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THE ROLE OF THE SUPREME COURT IN AMERICAN SOCIETY

ARCHIBALD COX*

One hundred and thirty years have done nothing to diminish the truth of De Tocqueville's observations upon the pervasiveness of law in American society¹ but, if we are a people ruled by law and lawyers, we are also the freest people the world has ever known. The coincidence of these two facts is not mere happenstance. We are free because we have subjected ourselves to the rule of law.

The reason is this. Men can be lifted from savagery to a form of civilization solely through the pacification achieved by concentrating power in the hands of the State, but neither mere pacification nor the concentration of power will secure individual liberty and opportunities for each generation to remake society, if it can, without a violent revolution. To achieve those goals even the power of the government must be restrained and ways must be found by which men can live together not by power, be it physical, economic, or in some cases even political, but by what reason shows is just. There can be neither liberty nor opportunity for peaceful changes without a substitute for power.

Our substitute is the rule of law. Our constitutionalism is founded upon seven or eight centuries of continuous concern for the institutions and aspirations—for the processes, standards, ideals and sense of right and justice—that make for a free and civilized society achieved with a minimum of force and a maximum of reason. The germ of the idea that law was the bulwark of the individual against the sovereign was expressed in Magna Carta and restated by Bracton: "*Nonsub homine sub Deo et lege.*" Lord Coke revitalized the principle when he told King James that the King might find ten new judges who would subordinate their decisions to the royal prerogative but never ten lawyers. Through our own Bill of Rights even the people, the ultimate rulers in the United States, have voluntarily subjected themselves to the restraint of law, and we have created courts to help us observe the law's prohibitions. Ours is a free society because the law binds all men equally, the governors as well as the governed, the judges as well as the litigants.

It is the capacity to command free assent that makes law a substitute for power. The force of legitimacy—and conversely the habit of voluntary compliance—is the foundation of the law's civil-

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¹ DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272-280 (Alfred A. Knopf, Inc. 1945).

izing and liberalizing influence. There appears to be no alternative short of the millennium.

Both the pervasiveness of law in American society and the dependency of law upon consent are epitomized in the role of the Supreme Court of the United States. As De Tocqueville observed, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,"² and it is to the Supreme Court that those political questions ultimately come. Part of the Supreme Court's docket is unusual only in its difficulty but the other part—much the more important part—is utterly unlike the usual flow of litigation through the State and lower federal courts. Many of the cases would never come before the judiciary in any other country. Where else would you find a court charged with deciding whether prayers should be said or the Bible read at the start of the day in the schoolhouse;³ whether Negroes are entitled to equal public accommodations;⁴ or how the seats should be apportioned in a State legislature.⁵ Another example is the litigation over the apportionment of the waters of the Colorado River, which might well determine the relative opportunities for agricultural and industrial development in Arizona and California.⁶ In the United States, as nowhere else in the world, we 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 may participate in their disposition.

Each decade produces its own example of constitutional litigation resulting from the problems and divisions in contemporary society. Since our era is dominated by the coming of age, politically and economically, of the people of Asia and Africa, many of today's great constitutional issues grow out of the problems of race relations: the school desegregation cases,⁷ the sit-in litigation⁸ and the various challenges to the constitutionality of the Civil Rights Act.⁹ You will think of many other examples of the Court's concern with

² *Id.* at 280.

³ *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963).

⁴ *Bell v. Maryland*, 378 U.S. 226 (1964).

⁵ *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁶ *Arizona v. California*, 373 U.S. 546 (1963).

⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954); *Goss v. Board of Education*, 373 U.S. 683 (1963); *Griffin v. County School Board*, 377 U.S. 218 (1964).

⁸ *E.g.* *Garner v. Louisiana*, 368 U.S. 157 (1961); *Peterson v. Greenville*, 373 U.S. 244 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Bell v. Maryland*, 378 U.S. 226 (1964); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

⁹ *United States v. Raines*, 362 U.S. 17 (1960); *Alabama v. United States*, 371 U.S. 37 (1965); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

the deep-running tensions in our national life. The reapportionment cases beginning with *Baker v. Carr*¹⁰ emerged from the contest between rural and urban or suburban voters. Others result from the conflict between ideals of individual liberty and pressures for conformity at times when our national security seems threatened.¹¹ In any age of increasing regulatory measures a large part of the Court's work involves the protection of the individual against thoughtless, inept and occasionally oppressive government officials.

Individuals bring these cases. Lawyers remember them by their names. But the issues transcend and the rulings long survive the individuals' quarrels. Often they are questions upon which the country appears deeply divided. They arouse intense emotions. Their resolution writes our history. Yet we leave them, at least partly and often finally, to the Court.

The unique nature of the Court's work, more than any other characteristic, places its stamp upon the institution, creates the Court's own peculiar problems, and shapes its role in our national life.

