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THE NEW DIMENSIONS OF CONSTITUTIONAL ADJUDICATION

Archibald Cox**

> Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.[1]

Count de Tocqueville's observation is as true today as it was when he visited the United States in the 1830's. As nowhere else in the world, Americans have developed the extraordinary habit of casting critical aspects of social, economic, political and even philosophical questions into the form of actions at law and suits in equity so that the courts—and ultimately the Supreme Court of the United States—may participate in their disposition.

The substantive constitutional issues of each period reflect its central political questions. John Marshall's Court helped forge a Nation out of jealous States. Chief Justice Taney dealt all too unsuccessfully with the question of slavery in the territories. From the Civil War through World War II the great debate lay between the defenders of economic *laissez faire* and the advocates of the use of government as an instrument of the economic regulation, welfare measures, and social reform required for an urban, industrialized society. Recently, the dominant issues have arisen from the civil rights revolution, the demands for electoral reform, and the collision between subjectivism

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1. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (P. Bradley ed. 1945).

and laws ordained by an older morality. Those who have lost the battle in the political arena have always carried the war to the courts.

The new dimensions to which my title refers are of a different order; they are not substantive but institutional. That the Supreme Court has always played a *partly* political role—that it has always made a certain amount of public policy in some areas under the guise of interpreting the Constitution—is all too obvious. That it has usually felt *partly* bound by "law" is equally obvious to anyone who understands the self-discipline of the legal method. The question of emphasis always remains. How large or small is—or should be—the political element in judicial decisions?

There also remains a second question. How much and what parts of the business of government should the judicial branch oversee, even to the point of conducting it? More particularly, what kinds of interests will move a court to intervene? Who may join in the action? What kinds of questions will the court decide? What kinds of remedies will it make available?

The past quarter century seems to me to have brought dramatic changes not only in the weight of the political components of constitutional decisions but also in the nature, character, and extent of the judiciary's share of the overall business of government. Taken all together these changes give constitutional adjudication the new dimensions to which my title refers.

The primary aim of this article is to describe the changes. Their true significance lies in their cumulative effect upon the nature of the judicial process and the effectiveness of judge-made constitutional law. Towards the end, I shall pose a number of questions about the cumulative effect of the changes upon the nature of the judicial process and support for constitutionalism.

I. JUDICIAL ACTIVISM

Under Chief Justices Fuller, White and Taft, a majority of the Justices were usually ready to write their own political and economic philosophies into the generalities of the "due process" and "equal protection" clauses.[2] The volume of nay-saying decisions increased during

2. *E.g.*, Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Hammer v. Dagenhart, 247 U.S. 251 (1918).

the mid-1930's in the face of a rising political demand for state and national action to halt the Great Depression and adjust the imbalances created by corporate and financial power.[3] The strongest legal and intellectual attacks upon the decisions asserted that the conservative Justices misconceived the Court's proper function when they allowed themselves to read any particular political or economic philosophy into the Constitution, and that they also misapprehended the proper relation between the Court and the political branches in failing to defer to legislative findings of fact and policy preferences. Progressive historians were proving that judicial review was a usurpation of power. Political scientists emphasized its anti-majoritarian, undemocratic tradition. In 1937, in the face of President Roosevelt's court-packing plan, the Justices retreated,[4] and a philosophy of deference rapidly became the dominant view among the Justices and lower court judges, as well as in the law schools and legal profession.

Three components of the philosophy of judicial self-restraint deserve identification even though their statement oversimplifies the judicial process and no Justice adhered to any, much less all, of them absolutely:

(1) A judge should be slow to read—or should not read—into the majestic constitutional phrases "the freedom of speech," "due process of law" and "equal protection of the laws" more particular values based upon what some would call "natural law," "fundamental rights," or "the teaching of an inherited constitutional tradition," but which others brand "mere arbitrary personal preferences."[5]

(2) The judge should be slow to substitute—or should not substitute —his will for the legislature's in choosing between opposing values such as economic liberty and the protection of the wage earners.[6]

(3) A judge may not examine the facts underlying a constitutional question too meticulously. He should accept the legislative finding if it could be correct, and presume the existence of any state of facts that

3. *E.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); United States v. Butler, 297 U.S. 1 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

4. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

5. The best examples of the rigid version of this philosophy—"must not read"—are the opinions of Justices Black and Stewart in Griswold v. Connecticut, 381 U.S. 479, 507, 527 (1965).

6. *E.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Ferguson v. Skrupa, 372 U.S. 726 (1963). *See also* Justice Frankfurter's dissenting opinion in Board of Educ. v. Barnette, 319 U.S. 624, 646 (1943).

would validate the statute if the existence of such facts is rationally conceivable.[7]

This philosophy, of which Thayer, Holmes, Frankfurter and Learned Hand were the most eloquent spokesmen, plainly assigns a very modest role to constitutional adjudication. In dissenting from its assertion half a century earlier, Justice Field had given a fair description of the logical consequences:[8]

> If the courts could not in such cases examine into the real character of the act, but must accept the declaration of the legislature as conclusive, the most valued rights of the citizen would be subject to the arbitrary control of a temporary majority of such bodies, instead of being protected by the guarantees of the Constitution.

To exclude the Court from effective review of laws regulating property or economic behavior seemed eminently wise to nearly all the Justices and to most of the legal profession after 1937, but a number began to have second thoughts about such sweeping denigration of judicial review in the 1940's when civil liberties litigation began to crowd the docket. On the one hand, the recollection of past mistakes and the need for consistency of institutional theory cautioned against activist judicial ventures even in so deserving an area as civil liberty. On the other hand, self-restraint would leave much civil liberty at the mercy of executive or legislative oppression. The only logical escape from the dilemma was to elevate civil liberties to a "preferred position" justifying stricter standards of judicial review than those used in judging economic measures. The earlier free speech opinions by Justices Holmes and Brandeis pointed the way even though they had been dissenting opinions,[9] but the rationale was not fully developed without intense struggle.

The issue was first drawn sharply in the flag salute cases.[10] The sub-

7. *E.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 (1938); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935); O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 258 (1931); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78–79 (1911); McLean v. Arkansas, 211 U.S. 539, 550–51 (1909).

8. Powell v. Pennsylvania, 127 U.S. 678, 696–97 (1888).

9. Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.); Abrams v. United States, 250 U.S. 616, 628, 630–31 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

10. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* Board of Educ. v. Barnette, 319 U.S. 624 (1943).

stantive question was whether a state could expel from school, and treat as truants, the children of Jehovah's Witnesses who refused to salute the United States flag. Justice Frankfurter invoked the then conventional rationale of judicial self-restraint. National unity and respect for national tradition, he reasoned, are permissible goals of legislative action. The compulsory flag salute could *not* be said to be an *irrational* means of seeking to secure loyalty to those traditional ideals, even though the Court might be convinced that deeper patriotism would be engendered by refraining from coercing a symbolic gesture. To reject the legislative conclusion "would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence."[11]

Justice Frankfurter's view did not prevail. In *Board of Education v. Barnette*[12] Justice Jackson, speaking for the Court, rejected Justice Frankfurter's plea for consistency in the philosophy of judicial self-restraint. "We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[13] The Court decided that the compulsory flag salute law violated the liberty guaranteed by the first and fourteenth amendments.

Dispute continued, but ultimately the "preferred rights" thesis prevailed. Where a regulation of business can be successfully attacked only if it can be thought to bear no rational relation to any intelligible conception of the general welfare,[14] usually a law curtailing opportunities for freedom of speech or association, or other personal liberties will be sustained only if the government can prove that the limitation is necessary to protect some compelling public interest not to be secured by less restrictive means.[15] In the latter instances the Court

11. Minersville School Dist. v. Gobitis, 310 U.S. 586, 597–98 (1940), *overruled by* Board of Educ. v. Barnette, 319 U.S. 624 (1943).

12. 319 U.S. 624 (1943).

13. *Id.* at 640. Some of the summary statements in the text are, while essentially true, too simple and too sharp for literal accuracy. Similarly, no Justice embraced or followed a clear-cut philosophy of judicial review both in absolute terms and consistently. Justice Jackson, for example, was, or became, an advocate of judicial self-restraint in many civil liberties cases.

