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Abstract

Four major milestones mark the almost two centuries of Supreme Court activity. The first three are the 1803 power-grab in *Marbury*,¹ the invention of “substantive” due process after the Civil War,² and the abdication of the Justices as ultimate economic policymakers in the 1930s and '40s.

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The Supreme Court in a New Role: From Negative Naysayer to Affirmative Commander*

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I

Four major milestones mark the almost two centuries of Supreme Court activity. The first three are the 1803 power-grab in *Marbury*,¹ the invention of “substantive” due process after the Civil War,² and the abdication of the Justices as ultimate economic policymakers in the 1930s and '40s.³ The fourth, and possibly the most significant, is now clearly evident. Since 1958⁴ the Court at times has been an *affirmative commander* as well as a *negative naysayer*. On occasion, the Justices tell other government officers what they *must* do to have their actions jibe with the fundamental law, rather than what they *cannot* do. The Court has become a commander. This article outlines that portentous development.

At the outset, I recognize the semantic problem: a naysaying decision can be considered to mean that the Justices chose affirmatively to pursue certain values. For example, by striking down a statute—say, one providing for minimum wages and maximum hours in employ-

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
2. Recounted in A. MILLER, *THE SUPREME COURT AND AMERICAN CAPITALISM* 50-62 (1968). See also J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.
3. The turning point came in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and in *National Labor Relations Bd. v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).
4. The new posture of the Court first became explicit in *Cooper v. Aaron*, 358 U.S. 1 (1958).

ment—the Court in the 1890-1937 period could be said to have made a “must do” pronouncement on corporate rights and to have furthered business expansion even at the expense of the working class. The semantic problem exists, but my point is different. The Justices in recent years have begun openly and expressly to command, by issuing opinions couched in language of affirmative duty laid upon political officers. In these instances, there is no need to infer a command (as in the employment decisions); it is flatly stated in plain language.

This is a constitutional revolution of the first water. Although it was not announced as such, the Court moved in an entirely new direction without fanfare. It tried to make the new posture appear a mere variation on what had gone before; the Court was doing only what judges had long done. That is far from true; nothing quite like it has been seen in American history (nor in the history of any other nation). The Justices became a *de facto* council of elders. By asserting the right and the power to say what the law *is* (as in *Marbury*) they have, through time and because of widespread acceptance, become able to say what the law *should* be. Rather than being “mere umpires,” they now are able to be, in Justice William Brennan’s words, “law-makers—a coordinate branch of government.”⁵ The implications of this development have not yet been seen; there is little reason to think that the Court will not attempt to carve out an even larger role for itself in the future.

There is another way of looking at this development. During the heyday of what I have called the Constitution of Rights or of Quasi-Limitations,⁶ the Court chose to emphasize certain rights of personhood which it attached to economic collectivities. It did so by denying the government the power to intervene into economic matters. The Justices spoke in terms of individualism and of *laissez-faire*. Today there is at least tacit recognition that the basic unit of society is the group. Conse-

5. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) (concurring opinion).

6. In my book, *supra* note *, I posit that the United States has had four constitutions: the Articles of Confederation, the Document of 1787, as amended (herein called the Constitution of Rights or of Quasi-Limitations), the Constitution of Powers, and the Constitution of Control. See A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981) for further discussion.

quently, a concept of status is emerging in constitutional law.⁷ The task of the Court is to effect the nexus, within the scope of constitutional values which they identify and articulate for and by themselves, between the individual and the groups (including the nation-state itself) of a bureaucratized society. This means that the Court has collectivized constitutional law. One aspect of such collectivism is the propensity, by no means always employed, to issue decrees couched in language of affirmative command. The Justices are attempting to preserve the values of individualism in a group-dominated nation. In order to do that, they have had to invent new ways of looking at old problems. They know that in some manner the stability of "the system" depends on siphoning off social discontent. Since those in positions of authority, both public and private, are not likely to police themselves, and are unlikely to alter the system even minimally, the Court steps in and does so. In doing that, the Justices act as surrogates for those who benefit most from the system.

One example will suffice to illustrate the point. In *Green v. School Board*,⁸ a 1968 decision involving school desegregation, the unanimous Court used language of duty: "Brown II [the second, implementing decision of *Brown v. Board of Education*] was a call for dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as respondent [in *Green*] then operating state-compelled dual systems were nevertheless *clearly charged with an affirmative duty . . . to convert to a unitary system in which racial discrimination would be eliminated root and branch.*"⁹

No prior court opinion contained language charging administrative officers with "an affirmative duty" to do something. Thus *Green* went far beyond the traditional decisions of the Supreme Court. An express command aimed at school officials, *Green* meant that the Justices had openly entered the political arena, overtly taking part in the travail of society. The movement was from adjudication (settling only the dis-

7. See Phillips, *Status and Freedom in American Constitutional Law*, 29 EMORY L.J. 3 (1980).

8. 391 U.S. 430 (1968).

9. *Id.* at 437-38 (emphasis added).

putes of the parties at bar) to legislation (stating rules for the public at large or at least for those similarly situated to the parties in court). It was a constitutional revolution of the first magnitude. There were forerunners to *Green*, to be sure, but none used the express words "affirmative duty."¹⁰

The Court makes no pretense in such decisions. In philosophic terms, the Justices have become telocratic; they openly admit as much. The rules of law they promulgate are instrumental, i.e., goal-seeking, while most Americans have long believed that the United States is nomocratic, i.e., rule-governed. That belief, that basic myth, has now become more than threadbare; it simply is not true. In constitutional matters the emperor has no clothes.¹¹ A government of laws, not of men, has never characterized the United States. (To the extent it does so today, it hampers rather than helps the resolution of public-policy problems.)¹² Telocracy, furthermore, has always been apparent in the Court's work; the real question is which purposes it was pursuing. There are, however, two major differences between yesteryear and today. First, the Court is now openly and outwardly purposive; and second, it has broadened the reach of its decisions to cover many more people.

The Justices choose constitutional questions to decide, not to further the interests of the litigants, but to develop the general law. Chief Justice Fred Vinson reminded lawyers in 1949 that "you are, in a sense, prosecuting or defending class actions; . . . you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country."¹³ In a true class action, one plaintiff actually

10. For recent discussion, see J. BASS, UNLIKELY HEROES 308-09 (1981).

11. Cf. Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U.L. REV. 7, 8: "[W]e are repeatedly told by the courts that the current egalitarianism which they are helping to impose derives from the Constitution. That, I think, is arrant nonsense. It is not being taken from the Constitution, it is being put into it." See also Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212 (1977).

12. "[I]n 1960-80 America became a nation of laws instead of men. The country had previously thrived by being exactly the opposite, although its lawyers wrote books pretending it wasn't." 277 THE ECONOMIST (London), No. 7165, Dec. 27, 1980, at 22, col. 3.

13. Quoted in H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1404 (1953). See also Harlan, *Manning the Dikes*, 13 RECORD 541, 551

sues in his own name and on behalf of others similarly situated. In *Brown v. Board of Education*¹⁴ for example, the immediate litigant, Miss Linda Brown of Topeka, Kansas, brought suit more for a general principle than for specific, immediate relief. (Immediate relief, of course, was also sought, but was not the primary motivation.) Vinson's remark was an oblique acknowledgment of the Court as legislator, for often "others similarly situated" do not even know of the lawsuit. Surely that was true in the Abortion Cases¹⁵ and in the controversial *Miranda*¹⁶ ruling (concerning the rights of a person caught up in administration of the criminal law). Although the Court has recently moved to tighten use of class actions,¹⁷ Vinson's point is that *all* constitutional cases permit judges to rule generally while appearing to do so only specifically. They are, thus, "backdoor" class actions,¹⁸ and therefore not subject to the statutory and decisional limitations imposed on true class actions. The Justices, not being logicians, have no difficulty in stating a general rule from the context of one particular case. The lesson here should be obvious: the Justices, speaking generally, set their own rules, both in the procedure to be followed and in the substance (the rules) to be applied. They have constitutional *carte blanche* and can go as far as the political process permits them to go.

II

By fits and starts, with some Sisyphean back-pedaling, the members of the High Bench are overtly pursuing their ideas of justice. They

(1958) (the Court chooses its cases "in the interests of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants.") (quoting C.J. Hughes, S. REP. NO. 711, 75th Cong., 1st Sess., 39 (1937)). I have elaborated on the point in Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron*, 58 U. DET. J. URB. L. 573 (1982).

