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## THE SUPREME COURT: STATESMEN AND JUSTICES

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### CRITICISM

RESPONSIBLE criticism made of the Supreme Court's opinion writing in 1958 would probably command somewhat general agreement today. Some of the suggestions offered in that year included the following: there should be fewer essays written with greater care given to those prepared; more advantage should be taken of the case-to-case development of the law; contradictory holdings and misleading generalizations should be reduced; past Court holdings, opinions and doctrines should be given greater respect without restricting the Court's freedom to overrule; and inquiry should be made as to the Court's tendency toward manipulating technical doctrines in order to produce substantive results in given cases.<sup>1</sup>

Intemperate judgment during the first session of the 89th Congress by presumably responsible legislators would command considerably less agreement in most quarters. This censure went beyond criticism of opinion writing and included criticism of judicial experience, functions and powers, as well as the role of the Court. In discussing legislation relating to an increase in the salaries of Supreme Court justices, many derogatory comments were made on the floor of the House of Representatives. One legislator said that, since they legislate on everything else and disregard the Constitution, let them legislate on their own salaries.<sup>2</sup> Another said that if "they are going to assume the leg-

<sup>1</sup> 1 DAVIS, *ADMINISTRATIVE LAW* v. (1959).

<sup>2</sup> 111 CONG. REC. 5127 (daily ed. March 17, 1965) (remarks of Representative Jones from Mo.).

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islative function, let them be paid on that basis."<sup>3</sup> It was also stated that members of the Court have no basis for assuming that they are the best lawyers in the country, when many lawyers in the House are far superior to them.<sup>4</sup> "[O]f the nine members of the U.S. Supreme Court, there is a total of 13 years' prior judicial experience if you count 1 year as a police judge for Justice Black. . . . And of those nine members, one member, Justice Brennan, has had well over half of that total experience, he having had 7 years prior judicial experience."<sup>5</sup> Another criticism expressed was that the members of the Court had not been performing duties which were set forth for them in the Constitution, and lawyers, due to overturned decisions, could not determine what was the law of the land.<sup>6</sup>

Other opinions as expressed below are highly questionable. One expressed the view that the Court "has no right to reverse an initial decision ascertaining intent and extracting a constitutional principle and thereby in effect to amend the Constitution."<sup>7</sup> Stated as a truism was that the Constitution and its amendments always retain the same meaning that they had when they were adopted.<sup>8</sup> Another equally disputable comment asserts that:

[t]he Supreme Court violated the law of legal precedent by ignoring and refusing to follow its own prior decisions which hold that separate but equal school facilities met Constitutional requirements under the 14th Amendment; it violated the law by its usurpation and exercise of power and authority that was never intended that it should have or exercise by the framers and adopters of the Constitution . . ."<sup>9</sup>

The following casts doubt on whether it is a legitimate function of the Court to make policy at all: "In his sophomore year he [Mr. Justice Goldberg] gave ample evidence that he would run second to none in effectuating reforms in our body politic."<sup>10</sup> It is unfair to say

<sup>3</sup> *Id.* at 5127 (remarks of Representative Waggoner from La.).

<sup>4</sup> *Id.* at 5132 (remarks of Representative Jones from Mo.).

<sup>5</sup> *Id.* at 5133 (remarks of Representative Ichord from Mo.).

<sup>6</sup> *Id.* at 5135 (remarks of Representative Jones from Mo.).

<sup>7</sup> Nichols, *An Appeal to Save Our Written Constitutional Form of Government*, 13 DE PAUL L. REV. 15, 16 (1963).

<sup>8</sup> *Id.* at 20.

<sup>9</sup> *Id.* at 27.