14. *E.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

15. *E.g.*, Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548 (1973); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960). If the abridgement of speech is censorship or suppression, or even direct

rarely deferred to the judgment of the policy-making branches upon the wisdom or need of a measure or even upon underlying questions of fact.[16] Nor was the Court reluctant to create rights under the first, fifth and fourteenth amendments that are hardly related to the words: a freedom of association for other than political purposes,[17] the right to travel abroad,[18] freedom to practice birth control,[19] and the right to have an abortion[20] are dramatic examples. Similarly, the majority used the equal protection clause repeatedly "to write into the Constitution its notions of what it thinks is good governmental policy,"[21] by setting aside certain kinds of legislative classifications which will be held unconstitutional unless justified by a compelling state interest.[22]

This familiar history is recalled for two reasons. First, it serves as a reminder that in reading policy-oriented notions of fundamental rights into broad constitutional phrases whose proper application cannot be derived from the words, the Warren Court's view of constitutional adjudication resembled the method of the older Courts of Fuller, White and Taft—an approach, indeed, that reflects the dominant judicial mood through most of our history. Second and more important, the necessity of justifying new standards of strict judicial review for civil liberties, and later civil rights, cases in the face of the accepted canons of judicial self-restraint generated judicial philosophy that encouraged novel forms of constitutional adjudication.

One theoretical justification is summarized in the famous fourth footnote to the *Carolene Products*[23] case, where Justice Stone invoked a theory of representative government in order to justify strict constitutional scrutiny of some legislation.[24]

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regulation, the test is more stringent. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971); Mills v. Alabama, 384 U.S. 214 (1966).

16. Buckley v. Valeo, 96 S. Ct. 612 (1976); United States v. Robel, 389 U.S. 258 (1967); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). *But see* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 94–95 (1961).

17. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971).

18. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

19. Griswold v. Connecticut, 381 U.S. 479 (1965); *cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972).

20. Roe v. Wade, 410 U.S. 113 (1973).

21. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 676 (1966) (Black, J., dissenting).

22. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Hunter v. Erickson, 393 U.S. 385 (1969); Levy v. Louisiana, 391 U.S. 68 (1968); Reynolds v. Sims, 377 U.S. 533 (1964).

23. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

24. *Id.* at 152 n.4.

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

He went on to list examples: restrictions upon the right to vote, restraints upon the dissemination of information, interference with political organization, and the prohibition of political assembly.

Justice Stone's philosophy explains some decisions but not others. The malapportionment of state legislatures so distorted the political process as to prevent political correction of the evil.[25] Restrictions upon speech or association may diminish the usefulness of political remedies.[26] The first amendment applies with the same force, however, to literature, entertainment and the arts.[27] Restrictions in the latter areas have scant relation to the openness of the political process. Justice Stone's philosophy also fails to justify strict review in cases involving religious freedom[28] and other non-political, personal liberties.[29]

The *Carolene Products* footnote also suggested that the Court should perhaps be especially sensitive to the claims of those whose color, religion, or esoteric views deprive them of political influence equal to their numbers. The argument that the Court's function is to protect minorities cannot be carried very far, however, because rich bankers whose power a legislature is asked to shear are no less a minority than blacks or Jehovah's Witnesses. Justice Stone might reply that when he spoke of "insular minorities," he referred to the groups that some political scientists call "permanent minorities," because even in a pluralistic society they have often been unable to form the alliances necessary to make them part of the majority part of the time. But even if one accepts the dubious factual premise, the cases go beyond the rationale.[30]

A second, very common theory argues that "personal liberties" deserve more stringent protection than "property rights" because society

25. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).
26. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971).
27. "Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966).
28. Wisconsin v. Yoder, 406 U.S. 205 (1972).
29. Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).
30. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

should assign them greater value. The rationale merely asserts the conclusion. As Justice Stewart has observed, no one has yet explained why holding property is not a personal right.[31]

A third justification for strict review of cases involving preferred rights was advanced by Justice Jackson in the second flag salute case:[32]

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.

The first amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The fourteenth amendment reads:

> No State shall . . . deprive any person of life, liberty or property without due process of law.

The difference in specificity is considerable, but its relevance is less obvious. Justice Black stood almost alone in the supposition that the language of the first amendment could be read literally. The outright suppression of particular ideas is relatively infrequent. More often, the restriction pertains to time or place or medium of expression,[33] or to an obstacle erected to the gathering or dissemination of information[34] or to a cost attached to it.[35] In such cases the public purpose served by the constraint must be weighed against the cost in freedom of expression, and the balance depends upon a view of the facts. One must ask, for example, how real the fears of the press are that sources of information will dry up if the courts continue to treat reporters like other citizens with information needed in the administration of justice and,

31. Lynch v. Household Finance Corp., 405 U.S. 538, 543–52 (1972).
32. Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943).
33. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972); Brandenburg v. Ohio, 395 U.S. 444 (1969); Adderley v. Florida, 385 U.S. 39 (1966).
34. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972); Kovacs v. Cooper, 336 U.S. 77 (1949).
35. *See, e.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

if some information dries up, whether the losses are justified by the gains of having the testimony.[36] The specificity of the first amendment does not explain why the Justices should resolve these factual issues while deferring when property is at stake.

Nor are the guarantees of the first amendment self-defining. Just as former Justices read concepts like "freedom of contract" and the "right to pursue a lawful occupation" into the fourteenth amendment, so the Warren Court interpolated into the first amendment freedom of association[37] and other qualified rights hardly related to the words.[38] The justification of "specificity" fails entirely when the preferred rights justification for active review is extended under the equal protection clause to allegedly "invidious" classifications[39] or to discrimination in respect to "fundamental rights,"[40] or under the due process clause to the creation of new personal rights such as to travel,[41] to practice birth control,[42] or to have an abortion.[43]

It may be said that the very presence of the Bill of Rights in the Constitution implies that the Framers intended to provide for judicially-enforced restrictions upon legislative power over certain areas of human activity which were thought essential to protect against legislative and executive oppression. Historical support can be adduced for the argument. During the debate in Congress upon the proposed bills of rights, for example, James Madison observed:[44]

> If they [the Amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or the Executive . . . .

But the argument from the adoption of a Bill of Rights and the pronouncements of its Framers hardly suggests the limits of preferred rights and strict review. The guarantee against deprivation of property

36. Branzburg v. Hayes, 408 U.S. 665 (1972).
37. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); NAACP v. Alabama, 357 U.S. 449 (1958).
38. *See* notes 17–20 *supra*.
39. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968).
40. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).
41. *See* note 18 *supra*.
42. Griswold v. Connecticut, 381 U.S. 479 (1965).
43. Roe v. Wade, 410 U.S. 113 (1973).
44. 1 ANNALS OF CONG. 439 (1789) [1789–1824].

without due process of law is as much a part of the fifth amendment as the assurance of liberty.

All the theories had two things in common: (1) they justified activism and (2) they assigned the Court special responsibilities and even —one might argue—particular constituencies. At bottom the theories assert that the ultimate protection for minorities, for spiritual liberty, and for freedom of expression, political activity and other personal liberties comes rightfully from the judiciary. In this realm—it was said —the political process, filled with arbitrary compromises and responsive, as in some degree it must be, to short-run pressures, is inadequate to enforce the long-range enduring values that often bespeak our aspirations instead of merely reflecting our practices. The Warren Court thus came to be influenced by an extremely self-conscious sense of judicial responsibility for the open and egalitarian operation of the political system, for minorities, for the oppressed, and for a variety of "rights" not adequately protected by the political process.

At the same time that the Court's sense of responsibility for those values was growing, losers in the political process were becoming more conscious of the potentials of constitutional adjudication for achieving their goals and better equipped to use this weapon. Constitutional litigation came to be conducted more and more by civil rights and civil liberties organizations, by radical political associations, and later by law offices funded to stimulate community action and provide legal services to the poor.

In the 1930's a modest view of the judicial function in constitutional interpretation fitted the desire for progressive social and economic reform. The legislative and executive branches were then engaged in the redistribution of power and the protection of the disadvantaged and distressed. By the 1950's because of the cold war, increased crime, fear of social disorder, and perhaps entrenched economic and political power, the legislative process had become resistant to libertarian, humanitarian and egalitarian impulse. In other circles, a wave of egalitarianism flowed from the rise of the peoples of Asia and Africa. The multiplication and magnification of government activities increased sensitivity to threats to civil liberty. Humanitarianism, aided by the prevailing teaching of the psychological and social sciences, cast doubt upon the sterner aspects of the criminal law. Later, a wave of subjectivism bred wide dissatisfaction with all constraints upon freedom to do one's own thing. The Supreme Court then

came to be the branch of government where these impulses beat the strongest, perhaps by the chance which puts one man rather than another upon the Court, perhaps because the Justices live in the intellectual rather than the political world.

