it is rational *and* because in *our* society it would not stigmatize whites. On the other hand, even if the "equality" demanded by the separate but equal doctrine had been lived up to, the doctrine itself, imposed by a white society, unconstitutionally stigmatizes Negroes in that society. Similarly, the miscegenation statutes, even though "neutral" on their faces, forbidding whites as well as Negroes from interracial marriage or cohabitation, unconstitutionally stigmatize Negroes in the same way.[79] This is largely what equal protection, at least in the area of racial classifications, is all about. It requires judicial vindication, for the legislature can hardly be expected to protect the rights of those it seeks to vilify.

B. *The Reapportionment Cases*

In 1962 the Court overruled *Colegrove v. Green*,[80] and held in *Baker v. Carr*[81] that a justiciable claim was stated in a complaint asserting that the inequality in voting districts, caused by the failure of the Tennessee Legislature to reapportion by population, resulted in a denial of plaintiffs' fourteenth amendment rights. The Court, however, did not indicate what the constitutional standards of apportionment were to be. In fact, it held that the justiciable issue was the determination whether "a discrimination reflects *no* policy, but simply arbitrary and capricious action."[82] It seemed, therefore, as though a state legislative apportionment scheme had only to meet the test of minimum rationality—that is, that the differentiation among voters had to reflect an intelligible policy consistently applied.

Perhaps at the time of *Baker* the Court did not know precisely

78 *But see* Bittker, *The Case of the Checkerboard Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962).

79 *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

80 328 U.S. 549 (1946).

81 369 U.S. 186 (1962).

82 *Id.* at 226.

where it was going, but its decisions in *Gray v. Sanders*[83] in 1963 and *Wesberry v. Sanders*[84] in early 1964 gave some indication of its direction. When it decided *Reynolds v. Sims*[85] and its companion cases[86] later in 1964, it was clear that the Court had arrived—not at a standard of minimum rationality, but at that of "one man—one vote—one value."[87] This, the Court held, was the constitutional standard required by the equal protection clause for both houses of a bicameral state legislature.

Concededly, the "immediate preoccupation" of those who produced the mandate of equal protection was not the malapportionment of state legislatures, but the relevant constitutional language of equal protection. Such language "deals not only with racial discrimination, but also with discrimination not based on color."[88] Like the Framers of the Constitution, the draftsmen of the fourteenth amendment chose "language capable of growth"[89] in order to "permit reasonable future advances."[90] Consequently

> it was open to the Court, in the "tradition of a broadly worded organic law . . . necessarily intended for permanence," to treat the matter of legislative apportionment within the confines of the equal protection clause.[91]

What is interesting about the decisions for our purposes is not the propriety of "one man—one vote," but that the Court was again aiding a group that was unable to achieve effective legislative recourse. Although in the *Reapportionment Cases* the Court was seeking to protect the rights of urban majorities rather than those of minorities, these urban groups were not political majorities with respect to the issue of apportionment because of the malapportionment itself.

---

83 372 U.S. 368 (1963).

84 376 U.S. 1 (1964).

85 377 U.S. 533 (1964).

86 *See* WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth Gen'l Ass'y, 377 U.S. 713 (1964).

87 For an excellent discussion and defense of the "one man—one vote" principle, see Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value,* 1964 SUP. CT. REV. 1. *See also* McCloskey, *The Supreme Court 1961 Term, Foreword: The Reapportionment Case,* 76 HARV. L. REV. 54 (1962). For criticism of the Court's work in this area, see Kurland, *supra* note 1, at 149-57; Neal, *Baker v. Carr: Politics in Search of Law,* 1962 SUP. CT. REV. 252.

88 Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 60 (1955).

89 *Id.* at 62-63.

90 *Id.* at 61.

91 Choper, *supra* note 33, at 30 (footnotes omitted).

For change, compulsion was required. There was little likelihood that the representatives from the malapportioned districts would voluntarily redraw the boundary lines of the very districts kind enough to put them in office. And though Congress doubtless could have acted pursuant to section 5 of the fourteenth amendment, there was no prospect that it would. After all, the representatives in the House itself were put there by malapportioned congressional districts. Consequently, where no referendum procedure existed, the majority was utterly powerless against the entrenched rural minority.[92] As with *Brown*, it was only the Court that could effectively remedy the situation.