14. 347 U.S. 493 (1954).

15. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). For analysis, see Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975), reprinted in A. MILLER, *THE SUPREME COURT: MYTH AND REALITY* ch. 8 (1978) [hereinafter cited as Miller & Barron].

16. *Miranda v. Arizona*, 384 U.S. 486 (1966).

17. *E.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

18. For brief discussion, see Miller & Barron at 1193.

do not seem to be bound by pre-existing rules.¹⁹ The consequence, as might be expected, is obvious: ideas of justice, of good public policy, differ among the nine Justices. I do not suggest this is a new situation, but some Justices now openly admit that they are law-makers and must at least try to accommodate the conflicting interests of a pluralistic society. That they are far from successful in the latter goal is revealing testimony of the shortcomings of pluralism itself as a form of political order.

The differences between the outward attitude of Justices of yesteryear and those of today are suggested by the following episodes, the first related by Judge Learned Hand about Justice Holmes and the second personal to myself. Said Hand: "Remember what Justice Holmes said about 'justice.' I don't know what you think about him but on the whole he was the master craftsman of our time; and he said, 'I hate justice,' which he didn't quite mean. What he did mean was this. I remember once when I was with him; it was on a Saturday when the Court was to confer. It was before he had a motorcar, and we jogged along in an old coupe. When we got to the Capitol, I wanted to provoke a response, so as he walked off I said to him, 'Well, sir, good-bye. Do justice!' He turned quite sharply and he said, 'Come here, come here.' I answered, 'Oh, I know, I know.' He replied, 'That is not my job. My job is to play the game according to the rules'."²⁰

Holmes had the nineteenth-century view. (It is interesting to compare that episode with his 1873 candid acknowledgment that the rules were not neutral.)²¹ He simply did not care about trying to help rectify some of the injustices of the world. "Savage, harsh, and cruel," as Professor Grant Gilmore described him,²² he was quite willing as a Justice on the Supreme Court to aid "the rich and powerful [to] impose their

19. See Kurland, *supra* note 11; Forrester, *supra* note 11. Cf. R. BERGER, GOVERNMENT BY JUDICIARY (1977).

20. Quoted in M. MAYER, THE LAWYERS 490 (1967) (paperback ed. 1968).

21. See Comment, *The Gas-Stokers' Strike*, 7 AM. L. REV. 582 (1873), discussed in Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 1029-31 (1977). See also Tushnet, *Truth, Justice, and the America Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

22. G. GILMORE, THE AGES OF AMERICAN LAW 49 (1977).

will on the poor and weak.”²³ His was a harsh and gloomy universe; and although he knew quite well that playing the game “according to the rules” gave judges great leeway, he was unwilling to make the mental leap into considerations of justice and fair play.

The modern, albeit publicly unacknowledged, conception is that of Justice Hugo L. Black, a man whose cosmology made him an inheritor of the ideals of the Enlightenment. He saw in the Court—not consistently, to be sure, but often—a means whereby something more than the nebulous Holmesian rules could be employed. In 1959, I had an opportunity to speak with him in his chambers in the Marble Palace. The room was piled high with books, almost cascading off his desk, most of which dealt with philosophy and history and economics rather than with law as a technical doctrine. Black, a gracious man, spent an hour discussing the work of the Court and his role. With some reluctance, I finally got up to leave, for he obviously was a busy and hard-working man. As we walked to the door, I turned and shook his hand, and asked a final question: “What, sir, do you conceive your basic task to be?” I don’t know what I expected, but what came back was this: his eyes blazed, his right hand shot into the air, and without hesitation he fervently said, “To do justice!”

It would be wrong, of course, to infer too much about either episode. Black’s answer to my question, nonetheless, does seem to epitomize the Court’s new jurisprudence, the open desire, not always followed, to do justice or achieve fairness in individual cases—and thus to promulgate a general norm (or norms) of justice as fairness. It is not an invariable practice. At times some members of the present Supreme Court proceed in the opposite direction.

Justice William Rehnquist is perhaps Holmes’ intellectual heir in his attitude.²⁴ Consider in this connection *Rummel*,²⁵ decided by a bare 5-4 majority in 1980. In an opinion written by Rehnquist, a Texas law was upheld that made a life sentence mandatory when a person was convicted of three felonies. Texas’ criminal law is notoriously harsh. Rummel’s three offenses involved a total sum of \$229.11 (forgery,

23. *Id.*

24. For Justice Rehnquist’s views, see Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). For early discussion of Rehnquist’s ideology, see Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

25. *Rummel v. Estelle*, 445 U.S. 263 (1980).

wrongful use of a credit card, and not fulfilling an air-conditioning contract). The life sentence, Rehnquist concluded, was not a cruel and unusual punishment proscribed by the Eighth Amendment. Maintaining that he was proceeding according to the rules and that the relevant rule was the Texas law, Rehnquist forgot (or simply ignored the fact) that the rule—the Texas law—was the very question at issue.

Most Justices today do not pretend, as did Rehnquist, that constitutional law is a game to be played—in Holmes' words—"according to the rules." Unabashedly making law, they often seem to strain for the "just" result. The problem is that no one, on the High Bench or elsewhere, has yet produced a workable definition of justice in the context of Supreme Court law-making. Hence sharp splits develop on the Court, as in *Rummel*, and as in the well-known decision concerning Allan Bakke's application for admission to the University of California medical school.²⁶ The school had a policy of preferential admissions for blacks and other disadvantaged people. When *Bakke* got to the Marble Palace, the Justices again narrowly split, and produced a Solomonic decision: Bakke would be admitted to the school, but race could be used as one of the criteria for future admissions. The net result was that white Americans (represented by Bakke) as well as black Americans (the disadvantaged generally) were each given at least a partial victory. My point is not to argue the pros and cons of *Bakke*, but to suggest that it, and others, reveal a marked propensity even in the Burger Court to follow Justice Black's *cri de coeur*: "Do justice!"

By no means is telocracy, avowedly pursuing a given goal and doing justice, publicly admitted by the High Bench. The pretense still exists that Holmes' prescription of nomocracy prevails. A failure to see through the pretense, accepting at face value what the Justices say in their opinions, impairs detection of reality and at times leads learned scholars into serious errors of judgment. Bertrand de Jouvenel, the well-known French political theorist, is an example:

Nomocracy is the supremacy of the law; telocracy is the supremacy of purpose. Modern institutions [i.e., Western] were developed around the central concept of law. Individual security is assured if the citizens are not exposed to arbitrary acts of the government,

26. *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978).

but only to the application of the law, which they know. . . . The guarantees of such a regime are precious. But institutions of a judicial type are not [designed] for action.²⁷

He went on to say that what “distinguished contemporary government is its vocation for rapid social and economic progress. . . . Once government activity has a relatively precise goal, the regime’s inspiration is telocratic and political forms necessarily reflect this.”²⁸

De Jouvenel was not speaking of the Supreme Court of the United States, but his views are nonetheless relevant. They display a faith in nomocracy, in “the supremacy of law.” That supremacy, however, has never existed in the United States (or elsewhere).²⁹ He doubtless was correct in describing contemporary government, but surely he erred in asserting that it was a new development. Telocracy is novel only in the express acknowledgement of it by all branches of government. Law in America since the earliest colonial days has been instrumental, i.e., goal-seeking or telocratic. Professor Morton Horwitz’s conclusions about the common law are equally accurate for constitutional law:

By 1820 the legal landscape in America bore only the faintest resemblance to what existed forty years earlier. While the words were often the same, the structure of thought had dramatically changed and with it the theory of law. Law was no longer conceived of as an eternal set of principles expressed in custom and derived from the natural law. Nor was it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal

27. de Jouvenel, *quoted in Kelly, Who Needs A Theory of Citizenship?*, 108 *DAEDALUS* No. 4, at 21, 25 (Fall 1979).

28. *Id.*

29. In making this statement, I am referring in the main to the highest levels of government, although it must be noted that most administrators have some discretion. For a statement by a knowledgeable Washington lawyer, see C. HORSKY, *THE WASHINGTON LAWYER* 68 (1952).

doctrine with the self-conscious goal of bringing about social change.³⁰

That statement, particularly the last sentence, describes remarkably well what the Supreme Court and other courts have been doing for at least a generation.

