WHEN SHOULD THE LIONS BE ON THE THRONE?* REFLECTIONS ON JUDICIAL SUPREMACY

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I am honored to have been invited to deliver the first lecture in the J. Byron McCormick Society of Law and Public Affairs annual series. To accept such an invitation requires not only that a topic be selected, but that I decide in what capacity I speak. To speak as a judge, for example, imposes such restraints of discretion as almost certainly to guarantee a dull and boring performance. To speak as a citizen, however, quite arguably could take me away from the area of my expertise, the law, which would result in a lecture almost certainly rooted in ignorance.

I have solved my problem by reverting to my earlier occupation of professing the law and thus I speak to you as a professor of law, albeit, as some would say, a defrocked one. Professors know a great deal, some of which is not so, and for none of which do they offer a warranty. That suits my purposes perfectly. Treat what I have to say as professorial heresy if its obvious truth shines not forth for you.

My mask will not deceive you I dare say. You will realize that my remarks are influenced strongly, but not wholly, by my experience as a judge. Your perception will be correct. I want to speak to you about the state of the judiciary in this nation. That cannot be done without drawing on my judicial experiences and philosophy. I only plead that

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* "The twelve judges of the realm are as the twelve lions under Solomon's Throne. They must be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty." F. BACON, THE ESSAYS; COLOURS OF GOOD AND EVIL; ADVANCEMENT OF LEARNING 136 ("Of Judicature") (A. Pollard ed. 1925), *quoted in* C. BOWEN, THE LION AND THE THRONE 294 (1957). Another version appears in F. BACON, ESSAYS: OF JUDICATURE IN I. THE WORKS OF FRANCIS BACON 58-59 (Basil Montague, Esq. ed. 1852). "Let the judges also remember that Solomon's throne was supported by lions on both sides; let them be lions, but yet lions under the throne."

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you accord me a small bit of the latitude to which I was accustomed when serving as a law professor. If this demands too much, you will sometimes observe that on occasion in my remarks I preface my statements with the assertion that I am about to speak as an American citizen. Surely you will permit even a judge such a modest First Amendment right.

Assuming your kind invitation was intended to accord me my full First Amendment rights, and that you accept my self-imposed restraint against commenting on decisions rendered by the court on which I sit (comments I should avoid at all costs), let me now turn to my remarks and set before you several rather troubling scenes.

SOME TROUBLING SCENES

During the last Term of the Supreme Court a justice, with whom this audience is familiar, quite firmly announced in a case concerning prison conditions that there was no " 'one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment"[1] and that "a prohibition against receipt of hardback books, unless mailed directly from publishers, book clubs, or bookstores, does not violate the First Amendment rights of MCC [Metropolitan Correctional Center] inmates."[2]

During the same Term, the Court struck down a federal statute, section 407 of the Social Security Act,[3] as violative of the Due Process Clause of the Fifth Amendment because its gender based distinction discriminated against women and this discrimination was not substantially related to the achievement of an important governmental objective.[4] Its remedy compelled, in the words of Justice Powell, speaking for himself and three other justices, "exactly the extension of benefits Congress wished to prevent."[5] To implement its constitutional decision, the Court was required to extend either more benefits than Congress intended, or fewer, or to rewrite the statute entirely. Not surprisingly, on a five to four vote, it provided more benefits than Congress intended.

In the course of this Term, the Court, as is its custom, directed most of its constitutional scrutiny toward state laws and the practices of state officials. For example, in a unanimous decision, it disapproved the use by Texas of the "preponderance of the evidence" standard of proof in involuntary commitments to state mental hospitals and im-

1. Bell v. Wolfish, 99 S. Ct. 1861, 1875 (1979).
2. *Id.* at 1880.
3. 42 U.S.C. § 607 (1976).
4. Califano v. Westcott, 99 S. Ct. 2655, 2662-63 (1979).
5. *Id.* at 2665-66 (Powell, J., concurring and dissenting).

posed a "clear and convincing" standard.[6] The rejected standard offended the Due Process Clause of the Fourteenth Amendment.[7] More surprising than the result was the fact that the constitutionally adequate standard had been employed.[8] The petitioner had insisted only the "beyond a reasonable doubt" standard would conform to Due Process while the state had argued that the petitioner had gotten more than he deserved. Since the Court had the option of approving the standard of proof used as adequate, it could have waited for another day to proclaim its view. It chose not to.