Thus, it is the special quality of the issues that does most to explain the sharp divisions within the Court. Such disagreements and five-to-four or six-to-three decisions are not merely unavoidable but desirable. Unanimity could be achieved only by appointing to the Court nine justices with the same cast of mind and the same set of experiences. Then we would have unanimous decisions and a clear-cut line of authority, all one way or all the other. That might seem desirable to those who are convinced that they know all the right answers to all the questions—might seem desirable if the Court's unanimous answers were the same as theirs. In truth, the community's most fundamental and divisive issues should not be decided overnight nor should they be decided in clean-cut fashion, all one way or all the other, until time and events have matured the analysis. One makes safer and quicker progress through an unfamiliar swamp by proceeding from hummock to hummock and island to island sometimes taking one step back for every two steps forward or even one step forward and two steps back.

It is the character of the Court's business which catches it up in public debate and makes individual justices the subjects of bitter criticism. This is nothing new. John Marshall was reviled in terms more virulent than even the present Chief Justice. Proper criticism is not to be regretted, whether it comes from laymen or lawyers.

¹⁰ 369 U.S. 186 (1962).

¹¹ *E.g.* *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Yellin v. United States*, 374 U.S. 109 (1963); *Communist Party v. Subversive Activities' Control Board*, 367 U.S. 1 (1961); *Albertson v. Subversive Activities' Control Board*, 382 U.S. 70 (1965).

It is essential, because the public questions which the Court faces are pressing and divisive, that they should be publicly debated each step at a time while the Court is pragmatically evolving new principles. The ultimate resolution of questions so fundamental to the whole community as to be constitutional must be based in a common consensus of opinion.

The nature of the Court's business also shapes the process of reaching decisions. We refer constitutional issues to the Court not for the opinion of a Council of Wise Men as to what is good or just or wise but for a decision according to law. Charles Evans Hughes, in a series of lectures delivered after his service as an Associate Justice but before he became Chief Justice of the United States, remarked that:

The success of the work of the Supreme Court . . . has been due largely to the deliberate determination of the Court to confine itself to its judicial task.¹²

Yet the very fact that its decisions involve some of our most fundamental public issues inescapably requires the Court to consider the social, economic and policy consequences of its decisions. One might as well ask the sun to stand still as expect the Court to rule upon the constitutionality of the Voting Rights Act of 1965 without considering the effect of the decision upon the civil rights movement and confidence in our political system. Surely this is proper. Law, like other aspects of government, is a human institution designed to meet men's needs. The civil rights movement tests our capacity to accomplish within the framework of domestic government and the rule of law the revolutionary changes required for rudimentary human justice. Three continents are watching us while they choose whether to nurture or reject the ways of democratic constitutionalism and legality. Similarly, the school desegregation cases, the "sit-in" litigation, and the challenges to constitutionality of the several civil rights acts could not have been decided wisely nor can the Court's work be understood without recognizing that it is called upon to preside over parts of a social and political upheaval.

Thus, the constitutional litigation presents a dilemma: it requires the Supreme Court to be more judicial than other governmental bodies yet more political (*i.e.*, concerned with policy) than other courts.

I shall return to this dilemma a little later but first it seems appropriate, having canvassed the unique character of the Supreme Court's business, to ask why we refer such questions to the courts. In De Tocqueville's words, why is it that scarcely any political

¹² HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 40-41 (1963).

question arises that we do not resolve, sooner or later, into a judicial question? The ultimate answer is the faith in law to which I have already adverted. The immediate answers are the duties put upon the Court.

I

One special charge of the Court is responsibility for the framework of our government. The Founding Fathers believed that the organization of any government would powerfully affect its substantive policies, and therefore they carefully divided the sum of all sovereign power between the Nation and the States; and then divided it again, in the national sphere, between three coordinate branches. A century later Lord Acton idealized the choice:

If the distribution of power among the several parts of the State is the most efficient restraint on monarchy, the distribution of power among several States is the best check upon democracy. By multiplying centers of government and discussion it promotes the diffusion of political knowledge and the maintenance of healthy and independent opinion. It is the protectorate of minorities and the consecration of self-government.¹³

Through the genius of John Marshall the Court became the guardian and umpire of this extraordinarily complicated framework. For a century, perhaps even a century and a half, the dominant aspect of its work was mediating between States and Nation, dividing between them the sum of all governmental power and keeping the whole in that balance best suited to the long-term needs of the community. The process is infinitely complex for it deals not only with the respective powers of the State and federal governments to regulate and the States' power to tax but also with the interrelationships between separate State and federal courts each charged with applying its own set of laws and also the laws of the other sovereign.