The change, thus, is not from nomocracy to telocracy, but in the recent open avowal of pursuit of social goals by officers in all segments of government. Congress, for example, by enacting the Employment Act of 1946,³¹ expressly called for policies that furthered the economic well-being of the people. Other statutes have delegated authority to agencies and bureaus to help fulfill that very purpose. The President's annual budget and economic messages to Congress are a conscious effort to tinker with the economy for telocratic purposes. And the Supreme Court has had a major role in the new (open) posture—first, by validating new powers of Congress in socio-economic affairs (the so-called constitutional revolution of the 1930s); and second, by rendering decisions that are themselves telocratic. "It is of the very nature of a free society," Justice Felix Frankfurter once maintained, "to advance in its standards of what is deemed reasonable and right."³² Today, it is deemed reasonable and right, even necessary, for all branches of government to pursue social welfare ends. The pretenses of the past have been cast aside. Law has become obviously instrumental. To be sure, disagreement occurs (at this writing, for example, in the details of President Ronald Reagan's economic programs); but it, at least outwardly, is about means rather than ends. Very few dispute that government has some role to play in socio-economic affairs; even the Reagan "supply-side" economics is being promoted as a means of helping all of the people (not just the affluent, who would be the immediate beneficiaries).

The legal theory for the new posture was suggested many years ago by Leon Duguit: "Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the hold-

30. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 30 (1977).

31. 60 Stat. 23 (1946). For discussion, see E. ROSTOW, *PLANNING FOR FREEDOM* (1958).

32. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

ers of power cannot do certain things; second, there are certain things they must do.”³³ Formal constitutional law from 1789 to 1937 evolved for the most part around the “cannot do” of that formulation, making the Constitution one of “rights” or of “limitations.” Since 1937, the “must do” aspect has been slowly emerging.

When the Court validated the New Deal in the 1930s and ‘40s, it confirmed, rather than wrought, a revolution in American government. The High Bench caught up with the political branches of government. Each branch became an active participant in the travail of society. At first, the Justices were not fully aware of what they were doing; but the new form of government—the emergence of an operative Constitution of Powers³⁴—quickly made it evident that not even judges could stay aloof from or forever block the tides of social change sweeping through the nation. Writing in 1908, Woodrow Wilson perceived the need for a common purpose among those who govern. Once it is conceded, as surely it must be, that courts are an integral part of the governing process, then his comment is particularly apt: “Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose. Their cooperation is indispensable, their warfare fatal.”³⁵ Although Wilson was speaking of the President and Congress, his observation fits the Supreme Court as well. Judges are not so much independent from other branches of government as they are cooperators with them. Rather than being separate and apart, they stand squarely in the mainstream of politics. And that is so whether their actions lend legitimacy to politicians’ goals, or quietly enable the political process to continue, or even impede some actions of political officers by declaring those invalid. Judges have an ongoing political function to perform.

An understanding of the flow of constitutional decisions, from the Supreme Court and elsewhere, requires inquiry into trends of doctrinal development in both the formal and the operative Constitutions. Trend analysis involves starting in the past, discussing interim developments, and projecting into the future. That can be done on several levels: the

33. L. DUGUIT, *LAW IN THE MODERN STATE* 26 (H. Laski trans. 1919).

34. So labelled by E. CORWIN, *A CONSTITUTION OF POWERS IN A SECULAR STATE* (1951).

35. W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 56-57 (1908).

evolution of specific constitutional principles, the structure of government itself, and the relationship of government *vis-a-vis* the citizenry. The last is our present focus.

The fundamental trend, as has been said, is from ostensible nomocracy to avowed telocracy. In politics, the change is from the negative, nightwatchman State to the positive State; in economics, it is from laissez-faire to regulation "in the public interest," and in law, the rule of law has been redefined from a seemingly static system of immutable principles to a dynamic, open-ended stream of decisions. Each change merits discussion, not separately but together.

Less than a half-century ago the American people crossed over one of the great constitutional watersheds of their history. In what was aptly termed a constitutional revolution, judicial approval was accorded to what most people wanted: governmental intervention in socio-economic affairs so as to provide—at least, attempt to provide—minimum economic security. The positive State came into existence under a third operative fundamental law—the Constitution of Powers. Government overtly became responsible for more than minimum internal order and external security; it assumed obligations of a social-service or welfare nature.

Whether the new commitments of government can long endure is by no means certain. Its politics, seemingly settled in the post-World War II period, are becoming unravelled. That may be attributed to the slowing down, even cessation, of economic growth, to the depletion of natural resources, and to the rising demands of people in the former colonial areas of the world. It comes as no surprise that our welfare programs precipitate tensions verging on violence. We are witnessing, in John Kenneth Galbraith's terms, the "revolt of the rich against the poor"³⁶ as a type of counter-revolution to the increasingly insistent demands of the underclass (both in the United States and elsewhere). Professor Lester Thurow has labelled the new politics "the zero-sum society,"³⁷ by which he means that in a slow or no-growth economy any important economic benefit for one segment of society requires a concomitant sacrifice elsewhere. Hence the zero-sum game: it is one in which all cannot win. "In the past," Thurow says, "political and eco-

36. Galbraith, *How to Get Ahead*, N.Y. REV. OF BOOKS 12, 14 (July 19, 1979).

37. L. THUROW, *THE ZERO-SUM SOCIETY* (1980).

conomic power was distributed in such a way that substantial economic losses could be imposed on parts of the population. . . . Economic losses were allocated to particular powerless groups rather than spread across the population. These groups are no longer willing to accept losses and are able to raise substantially the costs for those who wish to impose losses upon them.”³⁸ The groups include blacks and other ethnic minorities, workers, women and consumers. But business interests remain powerful; the result is a creeping political paralysis. Whether and how that Gordian knot of the American political economy can be cut may well be the central constitutional question of the day.

Galbraith and Thurow, without doubt, are correct. Their message is well worth pondering, for what they say is that the telocracy that has characterized government for the past several decades may no longer be possible. The economic pie is shrinking; of that there can be no real question. Even so, whatever the outcome of struggles already begun and certain to continue, the commitment of government to general economic security remains. Congress still sets the broad policy guidelines, their administration is left to the bureaucracy, and the judiciary cooperates. How long that posture will continue is uncertain. One thing, however, seems sure: there will be no reversion to the *status quo ante*, to the Golden Age of the 1945-1970 period. Americans are entering the age of limits, of frugality, of scarcity. The ecological trap is closing. There can be little doubt that the next decade and beyond will be “a harsher, more exacting, and more perilous age.”³⁹

Telocratic goals pursued by government may well have to change. I do not propose to discuss the point further, save in the context of Supreme Court decision-making. The social milieu is being rapidly altered. Does that mean that the instrumentalism of the Justices, so evident since 1937, will be altered so that different goals are pursued? Can human dignity, defined as the realization of basic human needs, survive and be enhanced in a “steady-state” economy? Can, in other words, the Court help effect the transition from the now-defunct Golden Age to “the lean years”⁴⁰ with a minimum of stress on existing

38. *Id.* at 12.

39. P. DUIGNAN & A. RABUSHKA, *THE UNITED STATES IN THE 1980s* at xxxix (1980).

40. *See* R. BARNET, *THE LEAN YEARS* (1980).

institutions and expectations? These are the problems that now face all governmental officers, including those in the Temple on the Hill, problems with which they will continue to be concerned as the future unfolds. No quick technological fix, nor any other similar remedy, is available. We are in for it, deeply and irretrievably; and it behooves all who care—and only saints and fools do not—to help in the extrication of humankind from the crisis of crises—the climacteric—it now confronts. Judges cannot be immune from that effort.

The problem emerges at the very time that the Rule of Law, historically nomocratic, is being redefined to encompass a telocratic dimension. Constitutional law was traditionally procedural, telling government how it must deal with the citizenry. It has now taken on enough of a goal- or purpose-seeking aspect to conclude that nomocracy is no longer an adequate conception of the role of law and legal institutions. This is not to say that none of the traditional view remains; of course it does. But it must operate side-by-side with the new instrumentalism. The United States, thus, has assumed the task, vastly more difficult than merely enforcing a law known to all (the orthodoxy), of deciding what the law ought to be and of making desirable changes.⁴¹

Perhaps the clearest expression of the new Rule of Law came in 1959, in the Declaration of Delhi of the International Congress of Jurists (a group of lawyers from countries outside the Soviet bloc of nations): “The International Congress of Jurists . . . recognizes that the Rule of Law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also *to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.*”⁴² To the extent that the spirit, if not the letter, of the Declaration is accepted, (and it is by a wide range of American governmental programs) the Rule of Law has come to mean,

41. See Knight, *On the Meaning of Justice*, in JUSTICE 1 (NOMOS VI: YEARBOOK OF THE AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY)(C. Friedrich & J. Chapman eds. 1963).