Whether the Court's solemn haste in this instance will lead to future complications remains to be seen. In any event, one decision seldom settles all in any area of the law. Certainly this is the case with state election laws. More proof emerged when the Court struck down a remnant of the Illinois petition requirements for obtaining a place on the ballot as violative of the Equal Protection Clause of the Fourteenth Amendment. In this instance the Clause was equipped with the strict-scrutiny-compelling-state-interest-least-drastic-means fine mesh screen.[9] The oppressive remnant was what was left after several earlier excisions by various federal courts, including the Supreme Court.[10] It could no more serve rationally the purpose for which intended than can the ruin of a medieval castle. Nonetheless, the Court used its fine mesh screen and found the remnant deficient. A few months earlier, however, it had employed a rational-legislative-purpose screen in upholding Alabama statutes that permitted the extension of certain municipal powers to unincorporated surrounding areas without the concomitant extension of the franchise to residents of those areas.[11] The Court unquestionably employs different screens in determining the constitutionality of state election laws.

What at this point must appear to be a random sampling of recent Supreme Court decisions should be closed by reminding you that, although the Court used its Due Process and Equal Protection lancets with skill and determination, it did not neglect one of its older weapons, the Commerce Clause. It struck down an Oklahoma statute that prohibited the out-of-state shipment for sale of minnows "seined or procured within the waters of this state."[12] In doing so, it overturned a venerable prior decision, *Greer v. Connecticut*,[13] decided in 1896, and

6. Addington v. Texas, 99 S. Ct. 1804, 1810 (1979).
7. *Id.* at 1809-10.
8. *Id.* at 1813.
9. Illinois Bd. of Elections v. Socialist Workers Party, 99 S. Ct. 983, 990-91 (1979).
10. *See id.* at 986 n.1, 988.
11. Holt Civic Club v. City of Tuscaloosa, 99 S. Ct. 383, 390 (1978).
12. Hughes v. Oklahoma, 99 S. Ct. 1727, 1736-37 (1979).
13. 161 U.S. 519 (1896).

placed in some doubt the scope of the power of the states to regulate fishing and hunting within their borders.

Now let me shift the scene abruptly. Three years before *Greer* was decided, the Ninth Circuit Court of Appeals had three judges and only sixty-seven appeals were docketed. The figures for 1958 were nine judges and 459 appeals; 1968, nine judges and 1182 appeals; and 1978, thirteen judges and 2866 appeals. Since 1893, the number of cases docketed per authorized judgeship in our circuit has increased from 22.3 to 220.4. Caseloads within the entire federal judiciary have grown similarly. The national figures during the same period have grown from nineteen authorized circuit judgeships and 704[14] docketed appeals, to ninety-seven and 18,918, respectively.

The total number of federal judges has grown from eighty-four in 1893 to 495 in 1978. Last year Congress authorized an additional 152 judges, 117 district and 35 circuit judges. Bankruptcy judges in 1978 were given power to try all matters arising in bankruptcy proceedings,[15] thus eliminating the former necessity to resort to state or federal district courts for resolution of "plenary jurisdiction" matters. This has created a body of 217 judges nationwide whose work in many respects will be similar to that of district judges. An almost childlike yardstick to measure the impact of these very recent changes is that, while in 1978 the entire published annual output of the federal courts, other than the Supreme Court, occupied eight feet on a library shelf, the same output in the early 1980's will require at least ten feet. In 1940, only two feet sufficed.

There can be no mistake. Judicial activity has increased enormously in recent years. Much of the increase has occurred since the late fifties. The last ten years of this period, incidentally, have seen a sharp reduction in the rate of economic growth of the nation.[16]

Once more let me shift the scene. Return with me to California. Justice Stanley Mosk has called the work of the Commission on Judicial Performance "an ominous danger" to judicial independence everywhere.[17] The work of this Commission also has been branded by Professor Laurence H. Tribe of the Harvard Law School a "bizarre drama of a televised inquisition" which will cause injury to the nation's entire judicial system.[18] On the other hand, two members of the Com-

14. This does not include the District of Columbia Court of Appeals created February 9, 1893.

15. Pub. L. No. 95-598, 92 Stat. 2668 (codified at 28 U.S.C.A. § 1471(c) (West Supp. 1979)).

16. W. FELLNER, *The Declining Growth of American Productivity: An Introductory Note*, in CONTEMPORARY ECONOMIC PROBLEMS 1979 (W. Fellner ed.).

17. San Francisco Examiner, Aug. 15, 1979, at 34, col. 3.

18. Tribe, *Trying California Judges on Television: Open Government or Judicial Intimidation*, 65 A.B.A.J. 1175, 1176 (1979).

mission have resigned, and one of them has charged Justice Frank Newman with grievous obstruction of the Commission's work.[19]

Of more direct interest to the federal judiciary, but completely lacking the high drama for which so much of California life is known, is the fact that presently before Congress are a significant number of bills designed to oversee the conduct of federal judges. Senator DeConcini is a leader in this movement. Some would like to develop a procedure for removal of federal judges that Congress could oversee, but which would not require the utilization of impeachment for which Congress has little time and generally little interest. More moderate voices speak for a disciplinary system centered in the judiciary more or less subject to congressional oversight.[20]

In a similar vein there was enacted last year a financial disclosure law applicable to members of the Congress, top level members of the executive branch, and the judiciary.[21] So demanding is this law that the annual income tax return, in comparison, is a model of discreet concealment. In addition, the selection of federal judges has to some degree been made a process in which the public has a greater share.