Although the reapportionment decisions have met with widespread popular approval, the judicial restrainers have not treated them kindly. Mr. Justice Harlan, dissenting, termed them "an experiment in venturesome constitutionalism."[93] Professor Kurland refers to their "unbending simplicity"[94] and Professor Freund calls their governing principle simplistic.[95] In 1963 Professor Bickel doubted that *Baker v. Carr* was likely "to play a substantial and enduring role in shaping our society."[96]

However, as Professor Auerbach has pointed out, it is

> paradoxical for the advocates of judicial self-limitation to criticize the Court for helping to make majority rule effective, because the case for self-restraint rests on the assumption that the Court is reviewing the legislative acts of representatives who are put in office and can be turned out of office by a majority of the people. Since malapportionment destroys this assumption, judicial intervention to remove this obstacle to majority rule may be less intolerable than the self-perpetuation of minority rule.[97]

Of course it may also be paradoxical "for the judicial activists, who extol the Court as the protector of minorities, to praise it [here] for helping to erase the power of minorities to curb majority rule in our state legislatures."[98] But even if it is desirable to require a consensus greater than that reflected by a simple majority before any affirmative legislation action can be taken, such a decision should not

---

92 As the Court stated in *Reynolds*, "No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available." 377 U.S. 533, 553 (1964) (footnote omitted).

93 *Id.* at 625 (dissenting opinion).

94 Kurland, *supra* note 1, at 156.

95 Freund, *supra* note 2, at 638.

96 Bickel, *Reapportionment and Liberal Myths*, 35 COMMENTARY 483 (1963).

97 Auerbach, *supra* note 87, at 2.

98 *Id.*

be made by the legislators whose political fates may depend on that decision.[99] Furthermore, there is no good reason to think that the rural minority which gains power through malapportionment needs such added protection. "Past experience gives us reason to think that protection of minorities will expand as the electoral base of our representative institutions becomes broader and more democratic."[100]

> Up to now few, if any, of our states have been governed by "transitory majorities representing the more populous districts."
> . . . [M]alapportionment has often given a coalition of conservative urban forces, farm groups, and small-town businessmen, the power to frustrate state welfare efforts.[101]

Indeed, malapportionment is undoubtedly one of the reasons why the states have not lived up to their constitutional responsibilities to the Negro and to the poor.[102]

Finally, it is not inappropriate that the guarantor of democracy in state government is itself a federal institution. For it was to counter the threat of factional domination of state legislatures that the Federalists wrote into the Constitution the command of article IV, section 4: "The United States shall guarantee to every state in this Union a Republican form of Government." They intended this clause to grant the federal government the power to restore republicanism, or what we now would refer to as representative democracy.[103] Even if the guarantee clause does not state a justiciable standard,[104] it does establish a model of federalism which contemplates the federal government safeguarding the democratic processes in the states.[105]

C. *Other Voting Cases*

The *Reapportionment Cases* are not the only ones where state limitations on the right to vote have come under equal protection scru-

---

99 *Id.* at 67.

100 *Id.* at 49 (footnote omitted). *See also* S. HOOK, THE PARADOXES OF FREEDOM 66 (1962).

101 Auerbach, *supra* note 87, at 49-50 (footnote omitted).

102 *See generally* Willbern, *The States as Components in an Areal Division of Powers*, in AREA AND POWER; A THEORY OF LOCAL GOVERNMENT (A. Maass ed. 1959); COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 39-40 (1955).

103 *See* THE FEDERALIST No. 10 (Madison); THE FEDERALIST No. 43 (Madison); *see also* Diamond, *The Federalist's View of Federalism*, in ESSAYS IN FEDERALISM 21 (Institute for Studies in Federalism ed. 1961); THE FEDERALIST No. 39 (Madison).

104 Baker v. Carr, 369 U.S. 186, 227 (1962); Colegrove v. Green, 328 U.S. 549, 552 (1946). *See* Bonfield, *The Guaranty Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

105 *See* Note, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007, 1023-24 (1964). *See also* Auerbach, *supra* note 87, at 84-87.

tiny by the Warren Court. In *Carrington v. Rash*[106] the Court held that the state could not disenfranchise actual residents simply because they resided pursuant to military assignment. And in *Harper v. Virginia Board of Elections*[107] the Court invalidated the long familiar state laws making payment of the poll tax a prerequisite of voting. In so doing, the Court applied an egalitarian principle of our community that emerged long after the drafting of the clause under which the law was struck down. For in 1868, when the fourteenth amendment was enacted, property requirements as a condition for voting were widespread.[108] Nevertheless, as Mr. Justice Douglas told us in *Harper*, "In determining what lines are unconstitutionally discriminatory we have never been confined to historic notions of equality . . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."[109] That the Court was correct in its assessment of our emergent principle of absolute equality between rich and poor with respect to the franchise seems abundantly clear. In fact in section 10 of the Voting Rights Act of 1965,[110] Congress had declared its view that the poll tax was unconstitutional.