In this context, the preferred rights rationale for strict judicial review could hardly fail to stimulate vigorous expansion of the functions of constitutional adjudication. The result was a period of extraordinary creativity in constitutional law. *Brown v. Board of Education*[45] —the first school desegregation case—lighted a beacon of hope for minority victims of racial prejudice. Decisions followed establishing the "one man, one vote" rule for legislative apportionment[46] and sweeping away the poll tax[47] and other restrictions upon voting rights.[48] The Court's intense concern for the open and democratic operation of the political system also took shape in decisions strengthening the constitutional safeguards securing the free flow of information, criticism and debate,[49] voluntary association,[50] demonstrations and dissent[51]—protection for far out groups as well as the conventional. The force of egalitarianism also led the Court to sweep away other forms of discrimination, most notably those based upon sex,[52] alienage,[53] legitimacy,[54] and length of residence.[55] Never had such thorough-going reform of criminal procedure been accomplished in so short a time.[56]

Barrels of ink have been spent in debating the return to an earlier activism,[57] but simple activism is not the point I wish to emphasize. It

45. 347 U.S. 483 (1954).
46. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).
47. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
48. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).
49. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Wood v. Georgia, 370 U.S. 375 (1962); Bridges v. California, 314 U.S. 252 (1941).
50. *See* note 37 *supra.*
51. *E.g.,* Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).
52. *E.g.,* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).
53. Graham v. Richardson, 403 U.S. 365 (1971).
54. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968). *But cf.* Labine v. Vincent, 401 U.S. 532 (1971).
55. *See, e.g.,* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).
56. A. Cox, THE WARREN COURT ch. 4 (1968).
57. For a collection and discussion of academic commentary see Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court,* 84 HARV. L. REV. 769 (1971).

is other characteristics of the new era which gave new dimensions to constitutional adjudication in the federal courts.

II. CONSTITUTIONAL ADJUDICATION AS AN INSTRUMENT OF REFORM

One novel aspect of constitutional adjudication during the past two decades has been the conversion of an instrument of continuity into a weapon of reform. A judge who believes in progress and in special judicial responsibility for values and groups not adequately represented in the political process will find it natural, if not obligatory, to require the revision of old laws and settled government practices inconsistent with what he believes to be national ideals. As a result, where the older activist decisions merely blocked legislative initiatives, the decisions of the 1950's and 1960's forced changes in the established legal order. The school desegregation cases[58] overturned not only the constitutional precedents built up over three quarters of a century but the social structure of an entire region. In the first reapportionment case[59] counsel frankly avowed that the judiciary should wipe out gross malapportionment because both Congress and the state legislature had failed to act; at least one Justice acknowledged that to do what the political branches would not do was his reason for voting to take jurisdiction.[60] The one man, one vote rule asserted that the composition of the legislatures of all but one or two of the 50 states was unconstitutional and had been unconstitutional for fifty or a hundred years.[61] Many of the decisions improving criminal procedure —for example, the ruling that a state is constitutionally required to provide counsel to indigent defendants in criminal cases[62]—corrected appalling state deficiencies, but others upset defensible practices sanctioned by decades of constitutional decisions.[63] *New York Times Co. v. Sullivan*[64] overturned the law of libel as it had prevailed from the beginning. *Bloom v. Illinois*[65] took away an historic judicial power to

58. *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).
59. Baker v. Carr, 369 U.S. 186 (1962).
60. *Id.* at 258–59 (Clark, J., concurring).
61. Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).
62. Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).
63. *See, e.g.*, Jackson v. Denno, 378 U.S. 368 (1964).
64. 376 U.S. 254 (1964).
65. 391 U.S. 194 (1968).

punish for contempt of court without a trial by jury. One could easily multiply examples.

President Nixon's four appointees, including Chief Justice Burger, slowed the pace of change but the new Justices seem not to shrink from using constitutional law as an instrument of reform when an existing rule offends their preferences. The decisions in the abortion cases[66] swept aside statutes in at least forty states, supported by recent votes as well as moral themes dominant in American life for more than a century. Similar reforming decisions have been rendered by the supposed "strict constructionists" in the area of "women's rights."[67] This January a unanimous Court overruled a century-old limitation upon state power to tax goods imported from abroad.[68] In 1962 Alexander M. Bickel could write, "Continuity is a chief concern of the Court, as it is the main reason for the Court's place in the hearts of its countrymen."[69] No one could say that today.

I return later to this new dimension of constitutional adjudication.[70] For the moment, it is enough to suggest that in the long run the Nation's acceptance of the constitutional decisions of the Supreme Court as instruments of enforced change without expression of legislative or popular approval *might* well be very different from the Nation's response to law as an instrument of continuity checking oppressive legislative innovation.

III. PROCEDURAL CHANGES

In the beginning Chief Justice Marshall justified judicial power to rule an act of the legislative or executive branch unconstitutional as an inescapable part of the judicial duty to decide ordinary actions at law and suits in equity in accordance with law. Marshall himself was not altogether backward in reaching out to decide constitutional questions. Jefferson was thoroughly justified in complaining that Marshall violated normal precepts of judicial behavior in *Marbury v. Madison*[71] by going far out of his way to assert that officers in the

66. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).
67. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971); Stanley v. Illinois, 405 U.S. 645 (1971).
68. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).
69. A. BICKEL, THE LEAST DANGEROUS BRANCH 32 (1962).
70. *See* text accompanying notes 118–146 and 154–158 *infra*.
71. 5 U.S. (1 Cranch) 118 (1803).

executive branch acting upon the instructions of the President are amenable to judicial process;[72] and the Court could easily have decided the case without proclaiming that the courts will disregard congressional legislation which they deem inconsistent with the Constitution.[73] In later years, particularly under the influence of Justice Brandeis,[74] what I describe as the orthodox view gained genuine acceptance. There had to be a plaintiff who had suffered or was about to suffer the kind of injury of which courts would take cognizance in nonconstitutional cases.[75] There also had to be a concrete instance of how the challenged statute had actually operated in a practical situation.[76] The constitutional question would not be determined if there were any other way of deciding the litigation.[77] Constitutional questions usually were decided when raised in defense of a criminal prosecution,[78] in actions to recover monetary damages for harm already done,[79] and in suits against government officials to enjoin them from carrying out threats to impose immediate sanctions against a specific plaintiff under an allegedly unconstitutional law under circumstances in which delay would result in irreparable injury.[80]

Judges who perceive the function of constitutional adjudication to be the promotion of values and the interests of groups not adequately represented in the political process tend to be impatient with restraints that rest easily upon those who see constitutional adjudication as an unpleasant and dangerous duty to be performed only when required in order to resolve issues arising in the exercise of other judicial functions. In this respect the Warren and Burger Courts are markedly dif-

72. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 244–45 (1926), *quoting*, letter from Thomas Jefferson to William Johnson, June 12, 1823.

73. G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 13–14 (8th ed. 1970).

74. *See, e.g.*, his concurring opinion in Ashwander v. TVA, 297 U.S. 288, 341–56 (1936).

75. Columbus G. Ry. v. Miller, 283 U.S. 96 (1931); Massachusetts v. Mellon, 262 U.S. 447 (1923).

76. Arizona v. California, 283 U.S. 423 (1931); Liberty Warehouse Co. v. Grannis, 273 U.S. 70 (1926).

77. Siler v. Louisville & N.R.R., 213 U.S. 175, 191 (1909); Light v. United States, 220 U.S. 523 (1911).

78. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); Lochner v. New York, 198 U.S. 45 (1905).

79. *See, e.g.*, Hall v. DeCuir, 95 U.S. 485 (1877); Dred Scott v. Sanford, 60 U.S. (19 How.) 691 (1857).

80. Unless these precise requirements were met, the bill would be dismissed for want of equity. *E.g.*, Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); Fenner v. Boykin, 271 U.S. 240 (1926).

ferent. The Warren Court often seemed impatient to reach any conceivable constitutional question. The present majority has accepted much of the loosening of old procedural constraints, but it resists further liberalization and has cut back in some particulars. No one can be sure where the balance will be struck, but it is clear that the view that constitutional adjudication is collateral to the essential judicial task of deciding lawsuits has yielded ground to the conception that the primary function of the Supreme Court of the United States, in support of its special responsibility for liberty and equality, is to insure that other organs of government observe constitutional limitations.[81]

A. Declaratory Judgments

One important instrument of judicial expansion is the declaratory judgment, a procedure much opposed by Justice Brandeis which was imported into the federal courts in 1937[82] in order that persons might determine controverted legal rights and duties growing out of a particular transaction without awaiting an action for damages, or even for harm to be done.[83] By the 1960's the new procedure had markedly affected constitutional litigation. No longer need a person wishing to challenge a statute or administrative practice await action—or at least an explicit threat of immediate action—against him.[84] No longer need he show that he is entitled to some remedy beyond a declaration upon the constitutional question.[85] Concurrently, the opportunity to use

81. The strongest statement of this conception is in the concurring opinion of Justice Douglas in Flast v. Cohen, 392 U.S. 83, 111 (1968):

> The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. . . .
>
> . . . .
>
> . . . The Constitution even with the judicial gloss it has acquired plainly is not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive Branches. He faces a formidable opponent in government, even when when he is endowed with funds and with courage. The individual is almost certain to be plowed under, unless he has a well-organized active political group to speak for him. The church is one. The press is another. The union is a third. But if a powerful sponsor is lacking, individual liberty withers—in spite of glowing opinions and resounding constitutional phrases.
>
> I would not be niggardly therefore in giving private attorneys general standing to sue. . . .

82. Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 (1970).

83. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

84. Steffel v. Thompson, 415 U.S. 452 (1974); Katzenbach v. McClung, 379 U.S. 294 (1964); Dickson, *Declaratory Remedies and Constitutional Change*, 24 VAND. L. REV. 257 (1971).

85. Powell v. McCormack, 395 U.S. 486 (1969).

declaratory judgments in order to resolve policy differences in constitutional litigation was expanded by the relaxation of rules determining who may seek judicial aid and who may raise constitutional questions.

B. Standing to Sue

The old law gave standing to sue in complaint of acts of government officials only if their conduct invaded a recognized legal right protected against like invasions of private persons. For example, electric power companies in the southeastern United States were denied "standing" to challenge the constitutionality of the Tennessee Valley Authority upon the ground that the law gave no legal protection against competition.[86] Today, almost any form of actual loss gives standing to sue the government. In one case it was held that a group of law students who said that they enjoyed the outdoors in the areas of Virginia close to Washington, D.C. had standing to complain of a general railroad rate increase because it would raise the cost of hauling scrap for recycling, increase the demand for exploitation of natural resources, including any resources near Washington, and thus reduce the students' enjoyment of the wilderness.[87]

During recent terms a limit has been imposed. The Court reversed decisions of the Court of Appeals for the District of Columbia Circuit allowing citizens to challenge under Article I, Section 6 the practice of allowing Senators and Representatives to hold commissions as reserves in the armed forces,[88] and to challenge under Article I, Section 9 the failure to publish a full account of expenditures of public money by the Central Intelligence Agency.[89]

C. Standing to Raise Constitutional Questions

Under the older rules even one who had suffered legal injury which entitled him to go to court was not allowed to attack a statute upon the ground that it violated some other person's constitutional rights.[90] For example, in an unusually strict decision, the owner of a bar who

86. Tennessee Power Co. v. TVA, 306 U.S. 118 (1939).
87. United States v. SCRAP, 412 U.S. 669 (1973). *See also* Flast v. Cohen, 392 U.S. 83 (1968).
88. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).
89. United States v. Richardson, 418 U.S. 166 (1974).
90. *See, e.g.*, Tileston v. Ullman, 318 U.S. 44 (1943).

had violated a state law prohibiting the sale of intoxicating liquor to women was denied standing to challenge the constitutionality of the law upon the ground that any violation of the equal protection clause inherent in the discrimination against women could not involve *his* constitutional rights.[91] Contrast the decision a few years ago resulting from William Baird's challenge to the Massachusetts statute forbidding the distribution of contraceptives to anyone without a doctor's prescription and to unmarried persons absolutely.[92] Baird had handed a young woman a can of vaginal foam at the end of a speech at Boston University explaining methods of contraception. Because he was prosecuted for the crime, he was properly in court; but the only persons whose constitutional rights were affected were those denied access to contraceptives they wished to use. Baird, being married, had lawful access to contraceptives. He was also a volunteer seeking to precipitate a constitutional test because of an ideological interest. Under the Brandeisian view Baird would have had no standing to argue that the statute invaded other persons' constitutional rights. Nonetheless, he was given standing on the ground that he wished to be an "advocate of the rights of persons to obtain contraceptives . . . . The very point of Baird's giving away vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives."[93]

In a somewhat similar vein the Court of Appeals for the District of Columbia Circuit has held that any Congressman has standing to obtain such as to the conduct of hostilities in Viet Nam[94] or as to the dismissal of a stubborn special prosecutor seeking access to presidential tapes.[95]

D. Unconstitutional on its Face

At one time it appeared to be the settled rule that the courts would inquire into the constitutionality of legislation only so far as a litigant claimed that a statute was unconstitutional as applied to him.[96] Under the decisions of the 1960's the rule seemingly became that, when the

91. Cronin v. Adams, 192 U.S. 108 (1904).
92. Eisenstadt v. Baird, 405 U.S. 438 (1972).
93. *Id.* at 445.
94. Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).
95. Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).
96. *See, e.g.*, United States v. Raines, 362 U.S. 17, 21 (1960); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914). *But cf.* Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940).

first amendment is invoked, the courts should examine the constitutionality of the statute in every possible application not already excluded by the state court and, if any imaginable application would be invalid, they should hold the statute a nullity even though the particular litigant challenging the statute had suffered no loss of his own constitutional rights.[97] Later cases cut back the doctrine of overbreadth in situations involving offenses other than the utterance of words, but the retrenchment is controversial and its extent is far from clear.[98] Most of the Supreme Court decisions applying the doctrine grew out of state prosecutions, but it must be remembered that one suing for a declaratory judgment, upon alleging that he may wish to engage in conduct to which a statute might conceivably be applied, may attack an entire statute as unconstitutional on its face.[99]

Taken together, these relaxations of procedural rules seem to have three larger consequences: (1) they encourage the bringing of constitutional cases in pursuit of political and ideological causes; (2) they multiply the collisions between the courts, on one side, and either a state or the political branches of the federal government, on the other; (3) they tend to shift the emphasis of the Court's work away from preventing or redressing particular wrongs to specific individuals and to direct it towards general supervision of the activities of the other branches. The Court becomes less of a court in the old fashioned sense and more of a roving commission charged with deciding whether other branches of government are observing constitutional limitations.

E. Class Actions

Other new dimensions are added when the declaratory judgment and relaxed notions of standing are brought to bear in class actions. At common law A sued B. If A prevailed, the judgment made A whole, or it ordered B not to interfere with A—nothing more. Under Rule 23(a)(3) of the Federal Rules of Civil Procedure an organization seeking to reform an entire government program need only to find two or three persons willing to lend their names to be used to represent

97. Gooding v. Wilson, 405 U.S. 518 (1972). *See also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).
98. Broadrick v. Oklahoma, 413 U.S. 601 (1973).
99. *See* Part III–A *supra*.

everyone the program may affect. Now, the rights of every conceivable member of the class must be adjudicated, and the remedy will protect all of them, even though they have never heard about the case. The utility of the class action as a device whereby civil rights organizations, community action and civil liberties groups, and public law offices furnishing legal assistance to the poor can assert the rights of individuals who are too weak, too poor or too discouraged to initiate individual suits should not blind us to the concomitants that fundamentally affect the character of constitutional adjudication.

One consequence is to invite wide but detailed judicial oversight over any entire body of executive or administrative practices: military intelligence,[100] police administration,[101] the management of prisons and asylums,[102] school desegregation,[103] school financing,[104] and government employment practices.[105] Two examples deserve narration because the lower court decisions exemplify the potential of class actions while the Supreme Court's five to four reversals reflect a new strain of caution that may arrest its full development.

In *Laird v. Tatum*[106] the named plaintiffs, who were active civil libertarians, sued on behalf of a class of persons whose desire or willingness to engage in exercising freedom of speech, assembly, or association, or any other political rights secured by the Constitution, might be "chilled" by the Army's collection of domestic intelligence. The members of the class could have nothing more in common than distaste for the Army's methods and a vague fear that somehow, somewhere, sometime they might be affected. How many were in the class it was impossible to say, and no one could know which Army activi-

100. Laird v. Tatum, 408 U.S. 1 (1972).

101. *See, e.g.*, COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *rev'd sub nom.* Rizzo v. Goode, 96 S. Ct. 598 (1976).

102. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.), *hearing on standards ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974).

103. Milliken v. Bradley, 418 U.S. 717 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

104. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

105. *See, e.g.*, Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3d Cir. 1974); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Officers for Justice v. Civil Service Comm'n, 371 F. Supp. 1328 (N.D. Cal. 1973).