<sup>10</sup> Kurland, *The Supreme Court, 1963 Term, Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 160 (1964).

of the Court that it “will continue to play the role of the omniscient and strive toward omnipotence.”<sup>11</sup>

#### RENUNCIATION

The Justices over the years have adopted rules and processes, not only to control their calendar, but to control untoward extensions of their judicial and political power. In many instances, they have declined to use power that resided in the Court. The refusal to render advisory opinions has been long established and continues as an unquestioned doctrine.<sup>12</sup> In 1938, the opinion of Mr. Justice Brandeis in *Erie Railroad Co. v. Tompkins*<sup>13</sup> halted the development of a body of federal common law in diversity cases, and stated that the law to be applied was the law of the state, thus stifling the trend toward a federal common law begun with the decision of *Swift v. Tyson*.<sup>14</sup> The doctrine of the “political question,” developed in *Luther v. Borden*,<sup>15</sup> is a renunciation of power. Deference to executive discretion is exemplified in *United States v. California Eastern Line, Inc.*<sup>16</sup> The “standing” requirement and insulation of federal spending from state or individual attack are not vehicles for the use of increased judicial power.<sup>17</sup> *Ex parte McCordle*,<sup>18</sup> giving Congress virtually complete control over the Court’s appellate jurisdiction, has not been overruled. The “case or controversy” and “ripeness” requirements continue as self-imposed limitations on the Court’s reception of a case.<sup>19</sup> The “presumed validity” rule of *Williamson v. Lee Optical of Oklahoma*<sup>20</sup> is virtually the death knell of substantive economic due process. The Court’s invitations to the political processes of the states to resolve problems before the court takes further action, after its initial handling of the problem, indicate a deference to the state. The court will not interfere in the matter unless the state is unable to resolve the problem or lacks the inclination to do so. In *Baker v. Carr*,<sup>21</sup> the holding that

<sup>11</sup> *Id.* at 175.

<sup>12</sup> *Alabama v. Arizona*, 291 U.S. 286 (1934).

<sup>13</sup> 304 U.S. 64 (1938).

<sup>15</sup> 48 U.S. (7 How.) 1 (1849).

<sup>14</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>16</sup> 348 U.S. 351 (1955).

<sup>17</sup> *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

<sup>18</sup> 74 U.S. (7 Wall.) 506 (1869).

<sup>19</sup> *International Longshoremen’s Union v. Boyd*, 347 U.S. 222 (1954).

<sup>20</sup> 348 U.S. 483 (1955).

<sup>21</sup> 369 U.S. 186 (1962).

there was standing, jurisdiction and justiciability had the effect of inviting the states to use their power to remove invidious discrimination in the distribution of voting strength. The *Brown v. Board of Education* cases<sup>22</sup> were also matters in which the Court moved slowly, so as to allow the states time to move with "all deliberate speed." Someone has suggested that the states have been allowed so much leeway that now "all deliberate speed" serves the same ends that "separate but equal" served before. In the field of the administration of criminal justice the Court has given warning and encouragement to the states to reexamine their constitutional standards. For example, the Court, in *Elkins v. United States*,<sup>23</sup> abolished the "silver platter" doctrine, thereby giving notice that the fourth amendment might be absorbed into the fourteenth amendment, and it was so absorbed with reference to state action in 1961.<sup>24</sup>

Mr. Justice Brandeis, in his concurring opinion in *Ashwander v. Tennessee Valley Authority*,<sup>25</sup> set forth rules under which the Court would refuse to exercise jurisdiction over constitutional questions undoubtedly within its jurisdiction. These rules, in substance, are that friendly, non-adversary proceedings cannot set the stage for constitutional proceedings, a constitutional question will not be anticipated before it is necessary to decide it, the decision of the Court will be no broader than required, a dispute will be decided upon a nonconstitutional ground if one exists, one must show injury to be entitled to raise a constitutional question, one who takes the benefits of a statute cannot question its constitutionality, and the Court will avoid determining a statute's constitutionality by adopting a construction which avoids the constitutional issue if such action is possible.

Thus, it would seem that there is a continuing history of Court refusal to exercise power and authority it could exercise. Relinquishment of power and self-restraint are not evidences of "usurpation."