42. INTERNATIONAL CONGRESS OF JURISTS, THE RULE OF LAW IN A FREE SOCIETY 3 (N. Marsh ed. 1960) (emphasis added). See Thorson, *A New Concept of the Rule of Law*, 38 CAN. B. REV. 239 (1960).

in Aristotle's terms, *distributive* justice as well as *corrective* justice. Government, as Duguit said, "must do" certain things of an affirmative nature.

How, if at all, has the Supreme Court responded to that version of the Rule of Law? The Justices, in the first place, have not announced any spectacular shift in so many words. However, when some of their recent decisions are viewed in terms of effects, of social consequences, rather than as examples of doctrinal exegesis, it may be said that the Court has indeed accepted at least some parts of the new Rule of Law. Furthermore, it has contributed to the settlement of some immediate aims of Americans. Yves Simon once observed that in a democratic society, "deliberation is about means and presupposes that the problem of ends has been settled."⁴³ The Justices have contributed to developing consensuses on such troublous matters as race relations,⁴⁴ abortion,⁴⁵ the church-state relationship,⁴⁶ the immersion of the nation in world affairs,⁴⁷ and other critical public policy issues.⁴⁸ I do not suggest that they have solved them. They have not. In those and other areas, the Justices have moved to catch the conscience of the American people, and thus to stimulate and keep alive a continuing seminar on vital constitutional matters. If democracy means anything, it means a continuing dialogue among the citizenry on matters of public concern. The Justices both lead and participate in that dialogue.

The precise turning point to constitutional telocracy can be identified in Chief Justice Charles Evans Hughes' 1937 opinion in a minimum-wage case, *West Coast Hotel Co. v. Parrish*.⁴⁹ To Hughes, liberty meant "liberty in a social organization" which used the law to ward away the evils of industrialization. From being a limitation on governmental power, the due process clauses of the formal Constitution became at least an invitation, and perhaps a command, for political ac-

43. Y. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 123 (1951).

44. *E.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and progeny.

45. *E.g.*, *Roe v. Wade* 410 U.S. 113 (1973) and progeny.

46. *E.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962).

47. *E.g.*, *Dames & Moore v. Regan*, ___ U.S. ___, 101 S. Ct. 2972 (1981).

48. Not that the Court has escaped criticism. Far from it. More than 20 bills were introduced in Congress in 1981 aimed at cutting down Supreme Court power. See Miller, *The Supreme Court Under Fire*, Miami Herald, June 28, 1981, at 4E, col. 1.

49. 300 U.S. 379, 391 (1937).

tion to ameliorate human distress. The command, if such, was couched in discreet terms, and the idea lay dormant for almost twenty years. Not until 1955, in the second, implementing decision in *Brown v. Board of Education*, did the Justices screw up their courage to tell the other government officers: "Do this." In that instance, the command was to integrate black children into public schools "with all deliberate speed."

Hughes' opinion in *Parrish* permitted government to actively further the cause of the disadvantaged—that is, to use law purposively. It also, as Professor Edward S. Corwin phrased it, changed the due process clauses from limitations on legislative power to "an actual instigation to legislative action of a leveling character."⁵⁰ At what point does an "instigation" become a command? There is no way to answer that question. At some time, however, between 1937 and 1955, a new perception of their role was accepted by the Justices.

The *Parrish* decision, with others, permitted the birth of what I call the (third) Constitution of Powers, for the Court had constitutionalized massive interventions into the political economy by Congress and state legislatures. That third fundamental law still remains as part of the operative Constitution; it is a layer on the palimpsest that is the Document of 1787. It was not that the (second) Constitution of Rights (of Quasi-limitations) was completely shunted aside and supplanted; it now had to share top billing with the third Constitution. (A fourth fundamental law—the Constitution of Control is now becoming visible.)⁵¹

III

It is—"an axiom of statesmanship," Henry George once observed, "that great changes can best be brought about under old forms."⁵² So with the formal words of the Constitution: they remain the same, but only as a facade, beneath which lies a radically different living reality.

50. E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 161 (1948) (emphasis omitted).

51. See A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981); Miller, *Reason of State and the Emergent Constitution of Control*, 64 *MINN. L. REV.* 585 (1980).

52. H. GEORGE, *PROGRESS AND POVERTY* 404-05 (1879).

The emergence of a Constitution of Powers meant that structural changes came without amendment of the Constitution of Rights. Two of them are well known: the shift in the federal system toward a consolidation of national power, and increased flow of power within the general government toward the presidency (and the bureaucracy). Nor was this a sudden development. Much of American history evidences the low beginnings of both changes. By 1950 it had become clear beyond doubt that both were permanent alterations in the allocation of governmental powers. (That is so despite some recent attempts, as in the 1976 decision in *National League of Cities v. Usery*,⁵³ to resurrect historical federalism.)

I do not propose to discuss either federalism or the rise of executive hegemony here. My interest lies in what has happened and is happening to the Supreme Court. The Justices have moved on several fronts to meet the challenges of the modern era. They have not remained quiescent, but have become active participants in the arena of politics. Examples are easily found: racial segregation; apportionment in state legislatures (and in the U.S. House of Representatives); the rights of women, aliens, children and illegitimates; administration of the criminal law. Taken together, they tend to validate, at least partially, McGeorge Bundy's comment that "The fundamental function of the law is to prevent the natural unfairness of society from becoming intolerable."⁵⁴ The core of many recent decisions of the Court is the equality principle, writ large, and a concept of justice as fundamental fairness.

Under its new jurisprudence, the Supreme Court acts as a commander, not in the sense of having enforcement power of its own (which it does not), but by stating norms that purportedly bind the entire nation. By becoming a commander, and getting away with it, the Justices have assumed an even larger role. What that might be is suggested elsewhere.⁵⁵ Suffice it for now to state that the Court as legislator is now well, if not fully, accepted. People throughout the United States look to the Temple on the Hill for guidance, if not for ultimate

53. 426 U.S. 833 (1976).

54. Quoted in M. MAYER, *supra* note 20, at 516.

55. See, e.g., Miller, *In Defense of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT (S. Halpern & C. Lamb eds.) (to be published in 1982); A. Miller, *supra* note *, ch. 11.

resolution, in some of the more troublous problems they confront. Anguished protests come, of course, from those whose oxen have been gored by the very idea of the Court as commander, protests not unlike those suffered by Chief Justice Marshall. They too will fade away. The Justices' position as a necessary constituent of government is too solidified to be altered. The Court is needed, badly needed, by the fragmented and alienated populace trying to navigate the white rapids of the climacteric of humankind lying dead ahead. I do not suggest, now or later, that the Court can or will do this alone. That, of course, is a manifest impossibility. But the Justices can light a candle rather than standing aside and cursing the darkness of the coming Age of Frugality.

IV

The new judicial posture built in the last generation or so revolves around the concept of "positive freedom." To explain it requires reference to a long forgotten English philosopher, Thomas Hill Green, who wrote in the latter part of the nineteenth century. To him, the notion of positive freedom reflected the rediscovery of the community as a corporate body of which both institutions and individuals were a part, so that the idea of collective well-being or the common good would underlie any claim to private right. Ponder that idea for a moment. Can there be much doubt that claims to private right do give way, under modern law and policy, to ideas of collective well-being? The community has indeed been rediscovered. It may be seen in the rise of the State to pre-eminence, in the successful assertions of national security as justifications for governmental action, in invocations of the public (or national) interest by successive Presidents, in the "entitlements" that more and more Americans consider to be their right. In all these, and more, the notion of individual autonomy has been supplanted by an inchoate collectivism. Despite much rhetoric to the contrary, few dispute the need for the change, and fewer would wish to revert to the storied days of individualism, (which existed more in myth than in reality). It should be remembered that individualism, far from being inherent in the human experience, is a latter-day phenomenon, no older than the French Revolution. Even as a theory or philosophy it is now either dead or dying both in social affairs and in law. The autonomous man does not exist as such.