106. 408 U.S. 1 (1972).

ties had, and which did not have, a "chilling" effect, except by speculating about the tendency. The inescapable consequence, if the case had gone to trial, would have been a pretrial inquiry into the entire conduct of the Army's domestic intelligence program. Exposing the program to light might well have had salutory consequences, as did the congressional hearings before Senator Ervin's Subcommittee on Constitutional Rights;[107] but it would have been an altogether novel use of the courts. No detail of the program would have been irrelevant because no one could say that there was not some unknown member of the class whom it might affect. Next, in order to decide the case, the district judge would have to decide just which activities were and were not sufficiently material to the Army's lawful mission to justify the "chilling effect" upon civil liberties. The court of appeals, which ordered the case to trial before reversal by the Supreme Court, acknowledged that the role of the judge would be to exercise the same kind of supervision over Army intelligence as the Secretary of War would exercise in reviewing the work of his subordinates:[108]

> Apparently in the judgment of the civilian head of the Army not everything being done in the operation of this intelligence system was necessary to the performance of the military mission. If the Secretary of the Army can formulate and implement such judgment based on facts within his Departmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for to confine the military to their legitimate sphere of activity and to protect appellants' allegedly infringed constitutional rights.

The Supreme Court reversed by a five to four vote upon the ground that the allegations of a "chilling effect" failed to state a ripe controversy.

The decision at the present Term in *Rizzo v. Goode*[109] furnishes another example of the degree of continuing judicial oversight invited by the class action combined within relaxed rules of remedy and procedure. The suit was maintained as a class action on behalf of all citizens of Philadelphia and an included class of black citizens by some

107. *Hearings on Federal Data Banks, Computers and the Bill of Rights, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971).
108. 444 F.2d 947, 958 (D.C. Cir. 1971).
109. 96 S. Ct. 598 (1976).

32 community organizations and the Southern Christian Leadership Conference. The defendants were the Mayor, City Managing Director, and the Police Commissioner. The aim of the suit was to force a complete revision of police practices in the City of Philadelphia and also the establishment of new and detailed procedures for handling citizens' complaints of police misconduct. Citizens' constitutional rights were shown to be violated in perhaps as many as 20 incidents in one year in a city of 3 million inhabitants with a 7,500-man police force. There was no evidence linking the named defendants with authorization or ratification of the misconduct. Upon these findings the district court asserted legal power to supervise the functioning of the Philadelphia Police Department[110] but, instead of exercising that authority in full, it directed the named defendants to draft, for the approval of the court, "a comprehensive program for dealing adequately with civilian complaints," to be formulated along the following "guidelines" suggested by the court:[111]

> (1) Appropriate revision of police manuals and rules of procedure spelling out in some detail, in simple language, the "do's and don'ts" of permissible conduct in dealing with civilians (for example, manifestations of racial bias, derogatory remarks, offensive language, etc.; unnecessary damage to property and other unreasonable conduct in executing search warrants; limitations on pursuit of persons charged only with summary offenses; recording and processing civilian complaints, etc.); (2) Revision of procedures for processing complaints against police, including (a) ready availability of forms for use by civilians in lodging complaints against police officers; (b) a screening procedure for eliminating frivolous complaints; (c) prompt and adequate investigation of complaints; (d) adjudication of non-frivolous complaints by an impartial individual or body, insulated so far as practicable from chain of command pressures, with a fair opportunity afforded the complainant to present his complaint, and to the police officer to present his defense; and (3) prompt notification to the concerned parties, informing them of the outcome.

A fourteen page document implementing the interlocutory order was then negotiated between plaintiffs and defendants and incorporated into the final judgment. The court of appeals unanimously affirmed.[112]

110. 357 F. Supp. 1289, 1321 (1973).
111. *Id.*
112. Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974).

The Supreme Court reversed the judgment in an opinion woven of two strands. One strand argued that the named defendants were not liable under 42 U.S.C. § 1983 where the defendants played no affirmative role in the scattered wrongs done by individual police officers which were only incidents "fairly typical of [those] afflicting police departments in major urban areas."[113] The second strand invoked the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law."[114]

The opinion can be read to block federal judicial intervention into the affairs of a police department unless the senior officials have authorized or ratified a pattern of unconstitutional practices. This would be the consequence of either strand pressed to its logical extreme. I am inclined to give more weight to the three dissents and to the opinions of the district court and circuit court of appeals, and so to confine the Supreme Court's decision to its facts, including a number of violations much too small to support an inference of higher official indifference to the individual wrongs inflicted by inferior officers. So read, *Rizzo v. Goode* reveals the strong potential for the use of constitutional litigation to resolve conflicts between citizens and municipal officials and to secure continuing judicial supervision of an executive department.

Second, a class action encourages the court to think in terms of group rights without regard to the situation of any individual plaintiff; it conceals diversity of opinion within the group and assumes that what the named plaintiffs request or the court opines is best is the wish of the entire class. On one occasion the Court of Appeals for the Fifth Circuit criticized the "abandoned view that Fourteenth Amendment rights are exclusively individual rights," and candidly acknowledged that it was less concerned with the rights of individual children than it was with remaking the educational system of the South in a way which it judged would redress previous wrongs to the black people as a group.[115] If a court does take note of any divergence of opinion within the class, either upon its own realization of the likelihood or because several representatives come forward with mutually exclusive proposals, the traditional structure of a lawsuit is broken

113. 96 S. Ct. at 606, *quoting* 357 F. Supp. at 1318.
114. 96 S. Ct. at 607, *quoting* Stefanelli v. Minard, 342 U.S. 117, 120 (1951).
115. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 864–78 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

and the court is forced to compromise or choose among multi-polar interests much in the manner of a political organ. The problem is illustrated by the clash between the national NAACP and its Atlanta branch over the remedy for previous unconstitutional school segregation.[116]

A third consequence of the increased use of class actions in constitutional litigation is to impart a legislative quality to many of the remedies prescribed. The court becomes concerned not with A's demands upon B but with the formulation of rules to govern hundreds and even thousands of persons. When the claim is that a man is held in prison without a fair trial or under a statute which punishes speech protected by the first amendment, the judgment reverses the conviction or, at most, requires that the defendant be released. If the suit is brought on behalf of all persons incarcerated or threatened with incarceration in the state penitentiary upon the ground that the physical conditions, crowding, disciplinary rules and methods of punishing infractions make confinement in the prison a cruel and unusual punishment violating the eighth amendment, the court which sustains the claim has little choice but to prescribe how the prison should be renovated and how it should be run.[117] Again, an action by a single black child and her parents complaining that she is denied equal protection of the law by assignment to a school for black students might lead to a decree requiring her admission to an unsegregated school. If the suit is brought as a class action on behalf of all the black school children in the city, the judge will be forced to order, and perhaps himself to prescribe and administer, a reorganization of the entire school system.

IV. THE IMPOSITION OF AFFIRMATIVE DUTIES

Throughout most of our history the form of the Supreme Court's contributions to public policy was negative. To note the form is not to minimize the grandeur of John Marshall's conception of a politically

116. Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973), *remanded*, 487 F.2d 680 (5th Cir. 1973), *aff'd*, 522 F.2d 717 (5th Cir. 1975).

117. *E.g.*, Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974); AFSCME v. Walker, 27 Ill. App. 3d 883, 327 N.E.2d 568 (1975); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971), *modified sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974).

and economically unified Nation, the influence of the Court's great opinions upon the national consciousness, the momentum generated by important judgments legitimating assertions of state or congressional power, or the obvious fact that eliminating a governmental restraint upon private action may release forces that do more to shape the character of life than any governmental measure. Nearly all our experience with constitutional adjudication, however, and most studies of the role of the Court have dealt with judgments which did little more than validate or veto as unconstitutional action by another branch of government: by the President, by the President and Congress, by the states and the state legislatures, governors and courts, and by other minor officials. Decrees telling state officials what programs they should institute or requiring legislatures to appropriate vast sums would have been unthinkable. When the Court entered its validation or veto, the Court was done with the matter.

This proposition is no longer true. Decisions mandating reforms in the on-going activities of other branches of government reforms often require affirmative action. The affirmative action can be secured only through voluntary cooperation of the political branches or else by the courts themselves embarking upon programs having typically administrative, executive and even legislative characteristics heretofore thought to make such programs unsuited to judicial undertaking.

The most prominent examples are the school desegregation cases. The court determines which students will be assigned to each school, how teachers shall be selected, what security measures shall be adopted, and even where new schools shall be built.[118] When transportation is required, the court directs the expenditure of hundreds of thousands of dollars.[119]

The necessary components of any program of integrated education in a large city appear to commit the courts to constant executive or administrative supervision of the organization, employment practices, curriculum, and extracurricular activities of entire school systems. In Boston, for example, the city was induced by fear of fiscal disaster to plan the elimination of 191 teachers. The federal court went down the

118. Probably the clearest examples are the orders relating to the Boston public schools following the decision in Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974).