#### POLITICAL

Politics is the art of the possible, and the possible entails compromises that will enable the political processes to work. Inevitably, compromises have their imperfections, mistakes and margins of error. Since the Supreme Court is part of the political process, compromises

<sup>22</sup> 347 U.S. 483 (1954); 349 U.S. 294 (1955).

<sup>23</sup> 364 U.S. 206 (1960).

<sup>24</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>25</sup> 297 U.S. 288, 346-48 (1936).

are often necessary to get a majority decision. However, there must be some final authority to provide the answers to pressing social problems that cannot, or will not, be answered by the other organs of the body politic, even though compromise and mistake are sometimes part of the end product.

The Court has been arriving at political decisions ever since *Marbury v. Madison*,<sup>26</sup> wherein it set itself above the other two branches as the final authority in regard to the meaning of the Constitution. This was the beginning of the Court's trip down the long, wavering path of deciding where certain powers should be lodged when called upon in the appropriate case or controversy. Moreover the tools, mechanisms and craftsmanship of the lawyer are used to arrive at what are usually political decisions with regard to solving problems between branches of government, between a branch of government and a person, and between persons. The lawyer realizes that his case will be decided according to certain legal rules, principles, and traditions; but even the better lawyer, who recognizes the relevant law well in advance, knows that he will not be able to discern what the judgment will be in his own case.<sup>27</sup> The following illustrates the role of politics in this legal picture:

A "constitution" is a matter of purest politics, a structure of power. "Law" is the machinery—courts and concepts, steel bars and statutes—for dealing with conflict between man and man, and with infractions of public order. The term "constitutional law" symbolizes an intersection of law and politics, wherein issues of political power are acted upon by persons, trained in legal tradition, working in political institutions, following the procedures of the law, thinking as lawyers think.<sup>28</sup>

[The Supreme Court] is at once a judicial and political body. It is judicial in that its usages are of a court of law. . . . It is political in that its orders extend far beyond the individuals immediately involved; it fixes conditions and sets bounds about the resort to law; it revises the pattern of separation of powers among the agencies of government; it endows with intent, discovers latent meaning and resolves conflicts between legislative acts; it invokes Constitution, statute, its own decisions, to hold Congress, department, administrative body in place. Even when it imposes self-denial upon itself, politically it extends the frontiers of some other agency of control. Judgments along these lines are political, not legal, decisions. Issues of due process, equal protection, privileges and immunities are questions of the limits of the province of government.<sup>29</sup>

<sup>26</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>27</sup> *The Supreme Court in the American Constitutional System*, 33 NOTRE DAME LAW. 521, 553 (1958).

<sup>28</sup> BLACK, PERSPECTIVES IN CONSTITUTIONAL LAW 1 (1963).

<sup>29</sup> Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1324 (1941).

American constitutional law is primarily political theory dressed in lawyers' language, and . . . justices of the United States Supreme Court, when they act in constitutional law cases, deal with juristic theories of politics. . . . Juristic theories of politics are propositions of political theories put into terms of rights and obligations.<sup>30</sup>

The Court is a part of the political process as are the governmental agencies, the Congress and the President.

#### JUDICIAL

It is not necessary that Supreme Court justices have prior judicial experience. In their dual role of judge and statesman, some of the finest have served without judicial experience, including Justices Frankfurter, Stone, Warren, Brandeis, Taney, Story, and Marshall. Mr. Justice Frankfurter said that one "is entitled to say without qualification that the correlation between prior judicial experience and fitness for the function of the Supreme Court is zero."<sup>31</sup> Wisdom, objectivity, knowledge of life, a sense of professional responsibility, an appreciation of the traditions and techniques of the law, broadness of experience, knowledge of history and logic, a sense of values, a strong conviction as to the role of the Court, judicial integrity, and a sense of duty, morality and ethics are all important if the justice is successfully to complete his work.