Nor are these tendencies manifested only by measures to render judges accountable to someone at some time and in some manner. There exist efforts, as described by a state bar president, to "de-professionalize" the practice of law.[22] Lay members on boards of governors and attorney disciplinary bodies have become commonplace. So too have legislative efforts to curb the power of state bar associations. Critics say that bar examinations are biased against blacks and hispanics and, in any case, raise an artificial barrier to entry into the profession.[23]

Extreme proposals sometimes appear. For example, only recently a column in the *San Francisco Chronicle* called for a constitutional amendment that would permit "Congress, the legislatures, [or] some

19. *See* San Francisco Chronicle, Aug. 28, 1979, at 1, col. 5 (comments of Mr. Chodos).

20. On October 30, 1979, after this speech was given, Congress enacted the Judicial Conduct and Disability Act of 1979, the fruit of Senator DeConcini's efforts. *See* 125 CONG. REC. S15, 412-35 (daily ed. October 30, 1979) (final debate and discussion of the bill before adoption).

21. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1851 (codified in scattered sections of 2, 5, 18, 28, 39 U.S.C.A.).

22. Anthony R. Palermo, STATE BAR NEWS July, 1979 (New York State Bar Association).

23. Professor G. Edward White, who believes that the historical mandate of the Supreme Court requires its members occasionally to substitute "social values that they [believe] to be predominantly supported by the Constitution, or a substantial number of American citizens, for social values supported by a legislative majority," finds the primary democratic constraint on this judicial activism in the public's response to particular decisions: "Too 'immoral' or too 'unjust' an interpretation of the Constitution by the Court is simply not accepted by the public. It is not . . . invested with legitimacy." White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the "Lessons" of History*, 63 JUDICATURE 162, 171-72 (1979). It may be that the check of public disapproval is manifest both in the events that led to the empanelling of the California Commission on Judicial Performance and in the spate of bills designed to provide constant oversight of federal judges.

combination, . . . to nullify, by suitable majorities, any court ruling they deem unconstitutional."[24]

JUDICIAL REVIEW OF LEGISLATION AND CONDUCT—IS IT LEGITIMATE?

Now let me darken the screen on which these scenes have been projected and raise the house lights and step down stage. "What is going on?" you ask. And so do I. The remainder of my remarks consists primarily of my answer to that question.

Let us begin with the obvious. The federal judiciary, led by the Supreme Court, shapes and reshapes the Constitution and that it does so is not a very well kept secret. The people know. In increasing numbers they come to federal courts seeking an interpretation of the Constitution that will advance their interests. Roughly two-thirds of the Supreme Court's opinions are in response to their pleas.[25]

Because the people know, there exists increasing unease with the relative immunity of the judiciary, both federal and state, from normal political processes. Even some responsible observers, who recognize the dangers of an elected judiciary, believe that some additional means of making judges accountable is necessary.

This unease, quite obviously, does not impede the rush of the people to the courthouse to secure favorable constitutional rulings. Because the price of this public service to the litigant frequently is small in comparison to the great value of the desired ruling, overconsumption, in the economic sense, inevitably occurs. Dockets become more crowded, more judges are needed, and queues similar to service station lines begin to form.

The direction of our drift is clear. More and more areas of life are being subjected to judicial regulation by means of constitutional interpretation. More and more judges, together with supporting personnel, are being authorized and appointed. More and more restrictions are being imposed on judges to assure their "accountability," and, most disturbing of all, more and more the Constitution is being perceived, by both winners and losers in the interpretive process, as a document on which are written, as on the walls of Peking, only ephemeral messages.

I acknowledge that the mounting volume of litigation and efforts to make judges more "accountable" does not spring solely from the widespread use of the Constitution to regulate behavior. The corpus of

24. Sobran, A Populist Remedy, San Francisco Chronicle, Aug. 14, 1979, at 39, col. 1.

25. During the 1978 Term, 40 of the Supreme Court's attributed opinions, more or less, were primarily exercises in statutory interpretation. The rest of approximately 114 opinions made significant constitutional rulings.

federal laws enacted by Congress has grown enormously in size. Increased litigation was inevitable. "Accountability," moreover, has become for this decade what the Vietnam war was for the sixties. The corrosive influence of perceptions inspired by Watergate has caused all government to fight the imposition of the stain of dishonor. The judiciary could not hope to be, nor has it been, wholly exempt from this pollution. My point is simply that, given the volume of legislation pouring forth from Congress and state legislatures, as well as post-Watergate attitudes, conditions that would exist in any event are being significantly enhanced by courts' use of the Constitution to regulate *too many activities*, *too frequently*, and *too minutely*.