119. The most dramatic example is the order relating to the Detroit public schools which was set aside upon other grounds in Milliken v. Bradley, 418 U.S. 717 (1974).

list, school by school, even hearing the personal pleas of individual teachers, and decided to allow 60 layoffs and disallow 131.[120]

Desegregation decrees have all the qualities of social legislation. They pertain to the future. They are mandatory; they govern millions of people. They reorder people's lives in a way that benefits some and disappoints others in order to achieve social objectives. Many parents whose children were to be bussed into other neighborhoods pursued the ambition of moving to a "better neighborhood" not alone or even primarily for their own lives, but for what they saw as a preferable social life and better education for their children. The decrees directing the state to remove children from this environment not only frustrate the parents' aspirations but, as the parents often see it, threaten the emotional well-being and possibly the physical safety of their children. There must be many parents in the inner cities who share very similar misgivings about the government's "pushing their children around" by assigning them to schools in the so-called "better neighborhoods." The decrees thus directly regulate the lives of millions of people without voice in the decision.

I can think of no earlier decrees with these characteristics in all constitutional history. Apart from the unhappy experience with economic "due process," constitutional adjudication under both the fourteenth amendment and the Bill of Rights has been concerned with stopping wrongs done by a state to a few individuals or a minority—usually by official aggression but sometimes, recently, by withholding benefits or other public protection. The decisions prior to the New Deal invalidating regulation of wages, hours of labor, and prices as well as laws protecting the formation of labor unions[121] did involve the conflicting interests of large social and economic classes, but even there the Court was vetoing accommodations worked out through the political process, not imposing upon millions of people a novel program of legislative character without popular representation. Those decisions were wrong primarily because the Justices in the majority failed to perceive the changes in American society. One wonders whether the old Court may not also have been wrong in thinking that issues involving the accommodation of the direct interests of large groups of people are fit for judicial resolution. If so, is the modern Court any less mistaken?

120. The Boston Globe, Mar. 21, 1976, at 1, col. 5.
121. *See* notes 2 & 3 *supra*.

In emphasizing these characteristics I do not mean to imply that the courts should have omitted the undertaking. Quite likely it was the only way to instill the conviction that the constitutional promise of equality was genuine and capable of realization. But approval of the aim and even of the means chosen should not blind us either to the novel aspects of the judicial venture or to the resulting degree of judicial dependence upon political support. The courts cannot possibly go it alone. At the very minimum the community's professional educators must cooperate. Even that will hardly be sufficient if the political community withholds its support and the people are recalcitrant. The danger is not inconsiderable because these quasi-legislative decrees cannot be said, like true legislation, to have the legitimacy which flows from the processes of democratic self-government.

The reapportionment cases provide a second dramatic example of judicial involvement in affirmative undertakings of an essentially legislative character as a consequence of constitutional adjudication. In theory, if an apportionment is shown to violate the "one man, one vote" rule, a court can content itself with declaring the existing system invalid and forbidding future elections until the system is reformed. As a practical matter, to hold no elections would be intolerable. If the legislature does not act, the court must take the affirmative step of preparing a new apportionment. A statistician using a computer could produce for any state scores of apportionment plans conforming to the one man, one vote rule. The choice between constitutionally adequate plans depends upon altogether different questions: (1) How many 'safe' districts shall be created for the major parties? (2) Should the bias be towards protecting incumbents or pitting them against each other? (3) Which party will be favored? (4) Shall an area heavily populated by a self-conscious racial or ethnic minority be made a single district, in which case it may elect one truly representative figure, or shall it be divided, in which case the minority may, under some circumstances, lose all power but, under other circumstances, exert decisive influence in two or three districts? (5) Should the district lines follow existing municipal and county lines? (6) How much use should be made of multi-member districts? The answers have large political consequences. Judges can devise the plans, if they have to do it, calling upon expert assistance, but they do not like the assignment because a court's public stature depends upon both the appearance and actuality of freedom from electoral politics, and because there are

no legal principles to govern the choice among constitutional plans. The task is utterly unlike any previously thought appropriate for a court, but it has been performed with apparent success by a number of state and federal judges.[122]

The use of constitutional adjudication to secure reorganization of state programs through affirmative judicial command is not confined to judicial remedies for past violations. The due process and equal protection clauses have gradually become sources of affirmative government obligations and not mere restrictions upon government interference with private action. Simple examples are in *Griffin v. Illinois*[123] and *Douglas v. California*,[124] holding that a state must provide an indigent person charged with crime a transcript and lawyer for appeal. Once allegations of denial of equal protection were focused upon the sanctions a state was imposing upon one group but not another. Today the charge more often is that the state is failing to provide equal benefits: in welfare,[125] in education,[126] in municipal protection.[127] Where once one would have regarded the due process clause as a check upon the government's power to push people around, today the due process clause may also furnish a constitutional basis for judicial reform of social services.

An example may make my meaning clear. Bryce Hospital is part of mental health facilities of the State of Alabama. A class suit was brought in a federal court on behalf of all the patients confined at Bryce Hospital and some of the employees aimed at compelling a reorganization and the improvement of the health services on the theory that the existing conditions violated the patients' constitutional rights.[128] Judge Frank Johnson, sitting in the federal district court,

122. R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 290–328 (1968). *See, e.g.*, Skolnick v. State Electoral Board, 336 F. Supp. 839 (N.D. Ill. 1971).

123. 351 U.S. 12 (1956).

124. 372 U.S. 353 (1963).

125. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dandridge v. Williams, 397 U.S. 471 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

126. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Brown v. Board of Educ., 347 U.S. 483 (1954); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

127. Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).

128. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.), *hearing on standards ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

ruled that because the patients had been involuntarily committed, they " 'unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.' "[129] Later, he entered a long and detailed order for the operation of the physical facilities and the conduct of the medical program. Only by reading the decree itself can the observer appreciate the extent to which a federal court ordered the expenditure of state funds and entered into the detailed management of a state institution. In prescribing physical renovation the decree went into such detail as:[130]

> Thermostatically controlled hot water shall be provided in adequate quantities and maintained at the required temperature for patient or residential use (110° F at the fixture) and for mechanical dishwashing and laundry use (180° F at the equipment).

The judge also prescribed the exact numbers of medical and supporting personnel required in each job classification for each 250 patients.[131] Even the doctors were told how to proceed:[132]

> 26. Each patient shall have an individualized treatment plan. This plan shall be developed by appropriate Qualified Mental Health Professionals, including a psychiatrist, and implemented as soon as possible—in any event no later than five days after the patient's admission. Each individualized treatment plan shall contain:
>
> a. a statement of the nature of the specific problems and specific needs of the patient;
> b. a statement of the least restrictive treatment conditions necessary to achieve the purposes of commitment;
> c. a description of intermediate and long-range treatment goals, with a projected timetable for their attainment;
> d. a statement and rationale for the plan of treatment for achieving these intermediate and long-range goals;
> e. a specification of staff responsibility and a description of proposed staff involvement with the patient in order to attain these treatment goals;
> f. criteria for release to less restrictive treatment conditions, and criteria for discharge.

129. 344 F. Supp. at 374 *citing* 325 F. Supp. at 784.
130. *Id.* at 382.
131. *Id.* at 384.
132. *Id.*

Another section described in 16 paragraphs the exact records to be kept for every patient.[133]

The court was not unaware that it was ordering the Alabama legislature to meet in special session and vote large appropriations.[134]

> In the event, though, that the Legislature fails to satisfy its well-defined constitutional obligation and the Mental Health Board, because of lack of funding or any other legally insufficient reason, fails to implement fully the standards herein ordered, it will be necessary for the Court to take affirmative steps, including appointing a master, to ensure that proper funding is realized. . . .

It is important to separate the need for reform at Bryce Hospital from the implications of using constitutional adjudication to accomplish the reform. The conditions at Bryce Hospital were inhuman. Possibly, the federal judges, acting in the name of the Constitution, are the only available ombudsmen to check upon the derelictions of the executive and legislative branches—on the derelictions of the whole people of a state acting in their corporate capacity. In many respects the role which the federal courts are thus undertaking is the modern analog of the earlier judicial task of forbidding governmental intrusions upon the citizens. As the dependence of the citizen upon government activities increases, so will grow the proportion of the cases in which the critical issues of human liberty, equality and dignity—of individual right against the government—will depend upon how well the government is satisfying its obligations rather upon whether the government should leave the individual to himself. The Court will scarcely perform its historical function of protecting the individual in his relation with the state unless substantive constitutional rights and the processes of constitutional adjudication can be adapted so as to retain vitality despite the difficulties of the new milieu. The only point upon which I wish to insist is that the role requires entirely novel forms of judicial action and subjects judge-made constitutional law to more severe stresses than traditional determinations. Just as Judge Arthur Garrity has become the chief executive of the Boston schools, Judge Johnson also became in effect, the chief executive or administrator of Bryce Hospital. Both also superseded the political bodies in appropriating funds and, indirectly, in raising revenue.