Since the beginning the trend has been toward the nationalization of governmental power. I do not mean to suggest that the constitutional principle has changed from that stated by Marshall in *Gibbons v. Ogden*:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the pur-

¹³ Acton, *The History of Freedom in Antiquity*, in *ESSAYS ON FREEDOM AND POWER*, p. 72 (Meridian Books, 1957).

pose of executing some of the general powers of the government.¹⁴

It is the facts that have altered. Economic as well as scientific and technological revolutions have made the economy so interdependent and the interrelation so plainly apparent that there are few internal concerns—almost none of a commercial or business character—which do not, in Marshall's words, so "affect the states generally" as to be within the power of Congress. The issue today is seldom what has Congress *power* to regulate; it is what degree of central regulation is it wise to impose, bearing in mind the effects of the centralization of regulatory authority. The growth of national markets and an integrated economy has shifted the ultimate responsibility for the balance of the federal system from the courts to the Congress.

The pressure toward national determination has also been felt in the area of voting and here, to a degree, the question is still constitutional. Establishing voter qualifications has always been a State function, not only by continuous tradition but also by the plain implication of the constitutional provision stipulating that qualifications of voters in federal elections shall be those required of the electors for the most numerous branch of each State legislature.¹⁵ The Fifteenth Amendment qualified the State's prerogative to the extent of prohibiting abridgment of the right of citizens to vote on account of race or color, but history makes it plain that Congress assumed that this provision would leave States free to establish literacy tests for voting. The Voting Rights Act of 1965 abolishes all State literacy tests, however administered in the future, where there is evidence of past discriminatory administration, as a means of enforcing the Fifteenth Amendment.¹⁶ This legislation, so long as the danger of racial discrimination exists, will make a profound change in the distribution of State and national power, and I suspect that its nationalizing influence upon the federal system will be felt long after the occasion for the exercise of the power has departed.

The constitutionality of the Voting Rights Act has not yet been decided.¹⁷ Section 2 of the Fifteenth Amendment gives Congress power—

to enforce this article by appropriate legislation.

¹⁴ 22 U.S. (9 Wheat.) 1 (1824).

¹⁵ U.S. Const. art. I, §2.

¹⁶ Section 4(a), P.L. 89-110, 79 Stat. 437 (1965).

¹⁷ The constitutionality of the Act was sustained on March 7, 1966. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). The text of this lecture, which was delivered prior to the decision, has been left unchanged.

In the case now pending before the Supreme Court, South Carolina pitched much of her case upon the argument that appropriate legislation "to enforce" the prohibition is confined to dealing with actual violations and does not include the enactment of regulatory laws reducing the danger of violations. The Attorney General joined issue, arguing upon precedent and analogy to the congressional powers under Article I that the power to enact appropriate legislation for the prevention of discrimination in voting includes all measures which Congress could reasonably deem related to that objective.

Having participated in drafting the Voting Rights Act and the argument in support of its constitutionality, my view of the case is hardly neutral, but it may be permissible to repeat that the issue thus joined reveals the dilemma which the Court faces in passing the final word upon questions of enormous practical and political consequence. The Court cannot ignore the practical consequences of its action. At the same time its constitutional function, defined by history as well as the implications of the document, is to decide whether the exercise of such national power disturbs the frame of government erected in 1789 as modified by the Fourteenth and Fifteenth Amendments. The performance of that function is of inestimable political importance if, as the founders believed, the frame of government influences substantive policies. Another judgment upon the wisdom of the policy embodied in a statute is no substitute for the voice of the organ of government charged with the long-run allocation of power. Somehow the Court must avoid both horns of this dilemma.

II

To the Supreme Court we have also committed a special and ultimate responsibility for the relationship between the individual and the State. In the debate upon the first ten amendments Madison explained:

If they 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; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.¹⁸

The flowering of this judicial function was reserved for an age in which the increasing interdependence and complexity of all parts of human society enormously multiplied and magnified governmental activity. As late as 1922 the Court declared, "neither the

¹⁸ 1 Annals of Congress, 1st Cong., 1st and 2nd Sess., 439.

Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about freedom of speech" (*Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543). Today, less than half a century later, a major part of the constitutional litigation is concerned with imposing restrictions upon what States may do about both freedom of speech and freedom of association. This increase in civil liberties' litigation has paralleled the growth of governmental activity for at least two reasons: (1) the enormous growth of public regulation proliferates the occasions on which government collides with personal liberty; (2) the very intervention of government into more and more aspects of our daily lives makes us more conscious of the necessity of marking off a private spiritual area into which government should be forbidden to enter.