Theodore Roosevelt recognized and emphasized the political consideration in the appointment of a justice when, speaking of Justice Holmes, he said: "I should hold myself guilty of an irreparable wrong to the nation if I should put . . . [in this vacancy] any man who was not absolutely sane and sound on the great national policies for which we stand in public life."<sup>32</sup> Again it is social philosophy, and not judicial experience, that the same president emphasized in a message to Congress:

The chief lawmakers in our country may be, and often are the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy, and as such interpretation is fundamental, they give direction to all lawmaking. The decisions of the courts on economics and social questions depend upon their economic and social philos-

<sup>30</sup> Latham, *The Supreme Court as a Political Institution*, 31 MINN. L. REV. 205, 205-6 (1947).

<sup>31</sup> Frankfurter, *The Supreme Court in the Mirror of the Justices*, VITAL SPEECHES OF THE DAY, 434, 436 (1942).

<sup>32</sup> CARR, *THE SUPREME COURT AND JUDICIAL REVIEW* 239 (1942).

ophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive and social conditions.<sup>33</sup>

#### LEGISLATING

Separation of powers does not prevent the justices from legislating. In the tradition of the common law, they may make law on a case-to-case basis. They make law when there is no law on the subject, when there are conflicting precedents, when Congress fails or refuses to legislate,<sup>34</sup> when Congress cannot conceivably legislate in detail,<sup>35</sup> and where Congress, aware of the problem, is seemingly inviting the Court to manage it.<sup>36</sup>

While the nine men on the Court, with their varying backgrounds and philosophies, make law, they do so within the confines of legal techniques and traditions, as well as the “case or controversy” requirement. Mr. Justice Holmes realized that judges are lawmakers when he said “I recognize without hesitation that judges must and do legislate. . . .”<sup>37</sup>

Moreover, legislatures, courts and governmental agencies have all created laws in the fields where administrative law applies. All issues not covered by statute can be decided by the courts no matter how narrow or unique. However, the courts tend to limit their power to broader issues than those that will only affect a particular case. Thus, the broadest policies are decided by legislatures, the narrowest ones by agencies, and the remaining ones by courts.<sup>38</sup> The role that the courts generally play in making law has been expressed as follows:

[O]ur courts have made most of our law, the mass of our common law. Courts do make law. It is their business to make law. At least that is true of appellate courts.

Some say that this system of judge-made law does not fit in with the ideal of a government by law and not by men. But who is to make our laws if not men. It is because there are none that are really in point, or because there are too many and they point confusedly in different directions, or perhaps some ancient

<sup>33</sup> 43 CONG. REC. 21 (1908).

<sup>34</sup> An example of the failure of Congress to legislate was the matter of providing equal protection. Until recently, the vacuum as to such matters was filled by the Court.

<sup>35</sup> Sherman Anti-Trust matters is an example.

<sup>36</sup> For many years, Congress seemed to invite the Court's management of matters involving state taxation where interstate commerce was involved.

<sup>37</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917).

<sup>38</sup> DAVIS, *ADMINISTRATIVE LAW TEXT* 556-57 (1959).

precedent does seem to apply but is illogical, or contrary to common understanding, out of keeping with the spirit of the time. . . .<sup>39</sup>

#### PRECEDENT

Precedent is not the terminal point of the law. It does not and should not forever fix its meaning. It is a guide, the best we have as to what the law should be, but it is not the irrevocable answer. "The inn that shelters for the night is not the journey's end. The law like the traveler must be ready for the morrow. It must have a principle of growth."<sup>40</sup>

Chief Justice Taney, in 1849, pointed out that the opinion of the Court in construing the Constitution is always open to discussion when such construction appears to be in error, and that precedent should depend on the force of the reasoning that supports such judicial authority.<sup>41</sup> In 1842, Justice Story said that decisions are often reviewed, reversed, and modified by the courts themselves whenever they are found to be in error.<sup>42</sup> Justice Brandeis' dissent in *Burnet v. Coronado Oil and Gas Co.*,<sup>43</sup> in saying that the Court has yielded to better reasoning and has recognized the process of trial and error as an appropriate judicial function, is to the same effect.