If this is what is going on, what should be done about it? Obviously we should not keep doing what we are doing. There is no assurance, however, that we will not. Professor Fehrenbacher of Stanford closed his recent book on the *Dred Scott* case with these words:

> It remains to be seen whether Berle's pronouncement in 1967 [that the "ultimate legislative power in the United States has come to rest in the Supreme Court"] was mere hyperbole or sound prophecy—whether the United States has or has not begun to replace representative government with the platonic elitism of a 'guardian democracy.' But the conduct of the Court in recent years suggests that we have yet to comprehend the full meaning of *Marbury v. Madison* and of the Dred Scott decision as well. We have yet to glimpse the ultimate potential of judicial sovereignty, a theory of power set forth by John Marshall in 1803 but first put to significant use by his successor on March 6, 1857.[26]

The successor was Chief Justice Taney and the date that of the *Dred Scott* decision. The ominous note on which Professor Fehrenbacher closes provides little comfort either to those who view present trends with equanimity or to those who confidently expect their timely reversal.

As Fehrenbacher points out, it all began with *Marbury v. Madison*. Those disturbed by present trends must confront the legitimacy of the awesome power that Chief Justice Marshall so adroitly created. The power to invalidate legislation on constitutional grounds is not an ordinary judicial power. Judicial subservience to the legislative will characterizes other nations within the English common-law brotherhood.[27] As a federal judge, I must accept *Marbury v. Madison* and all its progeny including tomorrow's opinions by the Supreme Court explicating

26. D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS 595 (1978).

27. Giraudo, Judicial Review and Comparative Politics: An Explanation for the Extensiveness of American Judicial Review Offered From the Perspective of Comparative Government (1979) (unpublished article).

the Constitution's then current meaning. As a citizen, however, I, like each of you, must ask the hard question: Is judicial review legitimate?

My answer is yes, but given with serious reservations. Chief Justice Marshall to the contrary notwithstanding, judicial review is not an inexorable necessity given the structure of our Constitution. It would not have been illogical for the Court to have accepted as constitutional all laws properly enacted by Congress. Justice Gibson's dissent in *Eaken v. Raub*,[28] a decision of the Pennsylvania Supreme Court, adopted such a view with respect to the power of state courts to declare state legislation unconstitutional. Nor would adoption of Jefferson's "tripartite doctrine,"[29] under which each branch of the federal government would decide for itself whether an act was constitutional, encounter logical difficulty with the Constitution as written. As Jefferson put it, "that branch which is to act ultimately, and without appeal, on any law, is the rightful expositor of the law, uncontrolled by the opinions of the other co-ordinate authorities."[30] Thus, Jefferson's pardon of Callender, who had been convicted for violating the Sedition Act, was based not on clemency but on what Jefferson perceived to be his constitutional duty. In his view, the Sedition Act was unconstitutional; it therefore was his constitutional duty to pardon Callendar.[31]

Neither subservience to the legislative will nor Jefferson's "tripartite doctrine," however, can provide the coherence of constitutional doctrine that judicial review is capable of providing. Herein lies the core of the strength of the judiciary's claim of supremacy. Inconsistencies, on the one hand, and conflicts between "ultimate" authorities, on the other, are the weaknesses of Justice Gibson's and Jefferson's positions.

The judiciary's capacity for coherence became very important to

28. 12 Serg. & Rawl. 330 (Pa. 1825). Judicial review of state legislation by the Supreme Court, as well as lower federal courts, rests on a different footing. The federal courts, on behalf of the nation, must give preference, by reason of the Supremacy Clause, to the Federal Constitution. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), was the first Supreme Court case in which a state law was invalidated on federal constitutional grounds. Justice Gibson recognized this distinction and readily conceded that state court judges were required to invalidate state laws not consistent with the Constitution of the United States. 12 Serg. & Rawl. at 355-57. The Civil War Amendments altered the constitutional duties of the states, but judicial power to invalidate state laws because of conflicts with the federal constitution existed from the beginning.

There are, of course, differences in the roles of the federal and state legislatures. The Supremacy Clause specifically binds state judges to enforce federal laws "made in Pursuance" of the Constitution, despite state laws to the contrary. U. S. CONST. art. 6, cl. 2. This subordination of state activity to federal law is not the focus of my references to the courts' use of the Constitution to regulate the affairs of the states. As I shall argue, the critical area in which judicial overregulation of state activities has occurred is one in which litigants may bypass the political and hence the legislative process, seeking constitutional aid on the sometimes legitimate ground that they do not have access to the political process. *See* text accompanying notes 54-58 *infra*.

29. D. MALONE, JEFFERSON THE PRESIDENT: FIRST TERM 1801-1805, at 155 (1970).

30. *Id.* at 156.