The task of protecting the individual against the aggressions of government, which under our system usually means aggressions willed by representatives of a majority of the people, often conflicts with the Court's special duty of maintaining the frame of government, which includes the separation of legislative and judicial power. Judicial review calls upon the Court to go over the very social, political and economic questions committed to the Congress and State legislatures, yet it can scarcely do so without usurping in some degree the legislative function of weighing and balancing competing interests. Here is a third basic dilemma in constitutional adjudication.

The point can be illustrated by an example based upon last Term's litigation over the restrictions on travel to Castro's Cuba.¹⁹ If a statutory ban were proposed, a legislator would have to consider the effect of inability to protect our citizens traveling in those areas upon the protection afforded elsewhere, the risk that attacks upon U.S. citizens in Cuba would embroil us in diplomatic difficulties or even war, the pressure upon the Castro regime of suspending intercourse, and the relation between the prohibition and inter-American efforts to prevent Castro from exporting sedition and revolution to other Latin American countries. Against such considerations the legislator would weigh the cost in terms of individual liberty of suspending freedom of travel and the effects, both here and in Communist countries, of erecting a wall against the exchange of ideas. The breadth of the proposed ban might affect one's thinking.

If majorities in Congress and the President struck the balance

¹⁹ *Zemel v. Rusk*, 381 U.S. 1 (1965). The example used in the text differs significantly from the actual case which involved executive power to withhold passports for Cuba under existing legislation.

in favor of the statutory prohibition and its constitutionality were challenged, how could the Court decide the case at all and still avoid substituting its judgment for that of Congress?

There is no satisfactory answer to this question. One approach is to ask whether the Bill of Rights specifically secures freedom to travel abroad and to uphold any legislation that does not curtail a right specifically mentioned in the Constitution upon the ground that a legislature is not restricted by the due process clause except as it incorporates specific constitutional guarantees.²⁰ There is no explicit guarantee of freedom to travel in the Constitution.

Alternatively, one might contend that travel abroad is necessary to secure information about social, economic and political conditions and such knowledge is indispensable to free discussion in political debate or simply in expanding human knowledge, thus bringing liberty of travel within the constitutional guaranty of freedom of speech.²¹ On this predicate it could be argued that since the First Amendment provides that Congress shall make *no law* restricting freedom of speech, it can make no law restricting freedom of travel.

The Court appears to have rejected these approaches in favor of the view that the liberty guaranteed by the Fifth Amendment includes a right to travel but the liberty is not absolute.²² It would seem quite plain, for example, that travel to an area ravaged by famine, flood or disease can be restricted in the interest of health and public order. Applied to our hypothetical restriction upon travel to Cuba, this approach seemingly requires the Court to go over the very same ground covered in the legislature and thus to review its judgment. How can the Court determine whether the legislative restriction violates due process without evaluating both the right and the need for curtailment? If the Court does that, is it not usurping the function of the Congress and violating the separation of powers? If it fails to do that, is it not abdicating the function of enforcing constitutional restrictions?

The conventional escape from this dilemma is to say that the conclusions of Congress will stand unless they are so wrong, upon any state of facts that might rationally be supposed to exist, as to be irrational, arbitrary or capricious, fundamentally unfair or shocking to the conscience of a free people. The formula has substance to command it but the difference between saying that an important law is foolish and saying that it is arbitrary or violates fundamental

²⁰ Compare Justices Black and Stewart dissenting in *Griswold v. Connecticut*, 381 U.S. 479, 507-531 (1965).

²¹ *Zemel v. Rusk*, 381 U.S. 1, 25-26 (1965) (dissenting opinion of Justice Douglas).

²² *Zemel v. Rusk*, 381 U.S. 1, 13-17 (1965).

rights lies chiefly in the strength of the speaker's conviction. Any weighing and balancing of the very same interests appraised by the legislature inescapably evokes personal judgments upon the relative importance of imponderable elements.

Whatever the answer to these questions the Court's responsibility for the framework of government does less to check the Court's reviewing of laws affecting personal liberty than its scrutiny of statutes regulating business and economic practices. This position has strong roots in constitutional history. The Bill of Rights is the chief express constitutional limitation upon legislative power. It is concerned not with the physical safety of society, jobs or economic activity and security—the bricks and mortar of the community—but with the realm of the spirit. The Framers dreamed that if their hopes for civil liberty were codified, man's energies of mind and spirit, released from fear, would flourish. They also knew that society's respect for the freedom of a man to grow and choose the best he can discern must be founded upon the protection of privacy and just and humane criminal procedure. Regulation of economic activity and the use of property would seem to belong in a different area of discourse, even though the dividing line is blurred by the use of speech for the economic purposes of management and labor.²³ There is force, too, in Chief Justice Stone's suggestion that the nature of representative government requires more exacting scrutiny of legislation which restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation, or which is directed at minorities whose condition is so peculiar as to escape political resolution.²⁴

III

Until recently the Court's responsibility for the relationship between the individual and the government centered upon protection against a hostile government. Today that responsibility extends, I think, to a second aspect of the relation—the affirmative obligations of the government to its citizens. The difference is between warding off legislative attacks upon civil liberties and securing civil rights. The impetus came from the demand for racial equality which is so profoundly influencing other aspects of our fundamental law. Already the negative side of constitutionalism is beginning to be matched by an affirmation of the State's duty to advance fundamental human rights. This new development greatly complicates the role of the Court.

