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Toward a Political Supreme Court

Philip B. Kurland†

Obviously the Supreme Court is more than the nine individuals gowned in black and ensconced in the marble palace in Washington. Like the Presidency and the Congress, the Court must be viewed as an institution separate and apart from those who temporarily occupy the offices. It is important to examine the Court's actions and to evaluate its use of power not just for today. Like Maitland, one must take a deep account of yesterday in order that today not paralyze tomorrow.

The ardent advocates of enhancement of presidential power when John F. Kennedy occupied the White House seem to have lost most of their ardor during the more recent tenures of Presidents Johnson and Nixon. Those prepared to have the congressional role in foreign affairs and the Senate's power to review treaty commitments bypassed for more efficient methods have begun to recognize the values inherent in such checks on the executive will, as the Viet Nam tragedy becomes ever more tragic. And, now, with a radical change of personnel on the Supreme Court already begun, there must be at least some advocates of judicial power prepared to think in more institutional terms.

For, just as the power flowing to the national government from the states became irreversible at some point in our history; just as the accretion of executive authority and the reduction of legislative authority has become intractable; so, too, the authority that the Court might assert—and the manner of its assertion—could become fixed for use by Justices who succeed those who first utilize it. I do not mean that these trends cannot be reversed. Certainly they can, but only at the cost of weathering a constitutional crisis with all its correlative consequences and dangers.

The proper question about the Court today—before the crisis is upon us—is not whether we should reverse the flow of authority, but whether it should be slowed or speeded. The question is whether the essential

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function that only the Court performs will be strengthened or weakened by further quick movements of the Supreme Court along the road that it has recently travelled.

We have it on very high authority that the Supreme Court's functions should be expanded and legitimized.¹ Professor Berle tells us that withdrawal from power, apparently like withdrawal from drugs, would have most unpleasant consequences:²

A corollary to the first law of power (that it always replaces chaos) is an implacable rule. Power cast aside without provision for its further exercise almost invariably destroys the abdicating power holder—as, for example, Shakespeare's King Lear found out when he improvidently abandoned his power, and was promptly crushed. Conceivably, the Supreme Court might have avoided assuming the power position in the first place—but it cannot renounce it now. It has entered, created, and accepted a field of responsibility. Elements in that field might wreck the Court were it now to desert the function it has assumed.

I do not know whether Lear's kingdom would have been better off had he remained in authority. Nor do I know that the Congress and the President are properly analogized to Goneril, Regan, and Cordelia or their husbands. After all, we have seen that the administration of the realm of civil rights, so far from perfect as it is, had become more effective as Congress and the executive took over control than when it was the sole concern of the judiciary. In any event, the proper question is not abdication, but how the Court's authority should be exercised.

I suggest that we ask whether, as the Warren Court has moved toward the legislative mode and away from the judicial mode of carrying on its business, it has endangered the capacity to perform its peculiar function. A truly legislative body, as the Court itself has frequently said, must be directly responsible to the expression of majority will. The single institution in our system created for the purpose of protecting the interests of minorities—assuming that is what the Constitution is about, at least in part—is the Supreme Court. Its essentially anti-democratic character keeps it constantly in jeopardy of destruction. But that characteristic is both its principal virtue and its primary limitation. The question is do we secure more of what we need or want by turning the Supreme Court into a third legislative chamber, or by retaining it in the form of a judicial body.

1 A. BERLE, *THREE FACES OF POWER* (1967).

2 *Id.* at 51.

It should be clear, even to the blindest partisan, that the Court has never been either purely judicial or purely legislative in its work. I should like, however, to examine some of its processes to suggest that it has in recent years been moving toward the legislative pole. I reject the notion that this is determinable simply by examining its conclusions and deciding whether the Court has made new law. If the Supreme Court did not make new law, it would be hard to justify its existence. Fixed principles are as readily applied by lower federal courts and by state courts as by the nine berobed men in Washington. The issue is rather how that new law is made and why, and what effect it will or should have.

Some political scientists and some self-styled realists among the lawyers would say that the Court is in fact already a legislative body, or is not different from a legislative body in its function. Indeed, Professor Berle's recent tantalizing little book opens with the proposition that "Ultimate legislative power in the United States has come to rest in the Supreme Court of the United States."³ But this position, it seems to me, rests on an oversimplified notion of how the legislative function differs from the judicial. I submit that the difference does not lie in whether one or the other has a lawmaking power. There may be some—even in this day—who are unwilling to recognize that courts make law. But our legal heritage derives from the great tradition of the common law which originated at a time when the courts were the prime lawmakers and the legislature was new to the function. And I am assured by Professor Kalven that, as he surveys developments in the field of tort law, he is convinced that the common-law courts are as creative today as they ever were. At least since Holmes' day, we have recognized judicial lawmaking as a conscious process of creation, not discovery.⁴

... in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of

³ *Id.* at 3.

⁴ O. HOLMES, *THE COMMON LAW* 31-32 (M. Howe ed. 1963).

instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves . . . , new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last, a new form, from the grounds to which they had been transplanted.

But hitherto this process has been largely unconscious. It is important, on that account, to bring to mind what the course of events has been. If it were only to insist on a more conscious recognition of the legislative function of the courts, as just explained, it would be useful

The distinction that I am seeking to draw here between the judicial mode and the legislative mode is a distinction between two rule-making processes. When I suggest that the Warren Court has moved closer to the legislative form than most of its predecessors have done, it is not because it has made new law, but because in making new law it has come closer to emulating the legislative process than any of its predecessors. But I should emphasize that the Court still has a long way to go before identity of the processes will have occurred. For, I would repeat, one essential difference between the two systems lies in their respective constituencies. The legislature represents that combination of groups and individuals that makes a majority on any issue; the Court's primary obligations are to discrete minorities. The majority is an ever-present threat to the Court's authority, and must be taken into account for that reason. And no one suggests openly that where the majority will is expressed through legislation, it is the Court's function to thwart it or prevent it. The exception is where the legislature imposes on individuals or minorities in so fundamental a fashion as to necessitate invoking the safeguards of the Constitution.

Comparing the role of the common-law judge to that of the legislator, Cardozo, in the Holmes tradition, said:⁵

My analysis of the judicial process comes then to this, and little more: logic and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the

⁵ B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 111, 112-14 (1921).

most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent

If you ask how he [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. The choice of methods, the appraisal of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.