133. *Id.* at 385.
134. *Id.* at 394.

The Bryce Hospital case does not stand alone. A similar action in Ohio led to the same kind of judicial prescription.[135] Federal courts have undertaken to require not only the rewriting of prison rules and regulations but the rebuilding of prison facilities.[136] In Boston, Federal Judge Garrity is requiring reconstruction of a local prison as well as running the public school system.[137] In Texas, a federal court undertook to specify the work load of each staff social worker, the level of training to be possessed by prison psychologists, the classes in mathematics, and languages to be provided inmates, and the social environment, including "[a] coeducational living environment . . . [allowing] frequent and regular contacts with members of the opposite sex. . . ."[138] Although the Supreme Court of the United States dismissed a similar suit,[139] the California[140] and New Jersey[141] courts have held that financing public education out of local property taxes where school districts vary widely in the value of the taxable property per pupil is unconstitutional. Perhaps the California and New Jersey legislatures will adopt new revenue measures, but at the moment the New Jersey court seems to face the choice of backing down or raising money by itself.[142]

The ever-increasing volume of constitutional litigation, the pace of change, the expansion of constitutional law into hitherto untouched fields, the transformation of lawsuits from narrowly-structured vehicles for redressing individual wrongs into occasions for wide-ranging judicial supervision of administrative and executive responsibilities, and the prescription of affirmative duties—all these seem to reflect a new conception of the function of constitutional adjudication. The transformation is also evidenced by changes in judicial style. Traditionally, a court ruled upon the particular case before it and left the next move to the political branches. Of late, the Supreme Court has deemed it appropriate to announce detailed guidelines written in the

135. Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974).
136. Gates v. Collier, 390 F. Supp. 482 (N.D. Miss. 1975), *aff'd*, 525 F.2d 965 (5th Cir. 1976); Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972).
137. Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973).
138. Morales v. Turman, 383 F. Supp. 53, 100–01 (E.D. Tex. 1974).
139. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
140. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
141. Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).
142. Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975).

form of legislative regulations. In an effort to prevent coerced confessions and protect the poor, the weak and the ignorant when suspected of crime, the Court promulgated the *Miranda* rules regulating police conduct with some specificity.[143] The opinion acknowledges that the rules are not in the Constitution but announces an intent to enforce them through constitutional adjudication until and unless the legislatures provide equally effective protection in another form.[144] At the 1971 Term the Court, speaking through Chief Justice Burger, laid down an even more detailed set of rules for the government of state parole boards.[145] Justice Blackmun's opinion for the Court in the abortion cases prescribes what abortions the state must permit all doctors to perform and what the state may prohibit, in full medical detail and with exact time limits.[146] I cannot shake the conviction that the style and tone of such opinions is still further evidence of major change in the Court's own conception of its role and not merely in the technique by which the role is accomplished.

V. THE CONSEQUENCES

In the polemics of constitutional debate the defenders of the Supreme Court are expected to assert that the Court is ever faithful to an inexorable, unchanging fundamental law. It is the critics who charge the Court with personal or political decisions. "Activist" is often a word of condemnation. My emphasis upon the changing nature of constitutional adjudication should not be misunderstood. In my view all law, including constitutional law, is a human instrument designed to meet human needs; the only question is how the needs can best be met as nearly as may be, not only for ourselves but for our children and their children. Judged by this test—and for the short run—the changes in constitutional adjudication during the past two decades have been extraordinarily fruitful.

But the test I state also implies concern for a long range future—concern for our children and their children. We *may* pay too high a price for some short range results that are good in terms of immediate substantive public policy if the cost is the destruction—or even the

143. Miranda v. Arizona, 384 U.S. 436 (1966).
144. *Id.* at 444–45, 478–79, 491.
145. Morrissey v. Brewer, 408 U.S. 471 (1972).
146. Roe v. Wade, 410 U.S. 113 (1973).

impairment—of the long-run usefulness of the Court as an instrument for achieving other important objectives. If destroyed or impaired, the instrument will not be available—or if available, will not be as effective—for doing the good it can do, without consuming itself, in the longer future. In quite utilitarian terms, therefore, there *may* be a tension between short-run, beneficial social and political results and longer-range institutional considerations—between today's good and tomorrow's. It is wrong to assume the antithesis, but equally wrong not to examine the potential.

The liberalization of procedural constraints, coupled with the widening circle of personal and political rights secured by active review, the expansion of constitutional law into hitherto untouched fields, the transformation of lawsuits from narrowly-structured vehicles for redressing individual wrongs into occasions for wide-ranging judicial supervision of administrative and executive responsibilities—all these changes multiply the occasions for collision between the courts and the political branches. Every collision creates strain and carries risk. Furthermore, when a constitutional mandate requires affirmative action, *i.e.* the revision, or adoption and implementation, of some on-going governmental program, the Court must either rely upon the good will of the legislature or else itself take over essentially legislative functions. To induce the political branches to adopt and implement an on-going, affirmative program conforming to a constitutional decision puts judicial power to a much more stringent test than the traditional order to stop governmental interference with private action. These difficulties are intensified when judicial decrees take on all the characteristics of social legislation—but without the consent of the people expressed through elected representatives.

Can the courts continue to fulfill these new functions successfully? Their success seems to depend upon their competence, *i.e.,* upon whether the problems will yield to the judicial method, and upon their "legitimacy," *i.e.,* upon the sense of the political branches, of the rest of the legal profession, and of enough of the public that what the courts are doing is "legitimate," and therefore deserves an uncoerced consent.

A. Of Judicial Competence

That lawyers have always been jacks-of-all trades is hardly a guar-

anty of competence, but at least it shows that no one should be frightened merely by the newness of the tasks undertaken by federal judges. Such assignments as reapportioning seats in a state legislature and bringing about racial integration in a large school system seem hardly more foreign to the general run of judicial duties than restructuring businesses under the anti-trust laws or presiding over the operation and reorganization of the Penn-Central Railroad.

The increasingly administrative and even legislative character of many of the tasks suggests the need for thorough-going review of the judicial machinery. The personnel and procedure suited to determining the guilt or innocence of one accused of smuggling, or the fault of two colliding vessels, are likely to be ill-adapted to reforming a prison system.

B. Of Legitimacy

In speaking of the "legitimacy" of constitutional decisions I mean to include two connotations: (1) adherence to some charter delimiting however vaguely the proper scope of the judicial function and the proper manner of performing it; (2) the power to command compliance, and acceptance, which are forms of consent. The two points are closely interwoven. The Justices' own interpretation of their charter—their notions of what it is legitimate for them to do—determines what they *will do*. The judgment of the rest of the legal profession, of the political branches, of publicists and other public persons, and ultimately of the people upon whether the judges have stayed within their charter, determines what the judges *can do* over a long period, for that judgment determines what is perceived to be, and therefore is, "legitimate" in the sense that it has the power to command an uncoerced consent. For in the long run, the judiciary, having the power of neither the sword or the purse, must depend upon this kind of public support in order to survive little wounds as well as major assaults from the political branches.

Let me elaborate the last point by two personal examples. In 1963 the Supreme Court ruled that it is unconstitutional for the teachers in a public school to start the day with prayer or Bible reading.[147] Governor Wallace announced that he was instructing the school officials

147. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

in Alabama to disregard the Supreme Court decisions and he challenged the federal government to stop the violation. Attorney General Kennedy called me into his office and asked, "Do I have to send federal marshals into Alabama to stop children from preaching the Bible in the schools?" I replied, "Of course not." Then he asked, "How is the Court's decision to be enforced?" I lamely murmured something to the effect that there was no suit in Alabama; that the problem was far off in the future; and that, anyway, courts had lots of ways of enforcing their decrees. It was a poor answer. What I should have said was: "Mr. Attorney General, in one sense there is no answer to your question, just as there is no answer to the question of what would have happened if President Truman had simply said in 1952, when the Supreme Court invalidated his seizure of the steel mills: "I do not intend to comply with the Court's decision." Similarly, there is no answer to the question, "What would have happened in the summer of 1962 if the railroad workers had persisted by the thousands in going on strike, regardless of what statute Congress might enact or what decree a court might enter? The simple fact is that our society is free because it depends not upon force but upon the rule of law; and the rule of law depends upon voluntary compliance. The answer to your question, in another sense, is that the community knows the importance of the rule of law and when such challenges occur, the people will insist upon compliance."