²³ Compare *Thornhill v. Alabama*, 310 U.S. 88 (1940) with such later cases as *Teamsters Union v. Vogt, Inc.*, 354 U.S. 284 (1957). See also *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941).

²⁴ *United States v. Carolene Products Co.*, 304 U.S. 144, 152, note 4 (1938).

The roots of the development go back to the post-Civil War Reconstruction. The original Bill of Rights had two important limitations. *First*, it applied only to the federal government. The relations between a State government and the individual were left entirely to local determination.²⁵ *Second*, the Bill of Rights was negative. My colleague Mark De Wolfe Howe points out that it should have been called a schedule of immunities because it was essentially a "no trespassing sign marking off a world of the spirit where government would have no jurisdiction."

The adoption of the Civil War Amendments removed both limitations. When the Fourteenth Amendment provided that no State should deprive any person of life, liberty or property without due process of law, it made the Bill of Rights' guarantee of civil liberty, privacy and fair criminal procedure at least partly applicable to State governments. With that step the national government pledged itself to make the guarantees effective. The pledge affirms a governmental role in securing liberty, and the whole truth can no longer be expressed in a metaphoric reference to the privilege of being let alone and a lack of governmental jurisdiction.

Indeed, the Fourteenth and Fifteenth Amendments, despite their generally negative language, carry unmistakable overtones of individual's claims on government—of civil rights, and not merely civil liberties—so fundamental as to require expression in the Constitution. Shortly after the enactment of the Fifteenth Amendment, in *United States v. Cruikshank*,²⁶ Mr. Justice Bradley, while sitting on circuit, pointed out that the Fifteenth Amendment:

confers a positive right which did not exist before. The language is peculiar. It is composed of two negatives. The right shall not be denied. That is, the right shall be enjoyed. . . .²⁷

Much the same appears true of the equal protection clause of the Fourteenth Amendment. Abstractly a State can avoid violations by granting no one the protection of its laws, but in truth the prohibition against discrimination carries an obligation to extend the laws and other State benefits equally to all races. The school desegregation cases are the plainest illustrations. *Brown v. Board of Education*²⁸ contemplated the extension of unsegregated public education to Negroes, not the closing of all public schools, and while no cases are squarely in point it is noticeable that attempts to evade affirmatively fulfilling the duty by such measures as closing the

²⁵ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

²⁶ 25 Fed. Cas. 707 (1875), *aff'd* 92 U.S. 542 (1876).

²⁷ *Id.* at 712.

²⁸ 347 U.S. 483 (1954).

schools in a county subject to a judicial order to desegregate,²⁹ or by contracting out the operation of public facilities,³⁰ or by resigning as municipal trustee of a public park,³¹ have all been unsuccessful.

The idea that the State has affirmative obligations to its citizens which attain constitutional magnitude is far more congenial to our age than to that which followed the adoption of the Fourteenth Amendment. Contemporary political theory acknowledges the duty of government to provide jobs, social security and medical care as well as widespread regulatory protection of various classes. Its constitutional affirmations begin with racial equality but, since the words are not limited to race, they may as logically be read to affirm constitutional rights to equality despite other differences in station or inheritance. Once loosed, equalitarianism is not easily cabined. Equality of all kinds is becoming an increasingly important theme in our constitutional law. In the legislative reapportionment cases the complainants were asserting the States' duty not merely to leave them alone but to give each citizen an equal voice in government regardless of any other consideration.³² In the poll tax cases now before the Supreme Court it is argued that the opportunity to vote must be made available to rich and poor upon equal terms and, since a poll tax of \$2 or \$3 is more difficult for the poor to pay than the rich, the tax is unconstitutional.³³ Similarly, the idea that the State sometimes has a duty to eliminate inequalities of wealth seems to lie behind the decisions requiring it to supply indigents with counsel and transcripts of the evidence in criminal cases.³⁴ How far the idea will spread is beyond my powers of prediction.

The shift in emphasis from constitutional restrictions upon State regulation to constitutional enforcement of a State's affirmative obligations introduces major new difficulties into constitutional adjudication which I can best introduce by referring to the efforts to desegregate a wide variety of establishments and institutions ranging from restaurants through charities to public works.

²⁹ *Griffin v. County School Board*, 377 U.S. 218 (1964).