It is important to recognize that both Holmes and Cardozo were talking essentially about common-law courts where the analogy to legislation is closer and easier. For one thing, if the common-law courts legislate interstitially, they also legislate only temporarily. If the legislature chooses a different rule from that pronounced by the courts, in the common-law world the legislative will is dominant. This is the point made by J. R. Lucas in differentiating the English high court from the Supreme Court:⁶

The example of the Supreme Court of the United States of America shows that if we want to keep politics out of the administration of justice, we must deprive the officials who administer justice of all discretion which might be influenced by political considerations. Else there will be an incentive for politicians to attempt to "pack" the courts with their own partisans. But where the ultimate authority is a non-judicial court or assembly, all we need to ensure when selecting

⁶ J. LUCAS, *THE PRINCIPLES OF POLITICS* 217-8 (1966).

people to be judges is that they shall faithfully apply the laws enacted by the Legislature in all cases to which they clearly apply. It was not necessary to pack the English Bench because the same judges who decided the Taff Vale case could be relied upon, whatever their political opinions or private views, to apply the provisions of the Trades Disputes Act, which reversed the Taff Vale decision. Provided the judges, like reeds, will bow to political winds in due legislative form, there is no reason for them not to exercise, in the absence of a clear directive from Parliament, their own judgment on what is equitable and just. All that we do demand is that where Parliament has given a ruling, judges should follow it, even against their own judgment, not because Parliament is wiser, more equitable or more just than the judges, but . . . because it is expedient to concentrate all political discretion in Parliament, where, though wrong may be done, it will be done openly.

It was this deference to legislative supremacy—and it should be recalled that 18th century Americans were tutored by Coke's *Institutes*⁷—that was expressed, if inappropriately, by Marshall in *Osborne v. Bank of the United States*,⁸ when he wrote: "Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." The equation of the will of the legislature with the will of the law is more interesting than the self-deprecation with which the sentence was begun.

This supremacy of the legislature is missing in constitutional litigation. And thus there is an additional important distinction between common-law judicial legislation and that kind indulged by the Supreme Court of the United States. Common-law issues, by definition, are problems submitted for resolution by the judiciary in the absence of statutory attempts at resolving them. Constitutional adjudication, on the other hand, never takes place at so early a stage in the search for a solution to the social, political, or economic problem presented. It is not until one of the other branches of government has faced the problem and exercised or refused to exercise its law-making powers that the judiciary is called on to decide a constitutional issue. It is this factor of prior rule making by legislative or executive decision that inheres in constitutional cases and is absent

⁷ See S. THORNE, D. DUNHAM, P. KURLAND & T. JENNINGS, *THE GREAT CHARTER* 53, 54, 57 (1965).

⁸ 22 U.S. (9 Wheat.) 738, 866 (1824).

from the list of intangibles described by Holmes and Cardozo in their description of judicial legislation.

Indeed, it is this factor that has really brought forth the charge that the Warren Court has improperly become a legislature. That charge is, in effect, that the Court did not give adequate weight to the conclusions reached by other branches of government, at least equally appropriate bodies for ascertaining proper public policy. And Professor Berle's claim that the Court has become a super-legislature is a claim to the power to discount the judgment of other governmental authorities in deciding what rule is best. In essence, the attack is that the Court has failed to subscribe to the Thayer thesis about judicial review. Thayer put it this way in his biography of John Marshall:⁹

To set aside the acts of such a body [a legislature], representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where the responsibility lies, and to bring down on the precise locality the thunderbolt of popular condemnation. The judiciary, to-day, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their responsibility. There will still remain to the judiciary an ample field for the determination of their remarkable jurisdiction, of which our American law has so much reason to be proud; a jurisdiction which has some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exercise it.

Certainly if the small number of cases of invalidation of national legislation are to be taken as the test, the validity of the charge that the Court has improperly legislated in the area of constitutional review is debatable. Even with reference to review of state action, for the most part the Court has been concerned not with determinations

⁹ J. THAYER, O. HOLMES, & F. FRANKFURTER, *JOHN MARSHALL* 87-88 (Phoenix ed. 1967).

by legislatures but with those made by police officials and courts, who cannot speak with the same voice of the sovereign that Thayer so readily attributes to a legislature. Moreover, the Court's actions have occurred primarily in the area where Thayer's theory of enhanced legislative responsibility will not work. For the protection of minorities is not yet so popular that failure by the legislatures to afford it results in a "thunderbolt of popular condemnation." In any event, we have come too far along the road to national supremacy to suggest that the Court weigh the judgment of these state agencies as heavily as it would their national counterparts before promulgating new legislation.

There are other complaints about the Court's judicial legislation at the constitutional level. One is Mr. Justice Black's that the Court frequently does not justify its legislation by any command of the Constitution. In essence this is a rejection not only of constitutional judicial legislation but equally of that kind described by Holmes and Cardozo. During the last part of the last Term of the Warren Court, Mr. Justice Black, in dissent, expressed his attitude in this manner:¹⁰

The latest statement by my Brother HARLAN on the power of this Court under the Due Process Clause to hold laws unconstitutional on the ground of the Justices' view of "fundamental fairness" makes it necessary for me to add a few words in order that the difference between us be made absolutely clear. He now says that the Court's idea of "fundamental fairness" is derived "not alone . . . from the specifics of the Constitution, but also . . . from concepts which are part of the Anglo-American legal heritage. This view is consistent with that expressed by Mr. Justice Frankfurter in *Rochin v. California* that due process was to be determined by "those canons of decency and fairness which express the notions of justice of English-speaking peoples. . . ." 342 U.S. 168. In any event my Brother HARLAN's "Anglo-American legal heritage" is no more definite than the "notions of justice of the English-speaking peoples" or the shock-the-conscience test. All these so-called tests represent nothing more or less than an implicit adoption of a Natural Law concept which under our system leaves to judges alone the power to decide what the Natural Law means. These so-called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional. On the contrary, these tests leave them wholly free to decide what they are convinced is right and fair. If the judges, in deciding whether laws

¹⁰ *Snigdash v. Family Finance Corp.*, 395 U.S. 337, 350-1 (1969).

are constitutional, are to be left only to the admonitions of their own consciences, why was it that the Founders gave us a written Constitution at all?