The development is reflected in American constitutionalism in the newly-emergent concept of status rights which derive from one's membership in a group (or groups) and not from some inherent, metaphysical notion of personhood.⁵⁶ An "indivisible" nation pledges "liberty and justice to all." That may be a mere slogan, a symbol, but we must always remember that, as Holmes said and Frankfurter often repeated, "we live by symbols."⁵⁷ The symbol today is of collective well-being, of welfare if you will. Green gave the philosophical basis for positive government: social insurance programs that provide the economic means for more people to be free (if they wish). The duty of government in this conception is not so much to maximize individual liberty as an end in itself, but rather "to insure the conditions for at least a minimum of well-being—a standard of living, of education, and of security below which good policy requires that no considerable part of the population shall be allowed to fall."⁵⁸ Analysis of governmental programs since the 1930s shows how closely they approximate that requirement. And one need only refer to the Declaration of Delhi⁵⁹ to see how some legal thinking coincides with Green's. It must be remembered, however, that Green wrote at a time when the economic growth seemed to make his proposals possible. The history of most of this century is also one of economic growth. Modern governmental programs were created during an age of abundance, well before the incipient age of frugality, and thus well before Thurow's zero-sum society became apparent. That, of course, makes the task of today's government immensely more difficult. It is a task, furthermore, that has lately encountered serious intellectual opposition from neo-conservatives generally and from such articulate wishful thinkers as philosopher Robert Nozick and economist George Gilder.⁶⁰ Both Nozick and Gilder want to create what they fancy was the world of yesteryear—a free market, non-statist society—or failing that, to move toward that end. That they cannot and will not succeed should be obvious to all.

56. See Phillips, *supra* note 7.

57. For Holmes, see O. HOLMES, COLLECTED LEGAL PAPERS 270 (1920); for Frankfurter, see H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 148 (1981).

58. G. SABINE, A HISTORY OF POLITICAL THEORY 676 (1937).

59. See text accompanying note 42 *supra*.

60. See R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); G. GILDER, WEALTH AND POVERTY (1981).

No one in government, certainly no Justice, has ever openly avowed that Green was the patron saint of the Constitution of Powers. Indeed, it would have been odd had anyone done so. Green was an obscure academic scribbler, little known outside of England. His ideas, however, have percolated through other, perhaps lesser minds to be seized by men of action who never heard of him and who had no interest in abstract ideas as such. But unquestionably Green's views on freedom as a social, not individual, right are dominant. He wished to reunite the individual with the social order of which he is a member, and without which his existence has no meaning. Green saw that individualism was running its course, a temporary phenomenon limited in time and space to a few centuries and the Western world. He also knew that organizations—the collective body, including the nation itself—were the new order. Therefore, the individual's freedom is, paradoxically to some, protected by legal and other institutions that can only be provided by the community. We have thus outlived the Robinson Crusoe myth. "When we speak of freedom as something to be so highly prized," asserted Green, "we mean a positive capacity of doing or enjoying something worth doing and enjoying, and that, too, something that we do or enjoy in common with others. We mean by it a power which each man exercises through the help or security given him by his fellow men, and which he in turn helps to secure for them."⁶¹ In a phrase, that is a formula for benevolent collectivism—precisely where Americans are now, at least in the ideal. The ideal, to be sure, has not been achieved for many; with the incipient age of frugality, perhaps even fewer will achieve it.

Has the Supreme Court lived up to Green's conception? Only indirectly, as the following examples illustrate. Taken together, the Court's decisions display a marked tendency toward overt telocracy on implicit Green lines. Their numbers may be small, but they are of fundamental significance, both because they reveal beyond doubt a new and significant role of the Justices and because they are the principal targets of the Court's modern critics. To generalize, these illustrations show that the Court is willing for the first time in American history to give con-

61. T. GREEN, WORKS: MISCELLANIES AND MEMOIR 371-72 (1888). See Phillips, *Thomas Hill Green, Positive Freedom and The United States Supreme Court*, 25 EMORY L.J. 63 (1976).

stitutional protection to some members of certain “discrete and insular” minorities.⁶² Thus, the Constitution has been extended substantially, but still not completely to “We, the people . . .,” the opening words of the Preamble.

Race Relations

The Negro problem, Gunnar Myrdal maintained in his classic *An American Dilemma* (1940), is really a problem in the hearts of white Americans. Except for a brief period, from about the mid-1940s to the late 1960s, whites have been quite willing to keep blacks in either a formal or an informal caste system. When slavery was abolished by the Thirteenth Amendment, the First Reconstruction began. It met an early death, first in politics and then by judicial decrees limiting Congress’ power to enforce the Civil War amendments. In the infamous *Plessy v. Ferguson* decision of 1896,⁶³ the Justices legitimated a caste system, wrapping it in the sugar-coating of “separate but equal,” even though everyone knew that blacks were in fact separate and unequal. Under the operative Constitution, blacks were kept “in their place.” Peonage was widespread, a form of bondage scarcely distinguishable from slavery.

That could not last, at least in formal law. No nation that trumpets itself as a democracy with “equal justice for all”⁶⁴ can indefinitely keep a large part of the populace submerged in a status providing little hope, except for an occasional fortunate escapee, of a better future. But last it did until the Second World War. The United States, like Great Britain, could hardly conscript men to fight, and at times die, in the name of freedom and democracy, only to return them to ghettos at the end of hostilities. Nor could blacks be further denied an opportunity for education and thus for fuller participation in American life. Moreover, blacks not called into service could not be denied employment in war industries; this led to President Roosevelt’s executive order barring ra-

62. The term comes from the *Carolene Products* case and Justice Stone’s famous footnote therein. *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938). For discussion, see J. ELY, *DEMOCRACY AND DISTRUST* 76 (1980).

63. 163 U.S. 537 (1896).

64. This is the slogan carved deeply in the facade of the Supreme Court building in Washington, D.C.

cial discrimination in employment.⁶⁵ FDR, a true Machiavellian, made a virtue out of necessity.⁶⁶

The main breakthroughs for improving the status of America's "untouchables" came in the Supreme Court—in the *White Primary Cases*,⁶⁷ in *Shelley v. Kraemer*,⁶⁸ and then in *Brown v. Board of Education*.⁶⁹ The facade of constitutional law has not been the same since. Others taking their cue from black Americans made the Court an object of pressure-group tactics. The reach of the equality principle has been extended to other areas. The Supreme Court, supposedly dispassionate, became compassionate. Men, women, and children, with little or no political influence, found through the judiciary a way to redress longfelt grievances. Federal appeals Judge J. Skelly Wright said it well: After pointing out that "great social and political problems [are better] resolved in the political arena," he went on to say "there are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance."⁷⁰ We have already mentioned that the Justices used express language of affirmative duty in the late 1960s in an effort to eliminate racial discrimination root and branch. What remains for blacks is not the principle found in the formal Constitution, but one based on cases and the operative Constitution. The Court may promulgate a general norm—a rule of law—but unless it is accepted and obeyed by people generally it tends to become, if not a dead letter, less and less significant.

Until they decided that discriminatory motive or intent was not only important but had to be proved by those alleging discrimination, the Justices had been remarkably consistent in furthering the cause of human dignity for black Americans. The basic change, subtle but important, surfaced in 1976 but was underscored in 1980 in *City of Mo-*

65. For discussion, see Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955).

66. N. MACHIAVELLI, *THE DISCOURSES*, Book I, Sec. 9: "A republic or a prince should ostensibly do out of generosity what necessity constrains them to do."

67. *E.g.*, *Smith v. Allwright*, 321 U.S. 649 (1944).

68. 334 U.S. 1 (1948).

69. 347 U.S. 483 (1954).

70. *Hobson v. Hansen*, 269 F. Supp. 401, 517 (D.D.C. 1967).

bile v. Bolden.⁷¹ In *Bolden*, black citizens of Mobile, comprising one-third of the city's population, argued that their vote was unconstitutionally diluted because of the city's at-large system of electing the three city commissioners who governed the city. The system, established in 1911, kept blacks from effective political participation. Six separate opinions were filed; Justice Potter Stewart, speaking for a plurality, rejected the claims. Adverse action on an identifiable group was not enough, said Stewart; there must be proof that a challenged action was undertaken "at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group."⁷² Professor Aviam Soifer ably summed up the implications:

It is as if in 1980 black citizens no longer constitute a discrete and insular minority. A black citizen's constitutional claim will not prevail unless he can demonstrate precise intentional discrimination against himself as an individual or some specific and intentional official discriminatory treatment of blacks. Otherwise, the promise of the fourteenth and fifteenth amendments, and the civil rights revolution, has either been satisfied or is properly left to the politicians. As we enter the 1980s, it is presumed that we all compete fairly. When no bad guys can be connected to evil discriminatory deeds, the Court apparently simply assumes that we all enjoy equal and fair opportunity.⁷³

The *Bolden* decision, then, made the Court, as Justice Thurgood Marshall said in dissent, an accessory to the perpetuation of racial discrimination. His point is well taken. How could Stewart and others who upheld the Mobile system not have seen what should be obvious to all?