³⁰ *Muir v. Louisville Park Theatrical Association*, 347 U.S. 971 (1954) vacating and remanding 202 F.2d 275 (6th Cir. 1953); *Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958); *City of Greensboro v. Simkins*, 246 F.2d 425 (4th Cir. 1957); *Tate v. Department of Conservation & Development*, 133 F.Supp. 53 (E.D.Va. 1955), *aff'd* 231 F.2d 615 (4th Cir. 1956), *certiorari denied*, 352 U.S. 838 (1956).

³¹ *Evans v. Newton*, 382 U.S. 296 (1966).

³² *E.g. Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

³³ *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

³⁴ *Griffin v. Illinois*, 351 U.S. 12 (1956); *Draper v. Washington*, 372 U.S. 487 (1963); *Douglas v. California*, 372 U.S. 353 (1963).

Consider first the "sit-in" cases as they arose in 1961-64 before the enactment of the federal equal public accommodations law.³⁵ Many stores and restaurants refused to serve Negroes or else required them to use segregated facilities. Young Negroes protesting this indignity went quietly to lunch counters, sat down and requested service. When service was refused, they refused to leave. Later they were arrested and convicted of criminal trespass or some similar offense under State law. The demonstrators contended that the convictions violated the Fourteenth Amendment's command that *no State* shall deny any person the equal protection of its laws. There was a denial of equality by the States, they said, because State officials made the arrests and State courts sentenced them to fines or imprisonment. The answer for the prosecution was that a State does not deny equal protection of its laws when it simply enforces the right of any owner of private property to determine whom he will invite upon his premises and whom he will exclude as trespassers. In such cases, it could truthfully be said, the State law is color blind in fact as well as theory. The State punishes anyone whom the owner wishes to exclude from his property. Any discrimination is individual, not governmental.

One agonizing difficulty in these cases, as many saw them, grew out of the sharp conflict between sound policy and good law—between the right as it might be determined by a council of wise men and the decision suitable for the judgment of a court. Racial discrimination in places of public accommodation ought to be abolished. A decision sustaining the convictions of the sit-in demonstrators seemed likely to injure the entire civil rights movement and would surely have impaired the Negroes' confidence in the integrity and human justice of our legal system. On the other hand, an essential characteristic of a decision according to law is that it be rooted in a continuous community of principle found in the words of the constitution, judicial precedents, constitutional practice and like sources of law. Here constitutional tradition seemed to be on the side of the prosecution not because it favored racial discrimination but because a private citizen's discrimination had never been treated as the action of a State and, according to accepted notions, the Fourteenth Amendment does not apply to individuals. Constitutional decisions, moreover, ought to be upon grounds that will stand generalization. Few would challenge the propriety of eradicating discrimination in places of public accommodation but the chief constitutional principle invoked in support of that conclusion would not stand generalization. To hold that a private decision becomes

³⁵ See cases cited at n. 8 *supra*.

State action for the purposes of the Fourteenth Amendment whenever the citizen resorts to law to support his personal choice would obliterate any distinction between private and official action and submit both to constitutional restrictions theretofore applied only to officials. For a civilized community, freedom of private choice depends upon legal sanctions against aggression. Thus, the sit-in cases put the Court in a dilemma: the answer to the question, "what result would be best for the country today," clashed with the answer to the question, "policy aside, which decision is according to law."

One may deny the existence of the dilemma by insisting that the Court should concern itself with law and leave policy to legislative bodies. Such a course has more to commend it when the Court is dealing with the declaration and enforcement of the government's affirmative obligations to citizens than it has when the court is concerned with the constitutionality of legislative action restricting personal liberty. In the former case the legislature can fill the gap left open by the Court. Nevertheless, I would argue that rigid adherence to such a formula in all cases takes too narrow a view of both the function of law and the role of the Court. Law must grow and change in response to the needs of the community. The Court's influence goes far beyond the formal limits of its decrees. Had the Court denied the constitutional claims of the sit-in demonstrators, a lawyer might accurately have said that the decision had nothing to do with morality or policy but represented only the limited function of a constitutional court. To the layman and legislator, however, the Court's decree would undeniably have legitimized the convictions and even the racial discrimination that lay behind them. The force of legality would have influenced both the national consciousness and the debate upon legislative solutions. In short, whatever the legal conception, affirmation of the convictions would have aided the advocates of segregation.

The sit-in cases also illustrate a second characteristic of litigation to enforce affirmative constitutional rights. The issue is less likely to lie between the government and the individual than when one deals with restrictions upon official action. The civil rights claimed by one group are likely to conflict with the civil liberties claimed by another—requiring the Court to strike a delicate balance.