31. *Id.* at 153-56.

the nation following the Civil War. Although that conflict overturned the *Dred Scott* case, it also created a compelling necessity for increased constitutional coherence. The Union had survived by force of arms, but its maintenance, growth and, yes, prosperity required a constitution that not only embodied the constitutional theories of the victors, but also was coherent and relatively free from conflicting interpretations and inconsistencies. Unity, not Jeffersonian disunity, had become the organizing principle.

That need has not disappeared. Rather it is probably greater today than at any time since the immediate post-Civil War era. As the old ties of family, church, and community become loosened and ethnic diversity increases, the need for coherence once more approaches its post-Civil War high water mark. The pervasiveness of the ethic of what Tom Wolfe aptly dubbed "The Me Decade" also increases the need for coherence.[32] A nation of individuals all solipsisticly enraptured desperately needs a voice of coherence to remind each of the presence of others and of what each owes to one another.

Therefore, despite what I regard as the superiority of Justice Gibson's logic over that of Chief Justice Marshall in *Marbury v. Madison*, as a citizen I accept as legitimate the power of judicial review. At the same time, as a citizen, I insist that this legitimacy depends upon the extent to which the judiciary in fact provides constitutional coherence. As I have already said, I am concerned about whether it is doing so.

SUGGESTIONS FOR IMPROVING CONSTITUTIONAL COHERENCE

But what, you again ask quite properly, should be done? Cries of distress are not enough. Specific suggestions are required. Let me offer a few.

Avoid Direct Popular Control

The first is negative in character. It is that coherence will not be improved by increasing the means by which the judiciary is more directly controlled by the people. The ways in which this control may be increased are numerous. For example, although I assume a constitutional amendment would be required, popular election of federal judges and justices of the Supreme Court would make the judiciary more responsive to the people. Coherence, however, would be further impaired.

Less extreme, and presently constitutionally possible, would be the

32. T. WOLFE, *The Me Decade and the Third Great Awakening*, in MAUVE GLOVES & MADMEN, CLUTTER & VINE 126 (1976).

development of the practice of appointing a substantial number of nonlawyers to the federal courts. It is not difficult to imagine a President creating quite a stir by appointing one or two lay persons to the Supreme Court and at least a score to the lower federal courts. If, as Aaron Burr is once supposed to have said, "the law is whatever is boldly asserted and plausibly maintained," the case for lay appointees is irresistible.[33] But if the legitimacy of judicial review rests on the peculiar ability of law trained judges to provide coherent constitutional doctrine, the case for lay appointees is quite weak.

No doubt other means further to subordinate the judiciary to the will of the people have occurred to you. Expanding the commissions President Carter has created and requiring by law that the President appoint only from a list of three names submitted by a commission would further "popularize" the appointment process. Institutionalizing public scrutiny of judicial performance also offers significant possibilities. An annual report by, for example, the General Accounting Office, of all public complaints about individual judges and justices perhaps joined with an annual review of the judiciary's work product prepared by scholars, lawyers, and lay persons would guarantee institutionalized public scrutiny. Truly it then could be said that sunlight now shines in the heretofore dark recesses of the judiciary.

Popular Control as a Threat to Constitutional Coherence

The result of these and similar means would be to impair substantially the capacity of the judiciary to provide coherent constitutional doctrine. Perceived current popular will would tend to become the force that shapes decisions. Consistency and stability would yield to momentary popular desire; the judiciary would more and more resemble but another legislative assembly, and the Constitution but the historical justification for its existence. In due course the question would be put, "If judges are but an expression of current popular will, why should they have the power to overturn legislation at all?" Indeed why?

Popular will, even when not the master of the Constitution and the judiciary in the manner just described, has its undeniable place, however. Although judges should not be required to respond to the people

33. There is a conclusive case for lay appointments to the bench if, as Professor White maintains, a Supreme Court that takes seriously its historic mandate must be prepared to disagree with the legislature's choice of "the predominant values of American society," and so override legislative policy. *See* White, *supra* note 23, at 171. The task of deciding which are the predominant values of a given social group is certainly not one that lawyers are trained for. Thus, at least with respect to the protection of "abstract rights against the state," *id.*, the area of judicial decisionmaking in which Professor White thinks that the courts must sometimes override legislative majorities, there could be no preference for law-trained judges.

as do legislators, it is true that constitutional doctrines, except when based on the plain letter of the Constitution, must reflect the deep-seated and abiding aspirations of the people. The *Dred Scott* case teaches this with a grimness that warns against neglecting its lesson. The fate of the old Supreme Court in the thirties provides confirmation of *Dred Scott*'s lesson. Perhaps the point can be made this way: Heed need not always be paid to the people's voice; but to ignore its heart inevitably will be fatal.

Mindless and sweeping democratization of the federal courts, however, is not the solution. Legitimacy, the sign that purpose and practice are in harmony, arises when the courts are doing well that for which their structure is best suited, *viz.*, the promulgation of coherent constitutional doctrines.