The meaning, for black Americans, seems clear beyond doubt: the formal Constitution is merging with the operative fundamental law. Under both, the blacks are slowly reverting to second-class citizenship. Under the living law of American constitutionalism, the promise of *Brown v. Board of Education* and progeny has not been realized. Ghettos remain and unemployment among blacks is highest in the nation.

71. 446 U.S. 55 (1980).

72. *Id.* at 71 n.17. See Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383 (1981).

73. Soifer, *supra* note 72, at 389. See Miller, *The Court and Racial Bias*, Miami Herald, May 24, 1981, at 1E, col. 1.

Blacks do not receive, as in Mobile, their fair share of city services. As for unemployment, one study concluded: "These data fail to provide support for the popular belief that there has been a significant increase in the proportion of middle and upper-income Black families in recent years. If anything, these findings suggest that the proportion of such families may in fact have declined, that the economic gains of many blacks may have eroded under the combined effects of inflation and recession."⁷⁴ Many whites want to believe the contrary, but the facts do not bear them out. While a larger number of blacks have been able to gain economic and social rewards, most do not, and they are joined by ever-increasing numbers of Hispanics and poor whites.

The social consequences may well be considerable. Will blacks and other disadvantaged groups long acquiesce to a condition of operative *apartheid* and a growing willingness of the Supreme Court to uphold it? Justice Marshall ended his dissent in *Bolden* with a warning that may be prophetic: He said that a "superficial tranquility" created by "impermeable" and "specious" requirements that discriminatory intent must be proven may be short-lived. "If this Court," he concluded, "refuses to honor our long-recognized principles that the Constitution 'nullifies sophisticated as well as simple-minded modes of discrimination,' it cannot expect the victims of discrimination to respect political channels of seeking redress."⁷⁵ Indeed, it cannot. When political avenues are barred and the Supreme Court does not respond, is there any way victims can peacefully work within "the system"? None is apparent.

I do not wish to push the point further at this time. It is enough now to say that the Court's new posture—issuing commands of affirmative duty—poses difficult and as yet unanswered questions. But for blacks at least, the Court's stance is by no means a one-way street. The public at large may not disagree with the Court as commander; but scholars, commentators, and judges themselves have not answered many questions. Where does the Court get its constitutional right to issue general rules? How will the rules be enforced? Is the President, constitutionally charged with the duty of assuring that the laws are

74. Hill, *The Illusion of Black Progress*, 9 Soc. POL'Y, No. 3, 14, 24 (1978). See Miller, *Brown's 25th: A Silver Lining Tarnished With Time*, 3 DISTRICT LAW. No. 5, —, 22 (1979).

75. 446 U.S. at 141.

faithfully executed, also under a duty to “execute” the decisions of the Court? Are Supreme Court decisions of the same rank as a statute so far as Article VI of the Constitution is concerned (making the Constitution, laws and treaties the supreme law of the land, binding judges in every state)?

As for the President, if he has a duty to execute judicial decrees, is it merely moral or political; or does it go further, carrying the implication that someone can go into court to make him enforce a judicial decision? Recall that in *Cooper v. Aaron*,⁷⁶ the Court maintained that its decisions are “the law of the land.”⁷⁷ If that means what it says, then a Supreme Court decision is akin to a statute under Article VI, and the logical implication is that the President must enforce the decision. Even though the writ of the Court can now run against the President (as in the *Nixon Tapes Case*),⁷⁸ no one has yet tried to trigger the Court to order the President to carry out that duty. The short answer to the question is that, at best, it is an unsettled constitutional question; at worst, no one can get the Court to act.

Another question is this: if the Court decision is “law,” can someone, not a litigant before the Court, be held in contempt of court for not obeying the asserted general norm? The immediate litigants certainly can, for the Court’s statement of a general norm is a specific decree aimed at them. Legal theory, however, does not at present make it a crime, nor does it make a person defying the Court subject to contempt charges, even though he may be within the scope of the actual or “backdoor” class-action ruling. To illustrate: if the Court holds that prayers cannot be recited in public schools in a case coming from Ohio, by no means would school officials be subject to contempt punishment for not adhering to it in Montana.

Nor does legal theory yet meet the challenge of federal judges acting as administrators. For example, in his sweeping mental hospital and prison rulings in Alabama,⁷⁹ Judge Frank Johnson in effect established

76. 358 U.S. 1 (1958).

77. 358 U.S. at 18. To my knowledge, this was the first time that the Court said that in explicit terms. The decision, thus, marks the point of departure for the new jurisprudence of the Court. It is unique, in that it is the only opinion in Supreme Court history that was individually signed by all nine Justices.

78. *United States v. Nixon*, 418 U.S. 683 (1974).

79. These are the well-known decisions in *Wyatt v. Stickney*, 325 F. Supp. 781

himself as *de facto* head of both systems, telling state officials to rectify admitted grievances on pain of emptying the hospitals and jails. Those decisions pose crucial questions about the power of federal judges, but are beyond the scope of this essay. Suffice it to note that Johnson's orders are the logical extension of the role of the Supreme Court as commander.

As the Justices continue their open acknowledgment of their new role, those and other questions will have to be answered. Judicial power has been enhanced. Perhaps, however, mounting criticism of the Supreme Court and an increasing awareness of the intractability of many questions may cause the Justices to pull back. They have done so, as noted above, in some cases involving black Americans, but not in others such as the Solomonic decision in *Bakke* and the decisions sustaining "affirmative action" in employment cases.⁸⁰ The Court is developing a new constituency—the "great unwashed" of the populace. Whether that new base of support will allow the Court to strike out and recognize claims for human dignity depends, however, upon whether those who are the ultimate (albeit hidden) beneficiaries of judicial action—the elites of the nation—are sufficiently acute to perceive that human rights decisions are in their interests also. On that score one should not be sanguine. What Gandhi called his greatest problem—the hardness of heart of the educated—is matched, perhaps exceeded, by the inherent inability (bordering on stupidity) of many of the moneyed and propertied to realize where their long-range interests can best be served.

In final analysis, what the Court can or cannot do for blacks and others depends on the social milieu. I have written elsewhere that the ecological trap is closing and that Americans will be fortunate if they are able to escape realization of Arnold Toynbee's doleful forecast. "In all developed countries," he asserted in 1975, "a new way of life—a severely regimented way—will have to be imposed by ruthless, authori-

(M.D. Ala. 1971), and *Pugh v. Locke* 406 F. Supp. 318 (M.D. Ala. 1976). See Johnson, *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979) for a statement of Judge Johnson's judicial philosophy. See also Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281. For discussion of the *Wyatt* case, see J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 115-128 (1981).

80. *E.g.*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

tarian government.”⁸¹ We can hope Toynbee was wrong, but there can be little question that the world is moving rapidly toward a steady-state economy; two centuries of unprecedented technological and economic development are drawing to a close. Those two centuries—almost exactly the life span of the American republic—have left an indelible mark on the mind of modern Americans. Many still believe in the inevitability of continuing progress, although few take the trouble to define that ambiguous word. The Justices and the politicians will have to operate in a social context well described by economist E. J. Mishan:

Modern economic growth, and the norms and attitudes it establishes, have produced a highly complex industrial and urban organization, albeit one that is increasingly vulnerable largely because the spread of affluence, the diffusion of the products and processes of technology, and the sheer rapidity of change, have combined, unavoidably, to undermine the influence of the complex of institutions and myths that invested all preindustrial civilizations with stability and cohesion. The existing libertarian order in the West is no longer rooted in a consensus that draws its inspiration from a common set of unquestioned beliefs. The legitimacy of all its institutions is perpetually under assault. Social order is visibly disintegrating.⁸²

In some respects, Mishan is confirming Lester Thurow’s idea of the zero-sum society. There is a factor, not mentioned by either, which when added shows that the ecological trap is not only closing but is producing a high potential for social tension, even violence. That factor is simply this: when the expectations of a significant group of people, e.g., black Americans, are raised so that many believe the rhetoric of democracy and equality, and when those expectations are dashed as they have been for blacks, not only is the political order in disarray (as Thurow says) but the economic system cannot meet their demands (Mishan and Thurow). The result is a high probability of violence, which in turn produces harsh repressive measures.