The Justice asks what is certainly a basic and difficult question. And he states as well as anyone another meaning of the charge of judicial legislation. One cannot really answer his question, except by rejecting the alternative that he suggests. Is it worse for the Court to read commands inhibitory of government from amorphous phrases that were put there by the Constitution's authors than to read the same commands into specific language that can accommodate them only with even more difficulty? What is the meaning to be given to such loose phrases as due process of law in the fifth amendment, or republican form of government in the fourth article, or privileges and immunities as used in the fourth article, or equal protection of the laws as in the fourteenth amendment? How can a strict constructionist, so-called, like Black have acquiesced in the reapportionment cases? The answer to Black and others voicing this same criticism can be found in the description of judicial legislation in the quotations above from Cardozo and Holmes. Frankfurter, against whom Black leveled this attack again and again, has said:¹¹

It may be that responsibility for decisions dulls the capacity for discernment. The fact is that one sometimes envies the certitude of outsiders [as well as some Justices?] regarding the compulsions to be drawn from vague and admonitory constitutional provisions. Only for those who have not the responsibility of decision can it be easy to decide the grave and complex problems they raise, especially in controversies that excite public interest. This is so because they too often present legal issues inextricably and deeply bound up in emotional reactions to sharply conflicting economic, social, and political views. It is not the duty of judges to express their personal attitudes on such issues, deep as their individual convictions may be. The opposite is the truth; it is their duty not to act on merely personal views. But "due process," once we go beyond its strictly procedural aspect, and the "equal protection of the laws" enshrined in the Constitution, are precisely defined neither by history nor in terms. . . .

No doubt, these provisions of the Constitution were not calculated to give permanent legal sanction merely to the social arrangements and beliefs of a particular epoch. Like all legal provisions without a fixed technical meaning, they are ambu-

11 J. THAYER, O. HOLMES, & F. FRANKFURTER, *supra* note 9, at 156, 167.

lant, adaptable to changes of time. That is their strength; that also makes dubious their appropriateness for judicial enforcement. Dubious because their vagueness readily lends itself to make of the Court a third chamber with drastic veto power. This danger has been pointed out by our greatest judges too often to be dismissed as a bogey. Holding democracy in judicial tutelage is not the most promising way to foster disciplined responsibility in a people.

On the other hand, it might be said that "holding democracy in judicial tutelage" is the only way that has yet been devised for preventing the "tyranny of the majority," as Mill termed it,¹² from imposing on the minority. This aspect of what Frankfurter's good friend Lord Radcliffe termed "The Problem of Power"¹³ remains the central problem of American life, not merely in terms of judicial problems but also because of those created by the executive and the legislature in their exclusive spheres of authority.

Yet, it must be conceded to Mr. Justice Black and others that, to the extent that the Court's discretion has become less and less fettered by the judgments of its coordinate branches of the national government, by the decisions of various state agencies, by the language of the Constitution and federal statutes, it is behaving more and more like a legislative body and less and less like a court.

To the extent, too, that the Court's lawmaking is not justified by well-reasoned opinions, it is indulging a privilege that belongs more to a legislature than to an appellate court. The Supreme Court's own rules impose on federal trial courts an obligation to justify their judgments by stated findings of fact and conclusions of law.¹⁴ That rule has two functions. One is to make the trial court more aware of the problems that it is confronting. The other is to justify its results to a reviewing tribunal. But as Mr. Justice Jackson was fond of reminding his brethren, the reason that the Supreme Court does not have to meet this same obligation of justifying its results is only that there is no other court which can hold it responsible. "We are not final because we are infallible, . . . we are infallible only because we are final."¹⁵

Strangely, the defenders of the Warren Court do not tend to argue that its opinions are well reasoned, but rather that they are no worse than John Marshall's classic judgments. The defect was put in these terms by Professors Bickel and Wellington of the Yale Law School:¹⁶

¹² See J. S. MILL, *ON LIBERTY* 68 (Everyman ed. 1910).

¹³ See C. RADCLIFFE, *THE PROBLEM OF POWER* (Comet ed. 1958).

¹⁴ FED. R. CIV. P. 52.

¹⁵ *Brown v. Allen*, 344 U.S. 443, 540 (1953).

¹⁶ Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln*

The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.

The defense is not that the Court should not do better, but that it has sometimes been as bad in the past as in the present. Again, we are on the border of legislative prerogative to create rules without the need for justifying them.

Worse, however, is that this kind of opinion writing has led to the evils that disturbed Mr. Justice Cardozo when he was faced with the same kind of behavior by the majority of the Nine Old Men with whom he sat. The problem of which Cardozo wrote is endemic in American society, but one looks to the Court for higher standards than those of the hustings or of Madison Avenue. In *Snyder v. Massachusetts*,¹⁷ Cardozo wrote:

A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.

Certainly the decisions that followed hard on the heels of *Brown v. Board of Education*¹⁸ fit the description that is contained in the quotation from Cardozo. And this derives, I would suggest, from the notion that the judgment of the Court is not a resolution of a case or controversy, but rather is an edict no different in form or consequence than a statute.

The old theory was that a court resolves a particular case that has been submitted to it. Its judgment is binding on all who were parties to the litigation. Indeed, it is said to be unconstitutional to bind those who were not parties to the litigation.¹⁹ In form, the Court's judgments do not purport to control the behavior of any except those who were brought under its jurisdiction. At the same time, the opin-

Mills Case, 71 HARV. L. REV. 1, 3 (1957). See also Handler, *The Supreme Court and the Antitrust Laws*, 1 GA. L. REV. 339 (1967), for further documentation.

¹⁷ 291 U.S. 97, 114 (1934).

¹⁸ 347 U.S. 483 (1962).

¹⁹ See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Walker v. Hutchinson*, 352 U.S. 112 (1954).

ions form an ample basis for prediction so that they meet Holmes' test, at least, of the meaning of law: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law."²⁰

Legislation, on the other hand, is premised on the proposition that it is directed to the entire population within the domain, or such portion of it as falls within the ken of the statute. Even if the executive or judicial power may be necessary to enforce it, the obligation is created by the statute. The distinction I have in mind may be revealed by pointing out the differences between the desegregation judgment in *Brown* and its coverage and the obligations created by the Civil Rights Acts of more recent vintage. The former, however clear its implications for those subjected to further litigation, created no duties except on those parties to the law suit. The statutes imposed duties on all within their ambits. And yet, as revealed in *Cooper v. Aaron*,²¹ the Court seemed to assume the same scope for its decision as the statutes could claim. We are told, not only by the opinion signed by every single Justice, but in the separate opinion of Mr. Justice Frankfurter as well, that the Court's decisions are the "law of the land." Frankfurter wrote:²²

The duty to abstain from resistance to "the supreme Law of the Land," U.S. Const. Art. 6, ¶2, as declared by the organ of our Government for ascertaining it, does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be stilled. Active obstruction or defiance is barred. Our kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is "the supreme Law of the Land. . . . Particularly is this so where the declaration of what "the supreme Law" commands on an underlying moral issue is not the dubious pronouncement of a gravely divided Court but is the unanimous conclusion of a long-matured deliberative process. . . .