Again those hit hardest by the laws struck down in *Carrington* and *Harper*—those, in other words, disenfranchised by them—could obviously not seek recourse through the legislative processes in which they were not permitted to participate. And legislators elected without their participation were not likely to worry greatly about their interests or be anxious to extend the franchise to them. In *Carrington* and *Harper*, then, as in the *Reapportionment Cases*, it was up to the undemocratic Court to promote our democratic values.

D. *The Criminal Procedure Cases*

In the area of criminal procedure, as with race relations, an appalling gap has existed between our principles and our practices. For while the constitutional provisions safeguarding the accused have proved politically viable as slogans in Fourth of July oratory, their effective implementation apparently has not. In this area also the Supreme Court has acted to compel the community to live up to its pro-

106 380 U.S. 89 (1965). The case is discussed in Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

107 383 U.S. 663 (1966).

108 In fact, the Supreme Court had twice before upheld state poll tax laws. Butler v. Thompson, 341 U.S. 937 (1951); Breedlove v. Suttles, 302 U.S. 277 (1937).

109 383 U.S. at 669 (emphasis in original).

110 42 U.S.C. § 1973(h)(a) (Supp. I, 1965).

fessed ideals. And once again those whom the Court has sought to protect are politically impotent.

Criminal defendants as such are not likely to be a popular group. And since those most subject to arrest and to the abuses of the criminal process are the poor, the Negro, and the poor Negro, even less legislative concern is to be expected. Their plight at the hands of the police is not likely to inspire legislative empathy,[111] and their rights, constitutional and otherwise, will almost surely go unprotected without judicial intervention. The political voice of the urban poor has not been a loud one until very recently, and malapportionment has further muffled its effectiveness in state legislatures. Especially since assurance of the indigent defendant's constitutional rights would require the state legislatures to appropriate money, the probability of continuing political stagnation was even greater.

Again the egalitarian ideal informed much of the Court's work in this area. *Griffin v. Illinois* held that a state violates equal protection by refusing to furnish a transcript of the trial to any indigent accused who alleges serious errors on appeal.[112] *Gideon v. Wainwright* required the states to supply trial counsel at public expense to paupers accused of felonies.[113] *Douglas v. California* extended the *Gideon* holding to paupers appealing to the initial court of review.[114] In the criminal process, then, as with the franchise, it has become unconstitutional to draw any lines between rich and poor. In the area where the ultimate coercive power of the state is brought to bear on the individual, such absolute equality is both constitutionally appropriate and required by our professed ideals. To realize this ideal fully, it may be necessary in

111 Skinner v. Oklahoma, 316 U.S. 535 (1942), is perhaps illustrative of this point. At issue there was a statute which authorized involuntary sterilization for those convicted of three felonies involving moral turpitude. But exempted from the statute's coverage were "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses . . . ." Could it be that the legislators could conceive of themselves, their families and their frieuds as potential violators of the exempted laws but not of those criminal laws much more likely to bear on the poor such as assault or robbery? The Court struck down the Oklahoma sterilization law as violative of equal protection because the lines it drew were found to be "artificial." But if the Court had not been dealing with "legislation which [involved] one of the basic civil rights of man"—the right to procreate—such artificial line-drawing would probably liave been sustaiued. *See* discussion of Railway Express Agency v. New York, 336 U.S. 106 (1949), at p. 26, *infra*. Perhaps *Skinner's* equal protection ground of decision was simply a way of avoiding the substantive due process (or cruel and unusual punishment) question which lurked in the background, *i.e.*, is involuntary sterilization even constitutional? *But see* Choper, *supra* note 33, at 33.

112 351 U.S. 12 (1956).

113 372 U.S. 335 (1963).

114 372 U.S. 353 (1963).

future decisions to require the states to provide "equality" for the poor with respect to bail and the facilities for investigation.

That the Court should take the lead is not surprising. The preservation of the integrity of the judicial process, unlike reapportionment, is a task for which the judiciary has a special competence and a special responsibility. It is only by seeing the criminal process as it functions in actual cases that the areas where constitutional rights are threatened, and the remedies required to vindicate them, become evident.