This necessity was involved in the sit-in cases although one sees it more sharply in later cases seeking to apply the Fourteenth Amendment to parks, hospitals and educational institutions founded by private charity. In each instance the formal legal question is whether there was "State action" for the purposes of the Fourteenth Amendment but each extension of that concept in the in-

terest of equality involves some surrender of individual freedom of choice and some sacrifice of the opportunities for a varied and diverse society. One may deplore the individual's choice but freedom to decide means freedom to be foolish as well as wise, to be wrong as well as right; indeed, the chief justification for freedom may be that it calls upon man to exercise his noblest quality—the power of choice between good and evil. Furthermore, any constitutional rule defining State action might well require generalization beyond the problems of race where the choice is so easy. Legislation striking the balances and drawing the necessary lines through the processes of representative government can be more pragmatic, can make compromises and adjustments and may therefore provide more acceptable solutions than adjudication by a court.

A third point also proved vexing: how much of the burden of leadership in the field of civil rights should the Supreme Court carry. Constitutional government operates by consent of the governed. Court decrees, unlike statutes, draw no power from the participation of the people. Their power to command consent comes partly from the belief that judicial decisions are based upon principles which bind the judges as well as the litigants. In the sit-in cases it was highly uncertain whether a Court decision sustaining the claim that the Fourteenth Amendment itself required the desegregation of lunch counters and restaurants without the need for legislative action could possibly command the degree of voluntary acceptance necessary to make the prohibition against discrimination effective. The response to the school desegregation decisions suggested a negative answer. In retrospect, moreover, it seems clear that the public accommodations sections of the Civil Rights Act of 1964, after the Supreme Court decision upholding their constitutionality,³⁶ commanded wider and deeper acceptance in all parts of the country than would ever have been accorded a Supreme Court ruling. Similarly, the Supreme Court decision that the equal protection clause forbids segregation in public education became more deeply imbedded in our constitutionalism after it received legislative approval in the enactment of Title VI of the Civil Rights Act of 1964.

This is not to say that, if the Supreme Court had reached the ultimate constitutional issue, it should have decided the sit-in cases against the demonstrators.³⁷ Happily, fate decreed that each of the

³⁶ *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964); *Katzbach v. McClung*, 379 U.S. 394 (1964).

³⁷ The United States, while the author was Solicitor General, consistently urged reversal of sit-in convictions upon grounds not reaching the ultimate constitutional question and, when it seemed inescapable, argued that the history of State support for segregation plus arrest and prosecution was sufficient State involvement to violate the Fourteenth Amendment. See Supplemental

cases could be decided in favor of the sit-in demonstrators upon very narrow grounds not inconsistent with prior law and not unacceptable as generalized rules for the future. And Congress acted before the ultimate issue was inescapably before the Court.

Nor do I mean to say that the considerations mentioned counsel a less active judicial role than the Court has assumed in affirming the duties of constitutional government to the individual. They raise problems not found in protecting civil liberties against legislative and judicial aggression. The need for judicial solutions is less because the enforcement of rights may be undertaken by the executive and legislative branches. But even here there are forces pulling in the opposite direction. The Court's role in our national life gives its rulings an influence broader, stronger and more enduring than the command of its mandate—an influence which also requires stress not upon inherited rules but upon what is right and just and wise. The Court's intellectual contributions to the process of self-government help to shape our national understanding of ourselves. Especially in the field of civil liberties, my colleague Paul Freund reminds us, where the British would call upon Milton and Mill, we evoke the words of Holmes, Brandeis and Hughes.³⁸ Often the opinion of the Court is the voice of the spirit telling us what we are by reminding us what we can be, leading us to guide ourselves not by our conduct but our aspirations.

During the oral argument in *Baker v. Carr*,³⁹ Mr. Justice Frankfurter referred to the limited power of the Court in comparison with other branches of government and asked whether the discouraging record of noncompliance with the school desegregation ruling in *Brown v. Board of Education* was not a complete answer to those who thought the Court should enter the field of legislative apportionment where resistance to its decree might be many times greater. Unhappily, the argument drifted into a relatively minor colloquy over whether the resistance would be greater or less. A better answer would have been that the *Brown* decision had an importance, and a contrary ruling would have been a tragedy, not to be measured by the practical test of immediate enforcement. The *Brown* decision lighted a beacon of hope for the Negro and restated the spirit of America at a time when other governmental voices were muted. It has taken the support of the legislative branch and will require still more vigorous executive action to make the constitutional principle a reality but surely no one supposes that those

Brief for the United States in *Griffin v. Maryland* and companion cases, Nos. 6, 9, 10, 12 and 60, October Term 1963.

³⁸ Freund *THE SUPREME COURT OF THE UNITED STATES* 89 (Meridian Books 1961).

³⁹ 369 U.S. 186 (1962).

would have been forthcoming during the 1960's but for the "non-judicial power of the Court."