The challenge for all American political institutions is obvious: to

81. A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* 151 (1981), quoting Toynbee.

82. E. MISHAN, *THE ECONOMIC GROWTH DEBATE: AN ASSESSMENT* 265 (1977).

develop another common set of unquestioned beliefs. It is here that the Court can be of substantial help. Of course, the Justices cannot do it alone. But if the disintegration of the social order that Mishan perceives is to be halted and turned around, the Justices cannot shirk participating in the task. The same sort of attitude that permitted the Supreme Court in 1954 to grasp the nettle of racial discrimination should prevail for other polycentric social questions. Americans should demand no less from the black-robed justices who work in the Temple on the Hill.

Legislative Reapportionment

To repeat: *Brown* and progeny, both judicial and legislative, successfully altered the formal Constitution and, during America's Golden Age, the operative Constitution, because an economy of abundance characterized the United States. With economic growth slowing or even ending, the consensus that held the nation together since 1945 is falling apart. The spinoffs from *Brown* and the legislative reapportionment cases,⁸³ have made this disintegration both possible and inevitable. The black vote, insofar as blacks vote in a bloc, becomes of great importance in political campaigns (particularly for the presidency). The apportionment decisions, mandating one person/one vote, came precisely when whites began to flee to the suburbs from the large cities. Not by mere chance did Raoul Berger, among others, single out *Brown* and *Baker v. Carr*,⁸⁴ the key apportionment decision, for particularly harsh criticism.⁸⁵ *Baker* and its aftermath, buttressed by the Voting Rights Act of 1965,⁸⁶ made bloc-voting crucial in key cities. People long bereft of political power could now make their weight felt, particularly in presidential elections where the Electoral College is still used. (The College works only because of widespread acceptance of the no-

83. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964). *But see* *City of Mobile v. Bolden*, *supra* note 72, and articles cited in notes 72 and 73 *supra*.

84. 369 U.S. 186 (1962).

85. R. BERGER, *GOVERNMENT BY JUDICIARY* (1977). *See also* L. CRAGLIA, *DISASTER BY DECREE* (1976). Berger's book is the subject of a symposium in 6 *HASTINGS CONST. L.Q.* No. 2, at 403-662 (1979).

86. Pub. L. 89-110, 79 Stat. 437, (codified at 42 U.S.C. §§ 1971, 1973-1973p (1970)).

tion, not in accord with the intentions of the Framers, that electors vote in accordance with the popular vote.)

Baker emanated from an especially pernicious situation in Tennessee, where the state legislature, contrary to the Tennessee Constitution, had failed to reapportion the legislature for sixty years. That meant that voters in rural areas had a grossly disproportionate number of representatives. After several failed attempts to have the system declared unconstitutional, the practice became so bad as to offend a majority of the Justices. In 1962, they ruled that an equal protection violation had been presented. Two years later the Court went the full distance and decreed that voting districts had to be as nearly equal in population as possible, both for state legislatures and the federal House of Representatives.⁸⁷ The principle was subsequently applied to local governments.⁸⁸

Again, a furor erupted, led by academic disciples of Justice Frankfurter, who thought the Court had not properly reasoned its decisions and had not exercised a proper amount of self-restraint.⁸⁹ Oddly, however, unlike the reception of *Brown*, the apportionment decisions have been placidly accepted by public and politicians alike. Frankfurter thought the voters in Tennessee could and should ask state politicians, in effect, to vote themselves out of office. Even a federal judge who was once a law professor should have known better. He carried his mistaken views about judicial self-restraint to absurd lengths. Another dissenting Justice, John M. Harlan, waxed even more choleric in 1964: he grumbled that the one person/one vote decisions “give support to a current mistaken view . . . that every major social ill in this country can find its cure in some constitutional ‘principle’, and that this Court should ‘take the lead’ in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. . . . This Court . . . does not serve its high purpose when it exceeds its authority even to satisfy justified impatience with the slow workings of the political process.”⁹⁰

87. See cases cited in note 83 *supra*.

88. *Avery v. Midland County*, 390 U.S. 474 (1968).

89. *E.g.*, A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 167 (1970).

90. *Reynolds v. Sims*, 377 U.S. 533, 624-25 (1964) (dissenting opinion).

That statement, to speak gently, is simply not adequate. Not only did Harlan seek to differentiate a “judicial body” from the “political process,” which for the Supreme Court is at best fallacious, he also asserted that his colleagues had exceeded their authority. That simply is not true. Nowhere is it prescribed, in the Constitution, statutes, or rules of the Supreme Court itself, what the authority of the Court is. Since almost the beginning of the republic, that authority has been what the Justices say it is, and what, politically, they can get away with. Frankfurter and Harlan, furthermore, badly misread the social tea leaves in their impassioned dissents; people have accepted the Court’s rulings on reapportionment, whether reasoned or not. Ideally, it doubtlessly would be better if the political process were adequate to manifest long-denied needs. But at times it is not, as Harlan conceded. How, possibly, could he and Frankfurter have thought that politicians would reform themselves and voluntarily give up some of their power. Surely, Judge Wright’s statement⁹¹ is closer to the realities of the constitutional order. For present purposes, the lesson of *Baker* and progeny is clear and unmistakable: they classically exemplify an affirmative constitutional duty imposed by judges upon the political branches of government. Since 1964 state legislatures have been restructured, at times after a direct command from a judge. Compliance has occurred. At this writing, another round of apportionments is taking place as a result of the 1980 census. The rotten boroughs of the nation have been easier to eradicate, therefore, than racial discrimination—a lesson to be pondered when one reflects on the political power of the courts.

The suggestion here is not that the products of state legislatures after reapportionment differ markedly from the past. It is far too simplistic to believe that legislators vote on a rural-urban split. The reapportionment decisions did little to cure the real ills of the political process. But the significance of *Baker* and subsequent decisions lies in the creation by the Justices of an affirmative duty on the part of politicians to do certain things, simply because the Justices so read the Constitution. That the Justices have prevailed is itself an important lesson in politics as the art of the possible, a lesson that surely can be applied elsewhere.

91. See text accompanying note 70 *supra*.

Other Examples

No need exists to multiply the examples where the Justices have acted as commander. Sometimes their command is couched in permissive language, as in the 1980 decision allowing patents to be issued for the creation of new forms of life.⁹² At other times, they are direct and pointed. *Miranda v. Arizona*⁹³ is an example of the latter. One of the most criticized of all recent decisions, *Miranda* set forth a code of conduct for officers to follow when someone is arrested. Affirmative duties thus were imposed on police officers throughout the nation, even though the lawsuit nominally concerned Miranda and the state of Arizona. Miranda was important to the ruling only because, as with divers others before and after him, he was necessary to trigger the mechanism of the Court.

Another example is the well-known and controversial rulings in the *Abortion Cases*,⁹⁴ where the Court decreed that a woman had a right to an abortion limited only by the duration of her pregnancy. A trimester system was established, under which abortions could not be prevented during the first three months, while during the second three months a steadily increasing societal interest in the viability of fetuses made abortions regulable by the states. During the final three months, abortions were permissible only in extreme circumstances. Again, a set of general rules was promulgated; and again, the litigants were unimportant.

Judges in both federal and state courts caught the cue from the Supreme Court; they, too, occasionally issue commands. We have already mentioned Judge Frank Johnson's mind-boggling decrees, that since Alabama's treatment of mental patients and prisoners violated the Constitution, the appropriate remedy was complicated administrative procedures established by Johnson. In Boston, Judge Arthur Garrity declared the school system to be in receivership and ordered busing

92. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

93. 384 U.S. 436 (1966).

94. I happen to believe that these cases, *supra* note 15, were decided correctly; and that those who criticize the Court, particularly Blackmun, J., for the reasoning in the opinion miss the mark. Other parts of the book from which this article is derived develop in some detail the idea of reason and its application in judicial decisionmaking.

to achieve racial integration.⁹⁵ As for the states, an outstanding example came in New Jersey, where its supreme court ordered the legislature to enact a financing scheme to improve schools on pain of having them closed by court order.⁹⁶

I do not suggest that Judges Johnson and Garrity or the New Jersey Supreme Court have been able to translate their bare-bones orders into operational reality. There is a long, long road between judicial decision and full compliance. What is important for present purposes is to see the growing willingness of judges to actively intervene in politics and to command obedience to judicial decrees. One can agree with Professor Nathan Glazer that “the courts truly have changed their role in American life” and have reached deeper into the lives of people than “they ever have in American history.”⁹⁷ But one need not—one should not—agree with Glazer when he maintains that this is “against the will of the people.”⁹⁸ Some people perhaps, but certainly it is the people themselves, many of them new types of litigants (the poor, the disadvantaged, women, etc.), who are energizing the judiciary. Impotent politically, these people see judges as their final hope. Given this, activist judges may be the final desperate hope of a crumbling system of American constitutionalism for salvation from its own inequities and inconsistencies. The litigants believe the incessant rhetoric about democracy and the rule of law; they call upon an oligarchic judiciary to further democratic ends. That may be a paradox, but it is the truth.