The rules and principles of case law, according to Mr. Justice Cardozo, have always been considered as tentative theories which have continually been reexamined by the courts. When the accepted rule yields what appears to be an unjust result, the rule has been considered again by the judiciary.<sup>44</sup> Thus, if pushing logic to its extreme would lead to an unjust result, the law should not be followed because justice is the ultimate objective of the law. It has been stated that when the law results in the denial of any remedy, it may have the beauty of logic but the ugliness of injustice.<sup>45</sup> Mr. Justice Holmes viewed logic as but one of the factors to be considered in the development of the law. Some of the factors which operate to determine the law besides the legal syllogism are the necessities of the time; the

<sup>39</sup> *The Role of the Supreme Court*, 44 A.B.A.J. 534, 536 (1958).

<sup>40</sup> CARDOZO, *THE GROWTH OF THE LAW* 20 (1924).

<sup>41</sup> *Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (dissenting opinion).

<sup>42</sup> *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

<sup>43</sup> 285 U.S. 393 (1932) (dissenting opinion).

<sup>44</sup> CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 23 (1921).

<sup>45</sup> Mitchell, *The Anatomy and Pathology of the Constitution*, 67 JURIDICAL REV. 1, 20 (1955).

prevailing moral and political theories; the public policy; and the prejudices of the judges.<sup>46</sup>

Mr. Justice Cardozo enunciates the directions principles may take in determining the growth of the law. Analogy might be most persuasive in one situation, historical development might be of more importance in another, custom and tradition might tip the scales in the next, while justice, morality, *mores*, and social welfare (the methods of sociology) might be the deciding factors in another judicial determination.<sup>47</sup>

It would not be practicable to adopt a rule that a judicial interpretation of the Constitution by the Supreme Court could not be modified by a later decision; that such a change should come about only by constitutional amendment. The power of the dead over the living would be too far extended.<sup>48</sup>

#### INTERPRETATION

The Constitution, consisting of less than 7,000 words, has its particularizations and its generalizations. The two houses of Congress, entitlement of each state to two senators, and the oath of the President are particularizations or specifics, and they have a fixed meaning. Due process, equal protection and liberty are generalizations, or broad concepts, that acquire new meanings as society's values change and as new generations mature. "A word is not a crystal, transparent, and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."<sup>49</sup> The evolving meaning of words in the Constitution finds expression in the following:

It is no answer to say that the particular need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow interpretation that Chief Justice Marshall uttered the memorable warning—"We must never forget, that it is *a constitution* we are

<sup>46</sup> HOLMES, *THE COMMON LAW* 1 (1881).

<sup>47</sup> CARDOZO, *op. cit. supra* note 44 at 30-1.

<sup>48</sup> Menez, *A Brief in Support of the Supreme Court*, 54 Nw. U.L. REV. 30, 53 (1959), citing an address by former Associate Justice Stanley Reed before the Bar of the City of New York.

<sup>49</sup> *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

expounding, a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."<sup>50</sup>

Many feel that the gift of the Constitution lies in the generality and adaptability of its language. Whether or not this is true, the fact remains that the imprecise nature of constitutional grants and limitations has caused the Court to be in a "continuous process of constitution-making."<sup>51</sup>

How may the interpretation that the framers meant to give be determined? Is it the intention of all, some, a majority, or just the one who expressed himself? Is it the intention of those who ratified? Maybe no intention can be discovered. Possibly the compromises that led to a particular provision deliberately made the provision vague so as not to precipitate a disagreement that could not be resolved. How the framers would have decided the meaning of a word or provision might be of benefit to a contemporary determination of the meaning of the phrase or word, but only if the court directed its attention to analyzing what the framers would have decided if they had given the matter particular attention, and if they had viewed the matter in terms of the particular problem in contemporary circumstances, using the current understanding of the language in the context of the Constitution as presently comprehended.