Baker v. Carr, the initial reapportionment case, epitomized the dilemma. Although I failed to perceive the difference at the time, it seems plain now that the issue related not to official aggression against personal liberty but to the share to be given to the citizen in democratic government. The enormous difficulty of finding standards for ruling upon questions of legislative apportionment, the risk of divisive controversy, the lack of precedent, the long history of congressional inaction and the uncertainty concerning the courts' ability to force reapportionment upon truly recalcitrant legislatures all counselled judicial abnegation. Yet against all this there weighed the stark fact that unless the Court intervened, the evil of malapportionment would continue. There was no other remedy. However the Court dressed its decision in the language of jurisdiction, its refusal to act would have the effect of legitimizing the evil. The Court could not do everything but it could do something, and there was reason to hope that the moral force of its decision plus its feeble sanctions and the weight of legitimacy placed on the side of reform might command a sufficient measure of assent to make the ruling effective. Events have proved (far beyond the expectations of counsel) the power of the Court to bespeak a national consensus.

IV

It is sometimes said that the Supreme Court has been too free in recent years in overturning precedent and that it exaggerates the judge's freedom and gives too little heed to the values of certainty, continuity and stability. Judged by an older past, the pace of new departures is swift indeed, but I wonder whether the critics give enough attention to the concurrence of forces today making for rapid changes in the law.

There is scarcely need to mention the revolutionary social and economic conditions: the growth of the population; the freeing of most men, in the United States at least, from the age-old necessity of spending nearly all their time and energy providing food, clothes and shelter for themselves and their dependents; the scientific and the consequent technological revolution; and the civil rights movement. Such rapid changes, reaching the roots of society, require pervasive changes in the law just as the change in the national economy required reinterpretation of the rules defining the power of Congress to regulate interstate commerce.

Revolutionary developments in other fields, I suspect, also influence the intellectual atmosphere in which the judges work. When the physical scientists are demolishing the old laws of physics and

chemistry and the social scientists are giving us new insights into the nature of man, the judge is not unnaturally impelled to examine pretty closely the rules that he has always followed. Sometimes the relation is one of direct cause and effect. All the ferment in criminal law—the area in which the changes in constitutional decisions are most frequent and most controversial—stems partly from the deeper inquiries of social scientists into freedom of the will, the causes of crime and the effects of punishment.

What the Supreme Court does in making new law through constitutional adjudication is also related to the action or inaction of other branches of the government. It would have been best, no doubt, for the Congress to have taken the initiative in compelling school desegregation, but legislative action was blocked by the power of the Southern Congressmen and the filibuster. The Executive theoretically could have given more leadership. As a practical matter, however, the task of initiating steps to realize a national ideal fell to the Court; either it must act or nothing would be done. Again, it would have been better if the States had themselves reformed their criminal procedure by providing counsel for all indigent defendants at public expense, but the simple fact is that a minority of States failed to act despite a long period of warning. The reapportionment cases are another illustration. In *Baker v. Carr*, the case in which the Supreme Court first intervened, the Tennessee legislature, elected by only a small minority of the people, had been violating even Tennessee's own constitution for sixty years. So far as one could tell from the record, there had to be either a constitutional remedy in the Supreme Court or nothing would be done.

Mr. Justice Frankfurter often warned that proof of a wrong was not alone enough to justify judicial, still less, constitutional intervention.⁴⁰ Ideally he was correct. Not all the business of government is constitutional law. Most wrongs must find their remedies in other forums. The federal judicial branch ought not to enlarge its own jurisdiction because Congress and State governments have failed to solve the problems confided to them. The remedy is to reform the delinquents. But government is more pragmatic than ideal. In a practical world there is, and I suspect has to be, a good deal of play in the joints. If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another. I suspect that a careful study would reveal that the Supreme Court today is most "activist" in the areas of the law where political processes have been inadequate, because the problem was neglected by politicians.

⁴⁰ *E.g.* *Baker v. Carr*, 369 U.S. 186, 269-270 (1962) (dissenting opinion).

Only history will know whether the present court has avoided both horns of the dilemma that lie at the bottom of its work. Today the question is open to debate. For myself, I am confident that historians will write that the trend of Supreme Court decisions during the 1950's and 1960's was in keeping with the main-stream of American history—a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic—in short, in keeping with the true genius of our institutions.

But perhaps I am prejudiced. One who has sat in the Supreme Court almost daily awaiting oral argument or the delivery of opinions acquires both admiration and affection for the Court and for all the justices. The problems with which they deal are so difficult, the number and variety of cases are so overwhelming, the implications are so far-reaching, that one sits humbled by the demands upon them. That the institution of constitutional adjudication works so well on the whole is testimony not only to the genius of the institution but to the wisdom and courage of the individual justices.