In addition, in the area of criminal procedure the interest of federalism per se—that is, the interest in the states as laboratories for social experimentation—has never seemed a particularly keen one. Furthermore, when the Court has decreed uniform protection for specific constitutional rights, the method of their protection has remained largely a matter of state concern. After *Gideon*, for instance, it remains the prerogative of the state legislatures to install either a public defender system or one of appointed counsel from the bar as a whole. In *Miranda*,[115] though the Court virtually promulgated a prearraignment code, it expressly invited legislative response and state formulation of alternative schemes that would provide equally adequate safeguards for the fifth amendment rights at stake.[116]

Perhaps under the prod of prior Supreme Court cases, many of the states had already adopted the various reforms which the Court subsequently decreed for the nation as a whole. In fact, at the time of *Gideon* only five states did not provide trial counsel for the indigent accused of a felony.[117] Even within the states, however, the needed reforms were frequently initiated by the state courts rather than the legislature.[118] Moreover, those states which had not acted before the Supreme Court's declarations were not likely to do so in the near future. For although *Wolf v. Colorado* held in 1949 that the federal fourth amendment right to be free from unreasonable searches and seizures applied to the states,[119] *Mapp v. Ohio* did not apply the federal exclusionary rule to the states until 1961, twelve years later.[120] In *Wolf*

115 384 U.S. 436 (1966).

116 *Id.* at 490.

117 Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 212 n.7.

118 *See, e.g.*, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

119 338 U.S. 25 (1949).

120 367 U.S. 643 (1961). *See* Allen, *Federalism and the Fourth Amendment: Requiem for Wolf*, 1961 SUP. CT. REV. 1, for an excellent discussion of *Wolf* and *Mapp* and events taking place in the interval between them.

the Court had left the newly declared federal right of privacy "to the tender mercies of the states for its enforcement,"[121] although in the federal system it had been recognized as early as 1914, in *Weeks v. United States*,[122] that only the exclusionary rule provided a constitutionally adequate safeguard for the protection of that right. Any state that did not realize this by 1961 probably simply did not want to, and never would.

In the criminal law area, the Court has faithfully discharged its reviewing responsibilities. It has decreed equality between rich and poor in an area where the community's principles required it, but where the legislatures had not translated these principles into practice. At the same time it has, where practical, left room for both legislative initiative and legislative response.

CONCLUSION

"Once loosed, the idea of Equality is not easily cabined."[123] Nevertheless, the Court's equal protection decisions have avoided the twin dangers posed by the judicial implementation of the egalitarian ideal. First, the Court has recognized that our egalitarianism is not, and is not likely to become, one of maximum *material* equality among people. We still believe in material rewards for individual accomplishment. It is only, therefore, in certain limited areas that equality between rich and poor is a moral principle of our society. Where such equality is a part of our ideals, however, the Court is right to decree its realization even if the political branches have been unwilling to pay for its implementation. The Court was correct in singling out the criminal process and the franchise for such treatment, since in these areas the relationship of the individual to his government should not depend on the ability to pay.

A second danger which the Court must continue to avoid is the choking of the political process with the equal protection clause. For almost all legislation is advantageous to some groups and disadvantageous to others, and often in a somewhat arbitrary way. Nevertheless, this sort of give and take within the political process, particularly where economic regulation is challenged, should not become the concern of the Court.[124] Unlike the old Court, the current Court has specifically eschewed responsibility in this area.

---

121 Allen, *supra* note 120, at 5.

122 232 U.S. 383 (1914).

123 Cox, *supra* note 22, at 91.

124 *See* A. BICKEL, *supra* note 24, at 221-28.

Railway Express Agency v. New York is illustrative.[125] Railway Express challenged a New York City traffic ordinance forbidding advertising on the sides of trucks, the theory being that it distracted drivers of other vehicles. Those trucks whose advertisements were connected with the owner's business, however, were exempted from the ordinance. Railway Express, which sold advertising space on its delivery trucks, argued that simply because one is touting one's own product does not make his sign any the less a distraction to other drivers. Railway Express of course was right. The statute *did* draw an arbitrary, unreasonable distinction. Mr. Justice Douglas, however, was also right in rejecting the argument, saying, "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[126] One can confidently surmise that in the New York City council the small business interests were sufficiently powerful to block the regulation altogether unless they were granted exemption from it. Granted, they won special "irrational" dispensation. But surely the legislation did not discriminate *against* Railway Express. Interpreted otherwise, equal protection could become as debilitating to welfare legislation as the ill-fated doctrine of substantive due process once was.