I am not quarreling with the result that the Court reached in *Cooper v. Aaron*. Indeed, I applaud it. Certainly interference with the effectuation of a decree of a federal court, whether by a governor of a state or by a president of a union or a civil rights marcher, is intolerable and cannot be condoned. My question goes only to the ele-

²⁰ O. HOLMES, COLLECTED LEGAL PAPERS 173 (1920).

²¹ 358 U.S. 1 (1958).

²² *Id.* at 24.

vation of Supreme Court decisions to inclusion in the supremacy clause of the Constitution.

Among other problems that such a conclusion raises is that of the immutability of constitutional decisions. If *Plessy v. Ferguson*²³ was the law of the land imposed on one and sundry, I expect it was, as many have contended, binding on the Supreme Court as well. If a Supreme Court opinion remains the law of the land until it is overruled, it becomes difficult to raise the question so that it might be subject to reconsideration. More, if Supreme Court decisions are the law of the land, there are frightening conclusions to be reached about some of the derelicts of constitutional law: For example, most recent major legislation enacted by Congress would fall afoul of the ban on delegation of legislative powers. Last I heard, neither the *Schechter* case²⁴ nor *Panama Refining*²⁵ had been overruled. A Supreme Court opinion, whatever its merits, cannot seriously be treated as the equivalent of a statute for purposes of the supremacy clause. Nor have they been so treated, however highly the Supreme Court itself may regard some of them.

Indeed, the high mortality rate among Supreme Court judgments not only supports the conclusion I just stated, but suggests still another analogy between Supreme Court and legislative processes. Congress is, of course, not bound to adhere to decisions that it has made at earlier times. It can reverse itself as often as a majority thinks it appropriate to do so, without being called to account for its inconsistency. So, too, apparently with the Warren Court. It has paid less heed to *stare decisis*—one of the features that Cardozo pointed out as distinguishing legislative legislation from judicial legislation—than any Supreme Court in history. It started by overruling *Plessy v. Ferguson* and ended by destroying *Palko v. Connecticut*.²⁶ In between a very large number of constitutional landmarks²⁷ that once were “the law of the land” were made into artifacts for the study of historians. Nor did it make a difference that some cases that were overruled were venerable while others were creatures of the Warren Court itself.

²³ 163 U.S. 537 (1896).

²⁴ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²⁵ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

²⁶ 302 U.S. 319 (1937).

²⁷ *E.g.*, *United States v. Reese*, 92 U.S. 214 (1876); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Weeks v. United States*, 232 U.S. 383 (1914); *Adams v. Tanner*, 244 U.S. 590 (1917); *Betts v. Brady*, 316 U.S. 455 (1942); *Feldman v. United States*, 322 U.S. 487 (1944); *Colegrove v. Green*, 328 U.S. 549 (1946); *Adamson v. California*, 332 U.S. 46 (1947); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Darr v. Burford*, 339 U.S. 200 (1950); *Irvine v. California*, 347 U.S. 128 (1954).

No less venerable an authority than Marshall's *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), was mortally wounded if not destroyed by *Youngstown Co. v. Bowers*, 358 U.S. 534, 552-3, 561 (1959).

If some of these features of the legislative process to which the Warren Court adhered had also been indulged, if to a lesser degree, by earlier Courts, the next analogy to which I would call your attention was totally novel to the Warren Court. The United States reports are full of statements suggesting a distinction between legislation and judicial lawmaking in terms of the prospective or retrospective application of the resultant rules. For examples: Mr. Justice Brewer once said: "One often-declared difference between judicial and legislative power is that . . . the one construes what has been; the other determines what shall be."²⁸ Mr. Justice Pitney asserted that: "Legislation consists in laying down laws or rules for the future."²⁹ And Mr. Justice McKenna wrote: "Statutes are addressed to the future, not the past."³⁰ The theme is constantly reiterated. They did not say that legislation could never be retroactive. "There is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and sometimes necessary."³¹ But nowhere was there any hint that judicial decisions could be solely prospective in their nature.

It was the Warren Court that initiated the practice of imitating the legislature by providing that its decisions in certain criminal cases, where it avowedly changed the meaning of the Constitution from what it had been, would have only prospective effect. The genesis of the rule is of some interest. It was in 1932 that the Supreme Court rejected the complaint that a state by making its judicial rule prospective had violated the Constitution. In *Great Northern Ry. v. Sunburst Co.*,³² the state court had held that while it would apply the old rule to the case before it, from that point on a different rule would be applicable. It was Mr. Justice Cardozo who wrote the opinion rejecting the proposition that this procedure impaired a "federal right":³³

Adherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is said to be a denial of due process when coupled with the declaration of an intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future.

We have no occasion to consider whether this division in time of the effects of a decision is sound or unsound applica-

²⁸ *I.C.C. v. Brimson*, 154 U.S. 447, 155 U.S. 3, 9 (1894).

²⁹ *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247, 272-3 (1913) (dissenting opinion).

³⁰ See *Winfree v. Northern Pac. Ry.*, 227 U.S. 296, 301 (1912); *Nichols & Co. v. United States*, 249 U.S. 34, 38 (1918).

³¹ *Blount v. Windley*, 95 U.S. 173, 180 (1877).

³² 287 U.S. 358 (1932).

³³ *Id.* at 363-5.

tion of the doctrine of *stare decisis* as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the federal constitution. . . .

We think that the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. . . .

The *Sunburst* case, of course, said nothing about the potential use of the prospective overruling process by the federal judiciary. What it did say was that there was no constitutional inhibition on such action, for if that judicial behavior did not violate the due process clause of the fourteenth amendment, it is hard to see how that kind of action would be a violation of the due process clause of the fifth amendment. On the other hand, it must be remembered that opinions of the 1932 Supreme Court carried very little weight with its successors.

In any event, nothing was done toward this possibility until Mr. Justice Frankfurter's concurring opinion in *Griffin v. Illinois*.³⁴ It should be noted that the utilization of this process would not be important except to a Court dedicated to wide revision of its old constitutional precedents. In the field of criminal procedure, *Griffin* was an early antecedent of the major changes that the Warren Court was to bring about.