The Meaning of Constitutional Coherence

Let me make my term "constitutional coherence" more precise. Heretofore, I have emphasized consistency and stability as characteristics of coherence. There is, of course, more to it than that. Coherence requires reasoned decisions, reached after full consideration of all interests, communicated to the parties and the people, and based on principles imbedded in the written constitution. Herbert Wechsler, a number of years ago, caused passionate debate within constitutional circles with his *Toward Neutral Principles of Constitutional Law*.[34] Neither the debate nor the intervening years has persuaded me that Wechsler did not describe accurately the kind of decisions that a court dedicated to constitutional coherence must render. According to Wechsler, decisions interpreting the Constitution should be "entirely principled." He described such decisions in the following words: "A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[35]

Wechsler's description, however, is not always easy to apply. That is, whether a decision is "principled" is not always self-evident. People differ on this. So much turns on what is perceived as the supreme principle. For example, during the last Term the Supreme Court in *North Carolina v. Butler*,[36] decided that the waiver by one under arrest of his right to the presence of counsel following a *Miranda* warning need not be explicit.[37] A waiver could be implied from all the facts and circum-

34. 73 HARV. L. REV. 1 (1959).
35. *Id.* at 19.
36. 99 S. Ct. 1755 (1979).
37. *Id.* at 1757.

stances.[38] To the majority, the principle was that waivers of *Miranda* rights must be made knowingly and voluntarily. The dissenters read *Miranda* differently. To them the principle was that the waiver must be "specific" and "affirmative."[39] It followed, therefore, that only "express" waivers were adequate.[40]

Such differences are inevitable. This does not, however, invalidate Wechsler's description. All recognize, for example, the difference between, on the one hand, accepting the principle that waivers need only be made knowingly and voluntarily, and then holding covertly and frequently that only explicit waivers can be so made, and, on the other hand, rejecting the less for the more demanding principle, as did the dissenters in *Butler*. The former is unprincipled; the latter is not.

Approaching the former sufficiently closely to merit concern is the Supreme Court's current use of equal protection. At least three, and probably more, versions of the equal protection standard exist. The choice obviously is determined by the identity of the claimant seeking invalidation and the nature of the rights he asserts. Principles have become elusive. Just recently, Justice Blackmun plaintively observed:

> Although I join the Court's opinion and its strict scrutiny approach for election cases, I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in the Court to use as tests such easy phrases as 'compelling state interest' and 'least drastic [or restrictive] means.' . . . I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. . . .
>
> I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them.[41]

In brief, as Justice Blackmun sees it, the Supreme Court has substituted its seal of approval for principles. His criticism deserves notice because to the extent that they are justified, and few would describe them as wholly without substance, they directly impugn the legitimacy of *Marbury v. Madison*.

Principles, however, must be derived from somewhere. From whence came the principle the majority employed in *North Carolina v.*

38. *Id.* at 1757-58.
39. *Id.* at 1759 (Brennan, J., dissenting).
40. *Id.* at 1760 (Brennan, J., dissenting).
41. Illinois State Bd. of Elections v. Socialist Workers Party, 99 S. Ct. 983, 992-93 (1979) (Blackmun, J., concurring).

Butler? from *Miranda v. Arizona*?[42] from *Escobedo v. Illinois*?[43] Ultimately, the trail leads to the Fifth and Sixth Amendments as incorporated into the Fourteenth. Here we confront the excruciatingly difficult question: Did the Framers contemplate the principle of *North Carolina v. Butler*? Was it within the Original Intent of the Fourteenth Amendment? If the answers are "no," which they most certainly are, are not many late twentieth century constitutional principles[44] but the consequence of earlier acts of judicial usurpation? And, if so, can it not be said that many constitutional principles are but the honored children of yesterday's usurpers? And that a principled decision is merely one in which these children are managed in a way that conceals from public notice their illegitimate background?

No citizen, lawyer, or judge can deny the force of these biting inquiries. The Constitution has been changed by means of judicial construction. And it must be changed. Professor Raoul Berger decries this but admits a "rollback" to the Original Intent of the Framers is not possible.[45] Reflecting almost palpable anguish, he concludes his brilliant work by calling for heightened public awareness of the Supreme Court's "overleaping its bounds."[46]

Use the Original Intent as the Interpretive Baseline

I echo his call. In doing so, let me make my second specific suggestion designed to strengthen the legitimacy of judicial review by improving constitutional coherence. It is that courts should return to the Original Intent of the Framers in each case in which significant alteration of existing constitutional doctrine is being considered. This return should be that of an historian, not that of a political orator. How depressing it is to be told, while announcing a new doctrine, that it was within the bosom of colonial Englishmen, consecrated in revolutionary blood, and tucked away unseen, but nonetheless within, the solemn meaning of the majestic language of the Bill of Rights. The new doctrine may be just, but its introduction by means of a political oration does little to establish that fact.