95. *Morgan v. Kerrigan*, 379 F. Supp. 410 (D. Mass. 1974); *aff'd* 509 F.2d 580 (1st Cir. 1976); *cert. denied, sub nom., White v. Morgan*, 426 U.S. 935 (1976).

96. *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (Super. Ct. Law Div. 1972), *cert. denied*, 414 U.S. 976 (1973), *modified*, 62 N.J. 473, 303 A.2d 273 (1973); 119 N.J. Super. 40, 289 A.2d 569 (Super. Ct. Law Div. 1972), *cert. denied*, 414 U.S. 976 (1973), *modified*, 62 N.J. 473, 303 A.2d 273 (1973); 67 N.J. 35, 335 A.2d 6 (1975); 67 N.J. 333, 338 A.2d 193 (1975); 69 N.J. 133, 351 A.2d 713 (1975), *cert. denied*, 423 U.S. 913 (1975); 69 N.J. 449, 355 A.2d 129 (1976), 70 N.J. 155, 358 A.2d 457 (1976), *modified*, 70 N.J. 464, 360 A.2d 400 (1976).

97. Glazer, *Towards an Imperial Judiciary*, 41 PUB. INTEREST 104, 106 (1975).

98. *Id.* For criticism, see Miller, *Judicial Activism and American Constitutionalism: Some Notes and Reflections*, in CONSTITUTIONALISM 333 (Nomos XXI, J. Pennock & J. Chapman eds. 1979).

IV

The Court as commander requires affirmative cooperation from other governmental officers. The Justices can pronounce, but they cannot administer. Even federal judges in lower courts, such as Johnson and Garrity, find detailed administration beyond their capacities. So judges must trust the good will of politicians to carry out their decrees. That means litigants, too, must trust the good will of politicians. No doubt it would be better were that not true. Many officers who should administer the law of the land as stated by the Court, do not; they are reluctant and often defiant. Even with the best of intentions, which doubtless many have, administrators also must contend with possible public disapproval.

That has an important effect. The Supreme Court interprets the Constitution but politicians, bureaucrats and lower-court judges interpret the Court. Those entrusted with administration oftentimes apply obscure commands. In so doing, they have considerable discretion. This has long been known, but seldom analyzed in depth. Few have inquired into the extent of compliance with the Supreme Court's rulings. Judicial opinions do not enforce themselves. In a widely-quoted statement, Bishop Hoadly said: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them."⁹⁹ The Justices may have "absolute authority" to interpret the Constitution, but those interpretations must be transmuted into operational reality by literally tens of thousands of other governmental officers who were not before the bar of the Court.

Compliance, thus, often is chancy, especially so when Court opinions are written in opaque language. The Justices, moreover, cannot possibly predict all of the factual situations that might arise in which their general norms are applied. Nor can they expect those who are affected by administrative actions to be aware of what the Court has said. Ambiguity in pronouncement plus uncertainty in application makes for uneven administration. Even in the best of circumstances, lawyers are adept at distinguishing cases, showing that factual situa-

99. *Quoted in* W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS* 1 (5th ed. 1980).

tions differ in significant ways, to evade even unambiguous judicial decrees. Furthermore, constitutional decisions tend to produce new claims and thus new litigation, with the net result that constitutional law has become a lawyer's paradise—a fertile area for more and more work for more and more attorneys. The truly fundamental principles of American constitutionalism are being lost in a swamp of thousands of judicial rulings; the Supreme Court alone has produced some 450 fat volumes of reports, all of which are kept in law libraries and computerized files.

To summarize, freedom in the United States is as much positive as negative in nature. For a person to have freedom *to* participate and *to* attain goals central to the concept of human dignity he must have freedom both *from* the arbitrary exercise of governmental power and *from* inadequate social conditions that make it unlikely he can achieve that level. Courts do help, albeit imperfectly, in dispensing justice. Their fundamental task now is to help create something wholly new: a Constitution of Human Needs.¹⁰⁰

Why judges, some may ask? The short answer is that, as political as well as judicial officers, they cannot avoid the swirls and currents engulfing the body politic. Why not legislators and administrators, including the President? The short answer is that the system of governance established by the Constitution is not suited to the demands of our era. It worked well, by hindsight at least, during the nineteenth and first part of the twentieth centuries. Today, however, politics are in disarray. Serious students speak of the “ungovernability of democracy.”¹⁰¹ History since 1789 has seen a steadily expanding franchise and the rise of decentralized groups that dominate the government, at times even challenging the State's claim to sovereignty. The name for the political order is pluralism. In theory, people form groups, and out of the clashes between them something called the public or national interest is supposed to evolve. That is a romantic conception of politics, far from reality (although some use it to argue that the Supreme Court should have a lesser role). Political pluralism is Adam Smith economics writ large

100. In a forthcoming book, tentatively entitled *GETTING THERE FROM HERE: TOWARD A CONSTITUTION OF HUMAN NEEDS*, I am developing this idea in some detail.

101. *E.g.*, Professor Samuel Huntington. See Huntington, *The United States*, in M. CROZIER, S. HUNTINGTON & J. WATANUKI, *THE CRISIS OF DEMOCRACY* 59 (1975).

and transferred to politics. It is no more valid there than in economics. Why judges? Because there is no alternative, if the American system of constitutionalism is to be saved.

I am not suggesting, of course, that the Court as commander is always followed. Far from it. Recent decisions, such as *Haig v. Agee* and *Dames & Moore v. Regan*¹⁰² display a tendency on the part of the present Justices to defer to the political branches of government. That posture of deference, of judicial self-restraint, runs counter to the thesis propounded in this article. Nevertheless, most members of the Court today were on the bench when *Roe v. Wade* was decided; of greater importance, there is no evidence that the Justices will not impose affirmative duties in appropriate situations. Certainly, it is true that they have not repudiated the theory of *Cooper v. Aaron*¹⁰³—that their decisions are “the law of the land”—nor of *Reynolds v. Sims*.¹⁰⁴ The Justices have more than an umpire’s function, as Justice William Brennan noted in 1980:

Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a co-ordinate branch of *government*. While individual cases turn upon controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. . . .

The interpretation and application of constitutional and statutory law, while not legislation, is lawmaking, albeit of a kind that is subject to special constraints and informed by unique considerations. Guided and confined by the Constitution and pertinent statutes, judges are obliged to do discerning, exercise judgment, and prescribe rules. Indeed, at times judges wield considerable authority to formulate legal policy in designated areas.¹⁰⁵

102. *Haig v. Agee*, 101 S. Ct. 2766 (1981); *Dames & Moore v. Regan*, 101 S. Ct. 2972 (July 2, 1981). In the same vein, see *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981).

103. 358 U.S. 1, 18 (1958).

104. 377 U.S. 533 (1964).

105. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 and n. 20 (1980) (concurring opinion).

In that extraordinary statement, Brennan acknowledged what I have argued in this article. First, general principles are inferred from one particular situation, even though that is logically impossible; individual cases impose official and practical consequences upon members of society at large. Second, the Court is indeed, at times, an affirmative commander; it can formulate legal policy.

While several problems of the new role of the Supreme Court have been outlined above, the essential question, which Court critics tirelessly repeat, goes to the legitimacy of the Court as commander. If, as the late Professor Alexander Bickel wrote, "*Brown v. Board of Education* was the beginning,"¹⁰⁶ surely it is accurate to say that we have not yet seen the end of judicial lawmaking. The form it will take, the issues that will be involved, may be difficult to predict; but the position of power of the fourth major development in Supreme Court history is not one that will soon be abdicated.¹⁰⁷

106. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 7 (1970).

107. Cf. White, J., dissenting in *Miranda v. Arizona*:

The Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has . . . in interpreting other great clauses of the Constitution. This is what the Court historically has done. *Indeed, it is what we must do and will continue to do until and unless there is some fundamental change in the constitutional division of governmental powers.*

384 U.S. at 531 (emphasis added).