Frankfurter's concurring opinion in *Griffin* was joined by not one other Justice. He joined the conclusion of the Court, but advocated the adoption of the prospective overruling procedure:³⁵

The Court ought neither to rely on casuistic arguments in denying constitutional claims, nor deem itself imprisoned with a formal, abstract dilemma. The judicial choice is not limited to a new ruling necessarily retrospective; or to rejection of what the requirements of equal protection of the laws, as now perceived, require. For sound reasons, law generally speaks prospectively. . . . In arriving at a new principle, the judicial process is not impotent to define its scope and

³⁴ 351 U.S. 12, 20 (1956).

³⁵ 351 U.S. at 25-26.

limits. Adjudication is not a mechanical exercise nor does it compel "either/or" determinations.

We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law. That this is consonant with the spirit of our law and justified by those considerations of reason which should dominate the law, has been luminously exposed by Mr. Justice Cardozo, shortly before he came here and in an opinion which he wrote for the Court. See Address of Chief Judge Cardozo, 55 Report of New York State Bar Ass'n., 263, 294 *et seq.*, and *Great Northern R. Co. v. Sunburst Oil & Refining Co.* . . . Such a molding of law by way of adjudication is peculiarly applicable to the problem at hand. The rule of law announced this day should be delimited as indicated.

I have suggested that the watershed case in the development of the new constitutional doctrines applicable to state criminal procedures came with the overruling of *Wolf v. Colorado*³⁶ by *Mapp v. Ohio*.³⁷ It was in the aftermath of *Mapp* that the seed planted by Frankfurter began its extensive growth. Starting with *Linkletter v. Walker*,³⁸ the Court has utilized this practice over and over again.

I do not propose now to enter the controversy over the desirability of the practice. Its problems have been fully elucidated by Professor Mishkin in a manner I am not likely to improve upon.³⁹ All that I would emphasize here is that once again the Warren Court's behavior has been assimilated to that of a legislature.

There are still other ways in which the legislative process was imitated by the Warren Court. One of them relates to the practice of *amicus curiae* briefs. Frederick Bernays Wiener, the reporter for the Supreme Court's committee on the revision of its rules that were effected in 1954 has written on the subject in a way that reveals the issue:⁴⁰

That the presentation of briefs *amicus curiae* had become a problem was evidenced by the 1949 amendment to old

³⁶ 338 U.S. 25 (1949).

³⁷ 367 U.S. 643 (1961).

³⁸ 381 U.S. 618 (1965).

³⁹ Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); see also Kitch, *The Supreme Court's Criminal Code: 1968-69 Edition*, 1969 SUP. CT. REV. —.

⁴⁰ Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 80 (1954).

Rule 27(9). In fact, such briefs were no longer presented only by parties with cases or interests similar to or identical with those actually before the Court; they had become a vehicle for propaganda efforts. Far from affording assistance to the Justices, on occasion they did not even mention the decisive issue on which the case turned and which divided the Court. Instead their emphasis was on the size and importance of the group represented, or on contemporaneous press comment adverse to the ruling of the Court. Certainly there were multiplying signs after 1947 that the brief *amicus curiae* had become essentially an instrumentality designed to exert extra-judicial pressure on judicial decisions

The stringent rule adopted in 1949 was continued by the 1954 rules.

Despite the supposed stringency of the rule, however, and in no small part due to pressure by Mr. Justice Frankfurter,⁴¹ the practice was relaxed. The Warren Court has been inundated with exactly the kind of *amicus curiae* briefs described by Wiener. What we have come to see is the development of a lobbying practice, more decorous than the ones used in the legislative halls, but directed to the same ends. The Court instead of squelching the practice has encouraged it.

There is still another aspect of the *amicus* brief that is a reminder of the legislative process. I have suggested elsewhere that no major congressional legislation has been forthcoming except at the request or direction of the President.⁴² It is not that the legislation necessarily takes the form that the President desires. It is rather that the executive's views must be taken into account before the legislative decision is reached. The same is becoming true in the Supreme Court. The views of the Solicitor General's Office have been offered or requested in almost all the major litigation that has come before the Court in recent years and in a good deal of litigation that cannot qualify as important.⁴³ The effect of the Solicitor General's *amicus* briefs, for example, is well known with regard to such cases as *Brown* and *Baker v. Carr*.⁴⁴ Whether the executive branch of government, which is also the chief litigant before the Court, ought to act in such an advisory capacity in cases in which it has no direct interest is a question that has not been raised. I

⁴¹ *Id.*

⁴² See Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619.

⁴³ In the final Term of the Warren Court, for example, the United States appeared as *amicus curiae* in the following cases: *Universal Interpretive Shuttle Corp. v. WMATC*, 393 U.S. 186 (1968); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Hadnott v. Amos*, 394 U.S. 358 (1969); *In re Herndon*, 394 U.S. 399 (1969); *Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100 (1969); *Daniel v. Paul*, 395 U.S. 298 (1969); *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969); *Benton v. Maryland*, 395 U.S. 784 (1969).

⁴⁴ 360 U.S. 186 (1962).

do not offer an answer here. Again, I emphasize only the trend toward the legislative process that has come about in the conduct of the Warren Court's business.

Two more such analogies and I am done with them. Neither may seem important. Both display imitation of congressional behavior by Justices of the high court. The first is the multiplying occasions on which the Justices have taken to the hustings in defense of their opinions or in anticipation of those that they have not yet written. Supreme Court Justices have always been in demand as speakers for bar associations and law schools. But they used to restrain themselves both in the number of occasions on which they would speak and in the subject matter that they were willing to address. This is all changed. In his Carpentier lectures at Columbia University, Mr. Justice Black explained why he was willing to use the public platform in defense of his own views:⁴⁵

In agreeing to deliver the Carpentier Lectures I was not unaware that many good people think that judges, more particularly Supreme Court justices, should never discuss legal questions beyond the requirements of particular cases which come before them. But in a country like ours, where the people have a voice in their government, public lectures about the Constitution and government can doubtless stimulate, and even help to clarify, discussion of vital constitutional issues that face our society. Under these circumstances, I cannot say that judges should be completely disqualified from participating in such discussions.