The Court must continue carefully to distinguish those groups whose rights are consistently trammelled and whose interests are consistently neglected in the political arena, from those groups whose interests are occasionally submerged in legislative compromise. This the Court has done. It has applied and extended the principles and ideals of our society to those "insular" minorities[127] which, either because they are unpopular or because the vindication of their rights is expensive, are persecuted or neglected by the legislatures. In so doing, it has tried to secure the integrity of the legislative processes themselves. These are tasks for which the courts, the "deviant" institutions in our democratic society, are required.[128]

---

125 336 U.S. 106 (1949).

126 *Id.* at 110.

127 United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). *See also* Chambers v. Florida, 309 U.S. 227, 238 (1940).

128 By contrast, the old Court was in large measure protecting states' rights, not individual rights. For the argument underlying the Court's *Child Labor Case*, Hammer v. Dagenhart, 247 U.S. 251 (1918), and its progeny (*e.g.*, Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hill v. Wallace, 259 U.S. 44 (1922); United States v. Butler, 297 U.S. 1 (1936)), was that the tenth amendment's reservation of powers to the states constituted an independent restriction on otherwise constitutional acts of the federal government. Yet the Court's use of substantive due process had already emasculated the states' power to deal with these social and economic problems. *See* cases cited in note 4 *supra*. Rather than fill a legislative vacuum, the Nine Old Men decreed one. And they did so in an area where Congress should have been left a free hand.

In three 1966 cases[129] interpreting Congress's powers to enforce equal protection pursuant to section 5 of the fourteenth amendment, the Supreme Court has given Congress almost free rein where the Fuller Court had curtailed it in the *Civil Rights Cases*.[130] As Professor Cox has said, "If the Congress follows the lead that the Court has provided, [these cases] . . . will prove as important in bespeaking national legislative authority to promote human rights as the Labor Board decisions of 1937 were in providing national authority to regulate the economy."[131] Congressional action, however, is a big "if." For as Cox also warns, "the need for judicial action is strongest in the areas of the law where political processes prove inadequate, not from lack of legis-

---

To begin with, the Court's interpretation of the tenth amendment was simply wrong. Before M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), a plausible argument could have been made that that amendment did prevent the implied expansion of federal power pursuant to the necessary and proper clause. But *M'Culloch* decided in 1819 that it did not prevent such an expansion of power. Then, 100 years later, in the *Child Labor Case*, the Court adopted the implausible position that the reserved powers of the states comprise an independent restriction on otherwise clearly constitutional acts of the federal government. As has been conclusively demonstrated, the tenth amendment was declaratory of the division of powers between state and nation and "was not intended as a yardstick, or independent restriction of federal power." Cramton, *The Supreme Court and the Decline of State Power*, 2 LAW & ECON. J. 175, 186 (1959). As its sponsor, James Madison, put it in 1791: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they [*sic*] might exercise it, although it should interfere with the laws, or even the Constitution[s] of the States." 2 ANNALS OF CONGRESS 1897 (1791). And in overruling the *Child Labor Case*, the Court came back to this view when it said: "The [tenth] amendment . . . states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941).

In addition to being wrong about the tenth amendment, the Court was wrong in so vigorously protecting states' rights from the national government. Where states' (as opposed to individual's) rights are at issue,

> . . . the justification for *judicial review* . . . , for the final constitutional word to be spoken by a "deviant institution" in a democracy, is weak. The states, whose constitutional rights are allegedly being assaulted, are well represented in the councils of national government (especially the Congress) and are in a peculiarly strong position to protect themselves against national encroachment. Here, the political process may generally be depended upon to produce a fair judgment. If a majority of the states' representatives (. . . [the] members of Congress) determine that federal power has not been exceeded, then the Court should overturn the decision, if at all, only if it is so clearly in error as not to be "open to rational question."

Choper, *supra* note 33, at 39-40 (emphasis in original) (footnotes omitted).

129 Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); United States v. Guest, 383 U.S. 745 (1966). *See generally* Cox, *supra* note 22.

130 109 U.S. 3 (1883).

131 Cox, *supra* note 22, at 91.

lative power but because the problem is neglected by politicians."[132] If the legislatures continue to neglect their constitutional responsibilities, we can only hope the Court will continue to do the best it can to fill the gap.

---

132 *Id.* at 122.