#### DECISION MAKING

While the justices are men sworn to defend the Constitution, difficulty arises in determining whose values, whose interpretations, whose philosophy and what precedents are to be followed. Should Justice Douglas have warmly embraced all of Justice Sutherland's opinions and philosophy? Should Justice Black have undeviatingly followed the law enunciated by Justice McReynolds? The Court in its time has developed different philosophies, different approaches, and different lines of reasoning which can be used as needed. "[O]nce a judicial opinion rationalizes such an order . . . the principle then lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim. . . ."<sup>52</sup>

The ideal would be for the Justice to write his opinion as a prin-

<sup>50</sup> *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43 (1934), citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>51</sup> *Supra* note 27 at 540.

<sup>52</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

ciplined decision which rests upon general and neutral reasons that would apply to any immediate result in the future.<sup>53</sup> However, Professor Alexander Bickel has stated that there can be very few principles of this kind because of the nature of our society and the consensual basis of its effective law.<sup>54</sup>

The provisions of the Constitution have their essence in substance and not in form, and are to be considered in terms of their origin and growth.<sup>55</sup> The law is not an exact science. The idea that the law of the land is a complete and perfect set of maxims to be applied to every controversy vanished many years ago.<sup>56</sup> Law is prophesy of what the court will do in the future. It furnishes the basis for decision, and is the bridge between the old and the new.<sup>57</sup> Present dominant principles must maintain a thread of consistency with the past so that there will be an adequate point of departure for the transition from the present to the future.<sup>58</sup>

#### GOALS

The individual members of the Court decide the values the Court should advance and the role or roles the Court should play. The Court of Chief Justice Marshall emphasized federalism and strong central government. The consensus of the Court of Chief Justice Taney was that the police power and the reserved powers of the states were particularly worth promoting and advancing. The Courts of Chief Justice Waite and of Chief Justice Fuller promoted a philosophy consistent with, and conducive to, the rise of industrialism.<sup>59</sup> The Warren Court finds its goals in the protection and advancement of political and civil rights and freedoms.

<sup>53</sup> WECHSLER, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>54</sup> Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 48 (1961).

<sup>55</sup> *Gompers v. United States*, 233 U.S. 604, 610 (1914).

<sup>56</sup> ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* 432 (3rd ed. 1951).

<sup>57</sup> Holmes, *The Path of the Law*, COLLECTED LEGAL PAPERS 173 (1921).

<sup>58</sup> McKay, *The Supreme Court and its Lawyer Critics*, 28 FORDHAM L. REV. 615, 634 (1960).

<sup>59</sup> Promotion of this philosophy can be seen in Court decisions holding that corporations are persons within the meaning of the fourteenth amendment (*Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 1886), and that the income tax law was unconstitutional despite a century of precedent (*Pollock v. Farmers Loan and Trust Co.*, 157 U.S. 429, 1895).

While judicial passivism formerly was the attitude generally with reference to civil and political rights, and a form of judicial activism was the attitude with reference to economic matters, the attitudes have been reversed since the thirties. Where the legislative or executive action has the effect of impinging upon civil and political rights, the present assumption is that the action is contrary to the Constitution, and the Court will protect the rights of the people which the other branch of government failed to protect by its interpretation of the Constitution. The Court presumes validity in economic matters, contrary to its pre-1937 philosophy, and does not presume validity in voting or free speech or equal protection matters.

The Court no longer purports to discover the law. As part of the political process, it helps supply the contours to our democratic processes by defining and redefining the values that go to make up the same. Its opinions are a means of teaching the ways of attaining the democratic goals and the pitfalls that must be avoided to attain these goals. The Court's concern extends beyond merely that which is prohibited. The Court has changed

from an "aristocratic censor" to "keeper of the nation's conscience" from, that is to say, a "negative" check on government to an "affirmative" instrument of governance. This is being accomplished in two ways: by progressive interpretation of constitutional terms and by interpretation of statutes.<sup>60</sup>

Occasionally, the Court attempted to interpret the national conscience in the past. Justice Harlan, in his dissent in *Plessy v. Ferguson*,<sup>61</sup> misinterpreted it in his opposition to "separate but equal." He was years ahead of his time. In *Dred Scott v. Sandford*,<sup>62</sup> the Court grossly misinterpreted the nation's conscience and in so doing, severely damaged its prestige.