What we have received, however, is not merely restatement of the Court's decisions, but commitments to positions made in advance of argument and hearing on cases that were to come before the Court. For example, Mr. Justice Douglas delivered a talk in which he indicated the evils of television cameras in the courtroom.⁴⁶ This was later utilized by the Chief Justice in writing an opinion for banning the use of television in criminal trials.⁴⁷ Mr. Justice Douglas' position on federal aid to parochial schools was the subject of a book,⁴⁸ and it will certainly be unexpected if his position on the lawsuit that will come before him will differ from the stance that he has already taken. Mr. Justice Black anticipated his position in the *New York Times*

⁴⁵ H. BLACK, *A CONSTITUTIONAL FAITH* xvi (1968).

⁴⁶ Douglas, *The Public Trial and the Free Press*, 46 A.B.A.J. 840 (1960).

⁴⁷ *Estes v. Texas*, 381 U.S. 532, 569 n.25 (1965).

⁴⁸ W. DOUGLAS, *THE BIBLE AND THE SCHOOLS* (1966).

case⁴⁹ in a paper published in a law review.⁵⁰ The very language of Mr. Justice Goldberg's Madison lecture⁵¹ showed up in his later opinion in *Bell v. Maryland*,⁵² without the benefit of attribution.

Nor do the Justices speak only prospectively. There is also their indulgence in rewriting or explaining their own opinions. And the law review article is then utilized as authority for the meaning of the opinion, though the brethren whose acquiescence in the opinion was necessary for its promulgation did not participate in the rewriting. That, I submit, was the case with Mr. Justice Brennan's restatement of the *New York Times* case in his *Harvard Law Review* article.⁵³ One Justice even responded by published letter to the editor in defense of his opinion against charges made in an editorial.⁵⁴

Once more, I am not concerned here with the desirability of the extracurricular activities, but only with the parallel to the actions of political officers who also take their causes to their constituents in this manner.⁵⁵

My final parallel between the Court and the legislative process relates to the crisis that develops at the end of each of their respective terms. Both the Court and Congress have the tendency to put off decision of their most important problems until adjournment is in the offing. Then we have what has appropriately been called "decision by deadline." One has but to glance through the reports of the Warren Court to discover that the month of June in each year is the time when vast constitutional revisions are most likely to take place. Whether this is conducive to the kind of opinions that such important problems deserve is a question that should arouse great concern. Congress has some reasons for decisions close to adjournment. Congress is not a continuing body and adjournment is necessary for Congressmen to return to their electorate for the determination of whether they shall be returned to office. Then, too, budgets are annual matters with consequent pressures unmatched by those on the Court. The Court's

⁴⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964).

⁵⁰ Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962).

⁵¹ Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205 (1964).

⁵² 378 U.S. 226, 286 (1964).

⁵³ Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

⁵⁴ See Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 99 n.48. Here again appeal might be made to the precedent of John Marshall. See JOHN MARSHALL'S DEFENSE OF McCULLOCH V. MARYLAND (Gunther ed. 1969).

⁵⁵ One might find another coincidence between judicial and congressional behavior in overseas junkets by members of the Court at the behest and expense of the State Department.

Term, on the other hand, is a totally artificial construct. There is no necessity for adjournment in June. And there is no reason why argued cases have to be decided before the June adjournment takes place. The latter is simply a holdover from the days when Chief Justice Hughes was trying to prove that the Court could remain current with its docket against a charge by President Roosevelt that the superannuated judges were too old to perform efficiently.

Let me turn then to the problems that would be faced by a political court, some of which are already existent. First, however, let me say that I do not mean to use the adjective in any pejorative sense. A political court is one that is given or assumes the function of making national policy. Since the Court is already engaged in that task, to a degree, we must be concerned with the expansion or contraction of the Court's competence and a recognition by the Court and the public of the role it is really playing in contemporary American government. Indeed, if the Court is to become a truly political institution, its competence would also have to be recognized by the other branches of the national government as well.

The first problem with entrusting large areas of public policy to the Court for ultimate decision is that it is still, despite the changes that have been brought about, restricted to the judicial form. As an institution it still cannot act until a problem is presented to it by way of an adversary proceeding in the form of a case or controversy. This means, for one thing, that the Court cannot initiate the appropriate policy until the proper question is presented to it. I recognize that the Court has found ample excuse in some cases to speak to issues far beyond those the cases presented. And I recognize, too, that in this day of the professional litigating organizations, many questions that would never have come before the high court will now be brought to it. But the extension in these areas is still not sufficient to make the Court into a prime legislating agency.

The adversary process brings with it additional burdens. The Court's decisions have to rest on the evidence and materials brought before it by the litigants or such similar information as may be garnered by its very small staff from already existing published data. The Court, because it is a court, lacks machinery for gathering the wide range of facts and opinions that should inform the judgment of a prime policy-maker. This was recognized many years ago by Professor Ernst Freund, as Dean Allen has recently made clear:⁵⁶

⁵⁶ Allen, *Preface*, in E. FREUND, *STANDARDS OF AMERICAN LEGISLATION* xxviii-xxix (F. Allen ed. 1965).

"When interests are litigated in particular cases, they not only appear as scattered and isolated interests, but their social incidence is obscured by the adventitious personal factor which colors every controversy. If policy means the conscious favoring of social above particular interests, the common law must be charged with having too much justice and too little policy. It has fallen to the task of modern legislation to redress the balance." Freund's general point is a valid and important one: the kind of law that is made depends significantly on the kind of lawmaking agency that is employed. The courts are well adapted to weigh the competing claims of individual litigants; but they are poorly equipped to resolve broad issues of policy involving, for example, the reallocation of resources among large social groups or classes. Judicial law making in the latter areas is confronted by a dual peril: it may ignore considerations relevant to intelligent policy formulation, or, in taking them into account, it may inspire doubts about the integrity of the judicial process.

Even Professor Berle, in his outspoken advocacy of the Court's assumption of the role of prime legislator in the national government, recognizes the difficulty:⁵⁷

Courts are organized and staffed and judges are trained to resolve cases and controversies, and decree remedies in individual cases. But where in doing that they are expected to enunciate rules applying to multitudinous situations at the same time—that is, to legislate—the problem of collecting data and arriving at a solution certainly goes far beyond their ordinary function. It is unfair as well as unwise to expect from courts legislation reorganizing county and state governments, rearranging school districts, directing school superintendents how their schools should be administered, determining whether the education given is sufficiently uniform to constitute "equal protection of the laws."