Of course, the upshot is rarely certain. In the beginning, President Jefferson and Secretary of State Madison refused to go to court to answer Marbury's application for mandamus. If the Supreme Court had issued an order, directed to Madison, Jefferson and he would have laughed successfully at John Marshall's pretensions.[148] President Lincoln disregarded a judicial of writ of *habeas corpus* at the start of the Civil War.[149] President Franklin D. Roosevelt was ready to take the case to the country if the Supreme Court invalidated his financial measures.[150] Knowing this history and assuming that President Nixon knew it too, I often lay awake until morning, while I was Watergate Special Prosecutor, worrying what would happen if President Nixon,

148. The best accounts are 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 169–316 (rev. ed. 1926); 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 1–222 (1919).

149. 2 C. WARREN, *supra* note 148, at 369–74.

150. W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932–1968, at 35 (1970).

who seemed to have an imperial view of the Presidency, were tempted to defy the courts. The courts, as I have said, have neither the purse nor the sword. President Nixon had received an overwhelming popular endorsement less than a year before. The question of executive privilege might seem dryly technical. The people might think it unseemly for judges in lower courts to be issuing orders to the Chief of State. At the time, there were few signs that the country had turned against the President. A Harvard professor seemed an unlikely rallying point. Suppose that President Nixon's defiance were successful. The habit of compliance—the notion that a powerful executive official has no choice but to comply with a judicial decree—is a fragile bond. Who could say in an age of Presidential aggrandizement that, if one President succeeded in defiance, others might not follow the example until ours was no longer a government of law? Was it right to reject compromise and risk setting in motion this train of events? On the other hand, what good was a tradition of constitutionalism if you dare not put it to test?

The fears proved fantasies. The people proved their determination —and their normal and political power—to require the highest officials to meet their obligations under law. Still, one has to ask—what is the source of judicial power to command acceptance, compliance, and even support for decrees which have no basis in popular consent. More particularly, how are the sources of this judicial power likely to be affected by the changes in the nature of the Supreme Court's role which I have been describing—changes which seem to put judicial power to new and more severe, if sometimes less important, tests?

History is one chief source of legitimacy for the basic idea of constitutional adjudication. Out of necessity the Court decided some constitutional questions, chiefly those arising out of our federalism, over a period of many years, and its performance proved acceptable. Whether it is because of "the dull traditional habit of mankind" or for some other reason, as Bagehot said, "[o]ther things being equal, yesterday's institutions are by far the best for to-day . . . [and] the most easy to get obeyed, the most likely to retain the reverence which they alone inherit, and which every other must win."[151] To this may be linked the general acceptance of the courts as forums for resolving a wide variety of judicially cognizable cases and controversies—a role to which con-

151. W. BAGEHOT, THE ENGLISH CONSTITUTION 8 (1963).

stitutional adjudication is readily acceptable as an appendage provided that individuals do not make the mistake of severing the two or of making the tail so big that it wags the dog. But history and habitual acceptance for adjudication of private rights will not make a new constitutional role legitimate in the eyes of the legal profession nor a radically and observably new role legitimate in the eyes of the people. Here the "dull traditional habit of mankind" may aid those who challenge the courts.

Judge Learned Hand, in a tribute to Cardozo,[152] ascribed the power of judge-made law to the belief that the major influence in judicial decisions is not fiat but principles which bind the judges as well as the litigants and which apply consistently among all men today, and also yesterday and tomorrow.[153]

> His authority and his immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate. . . . Yet the customary law of English-speaking people stands, a structure indubitably made by the hands of generations of judges . . . . A judge must manage to escape both horns of this dilemma: he must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant needs of his time . . . .

The tension is surely greater in constitutional adjudication than in applying the common law, not only because of the size and importance of the issues but because here judicial intervention takes the power to decide an issue away from other branches of government and puts it beyond the control of the people.

How are the new departures in constitutional adjudication likely to affect traditional notions of law as sources of legitimacy? No other Anglo-American court has ever overturned so many precedents and made so much new law in so short a time as the Supreme Court during the past two decades. In doing so, the Court often held laws unconstitutional and overturned social and political institutions which had stood for many years. Judicial reform also means a greater

152. L. Hand, *Mr. Justice Cardozo,* 52 HARV. L. REV. 361 (1939).
153. *Id.*

number of decisions resting, in fact and also in appearance, more upon the Justices' view of what represents wise public policy than upon principles derived from accepted sources of law. A nay-saying court engaged in invalidating novel legislation upon constitutional grounds seldom need overrule previous decisions. A reforming court is constantly overturning precedent and thus belying the belief that judges are not unrestrainedly asserting their individual or collective wills but applying an existing body of "law" to which they owe allegiance. Consider the abortion cases. The Supreme Court of the United States has held that the due process clause gives a constitutional right during the first three months of pregnancy.[154] The Supreme Court of West Germany, interpreting equally vague language, has held that the embryo or fetus has a constitutional right to continued existence.[155] When two courts of last resort reach diametrically opposed conclusions upon whether the decision to terminate a pregnancy exercises or violates a fundamental human right, will the layman accept either ruling as a "law" binding upon the judges rather than a fiat dictated by their personal preferences upon a debatable question?

Still, the prestige of the Supreme Court is surely greater today than that of other branches of government, and I am inclined to think that it has never been higher. Is one to explain this reaction by some peculiarity in the present era? Has the legal profession exaggerated the importance of judicial adherence to a rule of law? Are there other, stronger sources of legitimacy? Or has society been living on the momentum of a legitimacy won by earlier adherence to a system of law which is bound to decline if un-elected judges continue to take over functions once thought to be suitable only to the political branches?

The strains are indubitable. The courts cannot always go it alone in their new kinds of undertakings. Judge Johnson's decrees concerning Bryce Hospital may have done more harm than good. Alabama did little more than release 3,000 of the 6,000 patients in order to conform to his orders. Salaries remained so low that the required hospital staff could not be recruited.[156] In New York State, when a federal

154. Roe v. Wade, 410 U.S. 113 (1973).

155. Decision of the West German Constitutional Court *(Bundesverfassungsgericht)* of February 25, 1975, BVerfGE 39, 1. For a translation and discussion of this case see Gorby & Jonas, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSH. J. PRAC. P. 551 (1976).

156. Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1352–60 (1975).

judge ruled that an enormous mental health hospital fell short of constitutional standards, the state complied with the decree by transferring to the hospital all the funds appropriated for the prevention and relief of alcoholism.[157] In Chicago, upon finding in 1969 that the housing authority and city officials had followed racist policies in locating new public housing, the federal court issued specific orders with respect to future projects.[158] Since then, no public housing has been built in Chicago. In Boston, the judicial effort to integrate the previously segregated schools has produced two years of violence, hatred and frustration—and little education. Are such failures proof of judicial over-reaching? Or is the lesson that progress is seldom without difficulty, disappointment, and even some active resistance, which must be suffered in the faith that time will bring forth wisdom and restraint?

I leave all these questions unanswered, partly because I do not know the whole answer, partly because they seem to be ruled by antinomies, and partly in order to raise another point not unrelated to the first.

Professor James Bradley Thayer would have objected to enlarging the role of constitutional law even if the Court has power to sustain it.[159]

> [I]t should be remembered that the 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, and the people thus lost 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 of a common and easy resort to this great function . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

Was Thayer right? Or does the Court at its best assist in the process of education? Partly right and partly wrong, I suggest. The great opinions of the Court seem to me to help to make us what we are by telling us what we may be. The "one man, one vote" cases revived ma-

157. New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Stone, *Overview: The Right to Treatment—Comments on the Law and Its Impact,* 132 AM. J. PSYCHIATRY 1125 (1975).

158. The protracted litigation is summarized and the latest decision reported in Hills v. Gautreaux, 96 S.Ct. 1538 (1976).

159. J. THAYER, JOHN MARSHALL 106–07 (1974).

joritarian democracy in the choice of legislators.[160] *Brown v. Board of Education*[161] upset habits so ingrained that their vice could be conveniently ignored so long as the Court was silent. Other decisions expanded political liberty and brought more nearly equal justice into the criminal courts. These changes would have been long delayed—perhaps they would not have happened—if the country had waited for legislative action. Still, one cannot accurately say, busing aside, that the Court forced the decisions upon an unwilling majority or that the decisions deadened the sense of moral responsibility or dwarfed the political capacity of the people. The reapportionment cases evoked widespread popular support. The resistance to the desegregation cases is still widespread and genuine, but busing aside, there is no doubt that most of the American people reject apartheid when forced to face up to the question, and the constitutional decision stirred up a wealth of supportive political action which has immeasurably improved the opportunities of former victims of discrimination.

Constitutional adjudication depends upon a delicate, symbiotic relation. The Court must sometimes be the voice of the spirit, telling us what we are by reminding us of what we may be. But while the opinions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must be already in the Nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. In the end, I think, the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's resulting ability, by expressing its perception, ultimately to command not merely a passive but a supportive consensus.

160. Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).
161. 347 U.S. 483 (1954).