Professor McCloskey speaks of a balance between the doctrine of popular sovereignty and the rule of law. He believes that the Court has become a revered institution which has both judicial and political functions, which is sensitive to, but is not bound by, popular opinion, and which shares its duty of statesmanship while being aware of its capacities.<sup>63</sup> When the Court satisfies popular expectations, it is prob-

<sup>60</sup> Miller, *The Changing Role of the United State Supreme Court*, 25 MODERN L. REV. 641, 642 (1962).

<sup>61</sup> 163 U.S. 537 (1895).

<sup>62</sup> 60 U.S. (19 How.) 393 (1857).

<sup>63</sup> McCLOSKEY, *THE AMERICAN SUPREME COURT* 23 (1960).

ably doing so as a means to building its prestige so in turn it can successfully achieve its goals.<sup>64</sup> The following relates one view of what the general objectives of the Court are:

The judges are not experts by virtue of their training or commissions in the field of economics or public policy. They are, however, the special guardians of legal procedure, of the standards of decency and fair play that should be the counterpoise to the extensive affirmative powers of government. [T]here falls to the courts a vital role in the preservation of an open society, whose government is to remain both responsive and responsible.<sup>65</sup>

#### ANSWERS

Since the thirties, the Court has been most active in giving added meaning to due process and equal protection. Federalism has suffered because of the failure of the states to provide solutions to problems that demanded answers in terms of current concepts of fairness and equality.

*Powell v. Alabama*<sup>66</sup> and *Brown v. Mississippi*<sup>67</sup> were products of changing moral values, of a feeling that the voting strength of the criminally accused was not a factor in securing justice on the local level, of a feeling that the democratic goal is not merely the rule of law, but justice under the rule of law, of a feeling that low standards of criminal justice had to be raised to conform to the worth of the individual, and of a revulsion to the rising tides of totalitarianism.

Rights of ethnic minorities, particularly the Negro, began to develop in the context of the fourteenth amendment with the recognition that discrimination would be slow in disappearing as long as the political processes denied the power to participate by denying the ballot. Factors which served as catalysts to this realization were the rising influence of the African nations in the United Nations, the participation of the minorities in the wars, movement brought on by rapid transportation in a shrinking world, and automation and mechanization. When Congress could not, or would not, act on matters of racial equality, it was necessary for some agency of government to remove, or at least relieve, the pressures.

The Court moved into the field of legislative apportionment because the political agencies involved approved dilution of the individual's

<sup>64</sup> Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587 (1963).

<sup>65</sup> Freund, *The Supreme Court under Attack*, 25 U. PITT. L. REV. 1, 5-6 (1963).

<sup>66</sup> 287 U.S. 45 (1932).

<sup>67</sup> 297 U.S. 278 (1936).

vote and offered him no method by which he could secure equality. The routine political process did not work. Our current standard of equality required removal of this negation of democratic government. It has been said that:

[s]o long as the Federal Government continues to operate on a broad and flexible constitution capable of accommodating change in the world around us and on a philosophy that government is an instrument to accomplish the ends of society, while state governments operate on a nineteenth century statute masking as a constitution and a philosophy that government is no more than a policeman and a necessary evil, we may expect that continuation of the centralization of government power in the Federal government.<sup>68</sup>

It is true that the law does not provide a remedy for every wrong. This does not mean that the law should not keep trying. It does not mean that in redefining, reshaping, and furthering the values of our democratic society the Supreme Court should not, where possible, use the tools and doctrines of the law to fashion a remedy and thereby move toward attainment of the broad objectives of that most important living instrument of government, the Constitution.

<sup>68</sup> Flynn, *The Crisis of Federalism: Who is Responsible?* 51 A.B.A.J. 229, 232 (1965).