Berle, it will be noticed, is speaking only about the problems with which the Court has already purported to deal. Obviously, there will be other problems of social policy that are even more recalcitrant than those he mentioned. He would resolve the difficulty by providing the Court with a research arm, patterned, he said, after the Council of Economic Advisers—God save the mark!—which he would call the Constitutional Council. And he would also limit the Court to

⁵⁷ A. BERLE, *supra* note 1, at 67.

the resolution of major social problems that the other branches of government failed to resolve, whether from lack of interest or lack of capacity. (He does not tell us how these questions will get to the Court but assumes, as recent history suggests he might, that someone will bring them there.⁵⁸) Thus:⁵⁹

This is what a Constitutional Council of the kind suggested could do. If legislation were proposed or in progress, that fact could be suggested to the courts. Abstention to get away from a problem is one thing. Abstention to permit orderly resolution of the problem (other than of individual rights in the situation) is quite different, and perhaps justifiable. If in a case the Supreme Court had to make a decree, it would have the equivalent of a committee report, presumably rendered after research of the relevant material. If, on the other hand, the Council reported that the matter was in ordinary legislative process, there would seem to be honorable reason for the courts, possibly retaining jurisdiction, to stand aside and leave the remedy to Congress, or perhaps to the state in question, as the case might be. Specifically, it would provide a method for recommending questions essentially legislative in character to the institutions presently in existence to deal with them, backed by the political processes of the United States, and after an appropriate dialogue carried on before the Constitutional Council or the joint congressional committee.

The Constitutional Council—certainly a body of wise men—would consist of “professors of law, men with judicial experience, men with legislative experience, and men with social awareness,”⁶⁰ to be “appointed by the President by and with the advice and consent of the Senate.” I find the scheme to be of questionable feasibility. Presumably the Constitutional Council would work in the manner of a Warren Commission, a Kerner Commission, or—as is the current fashion—a presidential task force. Experience teaches me that this kind of body, like the Council of Economic Advisers, is not an efficient or effective means of discovering the facts needed for the best resolution of the problem, assuming there is a resolution of the problem. It is hard to discover a single such body that has provided a functional response to the problems presented to it.

Certainly, however, if this power is to be added to those already

⁵⁸ One way is suggested in H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 9 (1969).

⁵⁹ A. BERLE, note 1 *supra*, at 68-69.

⁶⁰ *Id.* at 61.

exercised by the Court, some program will be necessary—Berle's or another—to provide the Court with adequate data on which to base such momentous decisions.

The second deficiency of a political court goes to the absence of a means of supervising or enforcing the decrees that it promulgates. It can issue an order, it can use marshals and lower federal courts to bring about what it has commanded. But its tools are very limited indeed. One need but recall the response of President Jackson to Marshall's judgments in the Georgia Indian cases,⁶¹ or Lincoln's response to the Court during the Civil War,⁶² or even Eisenhower's phlegmatic response to the *Brown* case and its subsequent events, to realize that it takes more than an ipse dixit by the Court to make its decrees realities, even for those who were before the Court, no less for the nation at large. With all appropriate acknowledgment of the intractability of the problems with which the Court has recently dealt, neither its desegregation principles, nor its ban on school prayers, nor its revision of policy practices through the exclusionary rule can be said to have yet been enforced beyond their effect on particular litigants. It can chalk up a success in the reapportionment cases. But in the absence of public acquiescence it will need more clout than it now has to perform the more exalted function that is being wished on it. For all the talk of the famous decision in *Hobson v. Hansen*,⁶³ the schools in the District of Columbia are more segregated today than they were at the time of the *Brown* decision. Hobson's choice indeed. Nor can one point to a single successful resolution of a major social or economic problem by the Court. The tragedy of *Dred Scott*⁶⁴ remains a ghost of terrifying proportions.

Enough for me, however, to point to the problems of a political Court without naysaying those who have the wisdom and the courage to find the solutions for them.

There is a third major difficulty with what Professor Berle appropriately terms: "The Supreme Court's New Revolution." On the subject of revolutions, I concede Professor Berle's expertise, since he was a co-author of another peaceful revolution that succeeded better than many have been prepared to admit.⁶⁵ None the less, I would point

⁶¹ See *Worcester v. Georgia*, 30 U.S. (6 Pet.) 515 (1832); 4 A. BEVERIDGE, JOHN MARSHALL 551 (1919).

⁶² See *Ex parte Merryman*, 17 F. Cas. 144 (No. 9487) (C.C.D.Md. 1861); C. ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 25 (1951).

⁶³ 269 F. Supp. 401 (1967); A. BERLE, *supra* note 1, at 65-66.

⁶⁴ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁶⁵ See EINAUDI, THE ROOSEVELT REVOLUTION (1959); R. MOLEY, THE FIRST NEW DEAL (1966); R. TUGWELL, THE BRAINS TRUST (1968).

out that those who would expand the authority of the Supreme Court, like other contemporary self-styled revolutionaries, assume that the power to be given to it will be readily surrendered by those who now possess it. This must be based on the claim of the moral superiority of the revolutionaries. In this case, however, the change does not even have a base of "participatory democracy" to support it. More important, perhaps, is that competition for power is seldom resolved by simple claims of moral superiority.

The power that the Supreme Court would secure would have to come from the legislative and executive branches of the national government. Insofar as it purports to come from the states, it would be taking no more than a mirage. In fact, since it is the presidency that now dominates the policy-making scene, it would have to be that branch from which the Supreme Court would have to capture its authority. It is clear, I submit, that in a contest between the President and the Court or between the Court and Congress, the Court is not likely to enhance its power, it is much more likely to see it reduced. Wise Courts, in the past, have enlarged their ken insidiously not by direct confrontation. Every direct confrontation has found the Court engaged in a strategic retreat. And, for reasons I shall suggest shortly, the time is ripe for another *volte-face*, if the confrontation cannot be avoided. To this extent, at least, Hamilton was right when he suggested that "the least dangerous" branch has "neither FORCE nor WILL, but merely judgment" at its command.⁶⁶ The Court's capacity to express whatever will it has is entirely dependent upon the support of public opinion. Without it, as Tocqueville told us long ago, the Justices are impotent. As of now, the Court's hold on the public is weak indeed. This would not be so if it were true, as some of us like to think it to be, that the attitudes struck in academe are representative of the best thought in society. It may be that these attitudes are the best that American society can produce—though I have my doubts. What is pellucidly clear is that they are not necessarily representative of the thinking of anyone except some of those in these sheltered groves.

Let us assume, however, that ways and means can be found for enhancing the Court's prestige and power. The question then comes, how to staff such an institution. With the Court's duties no greater than they are, the problem has proved exceedingly difficult. For example, two judges whose view of the Supreme Court's proper role cannot be called expansionist, stated the job specifications. Judge Learned Hand once said:⁶⁷

⁶⁶ THE FEDERALIST No. 78, at 523 (J. Cooke ed. 1961) (A. Hamilton).

⁶⁷ L. HAND, THE SPIRIT OF LIBERTY 81 (2d ed. I. Dilliard 1953).

I venture to believe that it is as important to have a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.

That was written in 1930. And, unfortunately, Judge Learned Hand never learned by personal experience the demands made on Supreme Court Justices by their offices. In 1954, fifteen years after he ascended the high court, Mr. Justice Frankfurter spoke to the same question:⁶⁸

Human society keeps changing. Needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it at least in part, may burst forth with an intensity that exacts more than reasonable satisfaction. Law as the response to those needs is not merely a system of logical deduction, though considerations of logic are far from irrelevant. Law presupposes sociological wisdom as well as logical unfolding. . . .

A judge whose preoccupation is with such matters should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges, you will infer, must have something of the creative artist in them;

68 F. FRANKFURTER, *OF LAW AND MEN* 35, 39 (P. Elman ed. 1956).

they must have antennae registering feeling and judgment beyond logical, let alone quantitative proof.

You can readily see from these two quotations that these men, at least, thought the task of a Supreme Court Justice an awesome one. More, however, they also show that each man's notion of the ideal Supreme Court Justice is garnered from what he sees in his mirror each morning, however idealized and unrelated to the truth the image might be. The essential difficulty is that those making and confirming the Justices who take their places on the high bench—Attorneys General, Presidents, and Senators—do not see in their respective shaving glasses anything like what Hand and Frankfurter described.⁶⁹ And it is their images that are reflected in the actual appointments. The results have been what they have been largely for this reason. It takes something of the romantic or the intellectual to appoint great Supreme Court Justices. These elements are—fortunately or unfortunately—missing from the makeups of most of those who appoint Supreme Court Justices. And so the question remains, are we willing to entrust the power that belongs to nine Platonic Guardians to men of lesser capacity? If the response is affirmative on the ground that those who exercise the power now are no better qualified, I would suggest only that they are without life tenure—just think how you would shudder today at the thought of life tenure for Presidents—and they are politically responsible directly to the people. As Learned Hand said more than once: "For myself it would be irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which assuredly I do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."⁷⁰

There are other difficulties in expanding the political power of the Court, including that of securing adequate time to perform its functions⁷¹ with "the unhurried deliberation which is essential to the formulation of sound constitutional principles."⁷²

There are few strong personal beliefs that I have about the Supreme Court. The first is that the Court is not a democratic institution, either in makeup or function. This should be seen for what it is, even at the cost of that grossest of contemporary epithets: "elitist." It is

⁶⁹ Cf. Baker, *Observer: Up from Nonentity to Nixonia*, N.Y. Times, Sept. 9, 1969, at 40.

⁷⁰ L. HAND, *THE BILL OF RIGHTS* 73 (1958). But see Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

⁷¹ See Kurland, *The Court Should Decide Less and Explain More*, N.Y. Times, June 9, 1968, Magazine, at 34.

⁷² *Williams v. Rhodes*, 393 U.S. 23, 63 (1968).

politically irresponsible and must remain so, if it would perform its primary function in today's harried society. That function, evolving at least since the days of Charles Evans Hughes, is to protect the individual against the Leviathan of government and to protect minorities against oppression by majorities.

Essentially because its most important function is anti-majoritarian, it ought not to intervene to frustrate the will of the majority except where it is essential to its functions as guardian of interests that would otherwise be unrepresented in the government of the country. It must, however, do more than tread warily. It must have the talent and recognize the obligation to explain and perhaps persuade the majority and the majority's representatives that its reasons for frustrating majority rule are good ones.

The Warren Court accepted with a vengeance the task of protector of the individual against government and of minorities against the tyranny of majorities. But it failed abysmally to persuade the people that its judgments had been made for sound reasons. Its failure on this score was due to many causes, of which I can catalogue but a few. One is that its docket was so overcrowded with lesser business that it could not concentrate its efforts on the important constitutional questions that came before it. Second is that its communication with the public had to come through the distortions of the news media, who would not invest the time, effort, or space to the careful job that is necessary exactly because the Court has no power base of its own. A third reason for the failure, if I may say so, was a judicial arrogance that refused to believe that the public should be told the truth instead of being fed on slogans and platitudes. The fourth problem is even less soluble. It is that many of the Justices were incapable of doing better. They fooled not only the public but themselves.

There is need for intelligence and integrity on the bench that goes far beyond an average I.Q. and a distaste for venality. The Court, in performing what is, by definition, an unpopular task, is none the less dependent on popular support to keep it a viable institution.

If the Court's primary substantive function is impaired by these defects, so too is its important symbolic office:⁷³

A gentle and generous philosopher noted the other day a growing "intuition" on the part of the masses that all judges, in lively controversies, are "more or less prejudiced." But between the "more or less" lies the whole kingdom of the mind, the difference between the "more or less" are the triumphs of

73 FELIX FRANKFURTER ON THE SUPREME COURT XX (P. Kurland ed. 1970).

disinterestedness, they are the aspirations we call justice . . . The basic considerations in the vitality of any system of law is confidence in this proximate purity of its process. Corruption from venality is hardly more damaging than a widespread belief of corrosion through partisanship. Our judicial system is absolutely dependent upon a popular belief that it is as untainted in its workings as the finite limitations of disciplined human minds and feelings make possible.

And here again the Warren Court has failed us. What Arthur Schlesinger has termed a crisis of confidence clearly extends to the Supreme Court. The restoration of that confidence is vital to the continuance of the rule of law in this country. For above everything else, the Supreme Court is symbolic of America's preference for law over force as the ruling mechanism in a democratic society. If it fails, the vital center disappears, and we "must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows."⁷⁴

The Nixon Court has awesome tasks before it: To match the Warren Court aspirations for the protection of individuals and minorities that today justifies the Court's existence. To restore the confidence of the American public in the rule of law. One or the other is not enough.

⁷⁴ A. WHITEHEAD, *SYMBOLISM, ITS MEANING AND EFFECT* 104 (1928).