Once the limits of knowable historical meaning have been fixed, judges should candidly acknowledge the gap, if any, between that Original Intent and the new, or significantly altered, constitutional principle

42. 384 U.S. 436 (1966).
43. 378 U.S. 478 (1964).
44. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) (rejecting the assertion that the Fourteenth Amendment incorporated the Bill of Rights).
45. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 413 (1977).
46. *Id.* at 415.

sought to be established. Explicit confrontation with this gap serves not only to inform the public of the direction and pace of constitutional drift but also to require that substantial reasons be offered in justification for this drift.

The utility of recognizing the gap is reflected in the Supreme Court's recent decision in *Scott v. Illinois*.[47] There it was held that the Sixth and Fourteenth Amendments do *not* require state provision of counsel for an indigent defendant who, although prosecuted under a state statute which authorized imprisonment, was only fined.[48] Justice Rehnquist's majority opinion commenced with the probable Original Intent of the Sixth Amendment[49] and traced the changes in the scope of the guarantee of the right to counsel through *Powell v. Alabama*,[50] *Betts v. Brady*,[51] *Gideon v. Wainwright*,[52] and *Argersinger v. Hamlin*.[53] Exposure of the gap evoked, as it should, a thorough account of the Court's reasoning.[54]

Reasons for fixing the point at which the drift should be brought to rest must fall within a very wide range indeed. Although such reasons cannot be derived directly from the Original Intent, they must not evidence a purpose to frustrate that Intent. To argue, for example, that ordinarily counsel do more harm than good and that therefore state appointed counsel are not necessary in *Scott* would be improper. The Framers did not think so or, if they did, they considered that a matter about which only the accused should decide.

Subject to this constraint, the reasons take their substance from the situation. Thus, in *Scott*, both the majority and minority opinions focused upon the practical consequences of extending the right to state appointed counsel to instances in which no loss of liberty is involved. The extension would involve confusion, as well as unpredictable but substantial costs, argued the majority.[55] The minority thought otherwise and pointed out that numerous states already extended the right of state paid counsel when imprisonment was authorized even though not imposed.[56]

47. 99 S. Ct. 1158 (1979).
48. *Id.* at 1162.
49. *Id.* at 1160.
50. 287 U.S. 45 (1932).
51. 316 U.S. 455 (1942).
52. 372 U.S. 335 (1963).
53. 407 U.S. 25 (1972).
54. This proves embarrassing when the reasons justifying the drift are insubstantial. It also readily explains why courts frequently ignore the gap and focus only upon the difference between the result they intend to reach and the most recent precedent. By so doing, the gap is usually reduced and weak reasons are required to bear less heavy burdens. See Justice Brennan's dissent in Scott v. Illinois, 99 S. Ct. at 1163-70.
55. *Id.* at 1162.
56. *Id.* at 1164 (Brennan, J., dissenting).

Whatever the reasons, Justice Stevens was surely right in his concurring opinion in *Jackson v. Virginia*,[57] a recent case changing a constitutional standard to be employed in habeas corpus proceedings, in which he insisted that "powerful reasons" must exist to justify a change in constitutional doctrine.[58] It follows, of course, that the existence of powerful reasons *against* a change, not compelled by the Original Intent, should ensure maintenance of the status quo.

One such powerful reason, the force of which may be either for or against change, is the availability of a political solution of the type of grievance for which redress through constitutional means is sought.[59] No more legitimate justification for extending constitutional doctrine beyond the Original Intent exists than the realization that despite the manifest justice of the claimant's demand all avenues of political redress within the foreseeable future are closed. This was the rock on which *Brown v. Board of Education*[60] rested. Although it overturned *Plessy v. Ferguson*[61] and departed from the Original Intent, the inaccessibility of a political solution within foreseeable generations imparted to the Supreme Court's intervention a justification sufficient to withstand the historically accurate charge of usurpation.

Conversely, ready access to the political process for correction of a grievance constitutes a strong reason not to depart from the Original Intent or to extend further current constitutional decisions. This is the proper justification, I suggest, for the demise of substantive due process[62] and a reason for proceeding with care in the areas of procedural due process[63] and equal protection. In all three areas Justice White's observation in *Vance v. Bradley*,[64] in which the Court upheld the For-

57. 99 S. Ct. 2781 (1979).

58. *Id.* at 2794 (Stevens, J., concurring).

59. *See* text accompanying notes 54-58 *supra*.

60. 347 U.S. 483 (1954).

61. 163 U.S. 537 (1896).

62. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (upholding extension of time allowed by existing law for redemption of real property from foreclosure); Nebbia v. New York, 291 U.S. 502 (1934) (upholding milk price control law). While these cases signalled the beginning of the end for the doctrine of substantive due process, *see* Lochner v. New York, 198 U.S. 45 (1905), the Court in West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage law) declared *Lochner* dead. The Court went on to approve much New Deal legislation that would never have passed muster under substantive due process analysis. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (Agricultural Adjustment Act); United States v. Darby, 312 U.S. 100 (1941) (Fair Labor Standards Act); NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937) (National Labor Relations Act).

63. *Compare* Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that New York could not terminate public assistance payments to a recipient until it had afforded an evidentiary hearing to determine whether termination was justified) *with* Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality decision that the property interest of a Civil Service employee in his employment is conditioned on the procedural limitations that accompanied the creation of the interest by statute, namely, dismissal for cause with only a posttermination hearing). The moral may be that groups with established political power need fewer and less drastic remedies against state action than do groups whose weakness in the political arena is evident.

64. 99 S. Ct. 939 (1979).

eign Service retirement age of sixty against an equal-protection-through-the-Fifth-Amendment argument,[65] is compellingly relevant. He said, "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."[66]

Depart From The Original Intent Only For Those Without Access To The Political Process

This constitutes the text on which my third specific suggestion to advance constitutional coherence rests. It is that further departures from the Original Intent should not be undertaken when those advocating such change have substantially unimpaired access to the political process.[67] To me Justice White's qualifying clause, "absent some rea-

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65. *Id.* at 942.

66. *Id.* at 943.

67. In a recent interview, Justice Powell commented on precisely this undercurrent of the Supreme Court's innovations:

> [Professor Harry M. Clor:] [S]ome of the most important Constitutional clauses are open-ended . . . . I wonder in such cases where the principles come from, where the judges believe they are deriving the principles which govern interpretation of these open-ended clauses. . . .
>
> [Justice Powell:] That's a very complex question and I don't feel competent to address it in a short while in any sort of responsible and thorough way. We do try to reason from case to case, and to apply general principles consistently. I will mention one of these principles. We view, for example, the equal protection clause as intended primarily to protect people who most need protection.

Clor, *Constitutional Interpretation: An Interview with Justice Lewis Powell*, KENYON COLLEGE ALUMNI BULLETIN, (Summer, 1979) at 14, 16. There are, of course, several senses, not equally defensible, in which the goal of protecting those who most need it could play a part in the task of interpreting the Constitution. A danger that can be linked to the breadth of this attractive criterion is that judges may find in it a justification for falling back on their personal estimates of what is right and good for the groups affected by the issues posed in a given cause of action, without any further interpretative constraint.

> When a lawyer stood before [Mr. Chief Justice Warren] arguing his side of a case on the basis of some legal doctrine or other, or making a procedural point, or contending that the Constitution allocated competence over a given issue to another branch of government than the Supreme Court or to the states rather than the federal government, the chief justice would shake him off by saying, "Yes, yes, yes, but is it [whatever the case exemplified about law or about the society], is it *right*? Is it *good*?" More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of competences among various institutions by asking what it viewed as a decisive practical question: If the Court did not take a certain action which was *right* and *good*, would other institutions do so, given political realities? This, or something like it, though the political thrust may vary, is what a Court, encouraged to believe it is more than a Court, or perhaps less—a collection of philosophers empowered to find and apply the best in America's moral tradition—this is what such a Court will ultimately come to.

Bork, *The Legacy of Alexander M. Bickel*, YALE L. REP. Fall 1979, at 6, 10 (emphasis in original) (quoting Bickel, *Watergate and the Legal Order*, COMMENTARY, January, 1974 at 19).

For a recent defense of the position criticized in this passage, see White, *supra* note 23, at 171. Interestingly enough, the only constraint Professor White envisages for a Supreme Court that is a "protector of rights [without] intraprofessional constraints on its lawmaking power" is the "supra-professionalist" constraint of public reaction. *Id.* at 172. The complete absence of intraprofessional standards, however, leaves the Court no vocabulary in terms of which its decisions could be

son to infer antipathy"[68] refers to those who, for some reason or another, are shut out of the political process. To them the judiciary should be the forum of last resort and the Constitution their protection. For those who have proper access, the Constitution should not be used by the judiciary to award victory when defeat was the judgment of the political process. To so award victory not only reverses the judgment of the political process but it also, at least in theory, denies further access to that arena to those who previously were victorious. To the sting of defeat is added the blow of apparent finality.

The determination whether access exists is not easy. The controversy surrounding the reapportionment cases demonstrates this. Opponents of judicial reapportionment, I suggest, believed not only that malapportionment was to some extent within the eye of the beholder, but also that, when enough so beheld it, political action to correct it would occur. Supporters of *Baker v. Carr*[69] and *Reynolds v. Sims*,[70] on the other hand, believed no political solution was available for what they considered to be objectively measurable malapportionment.

There is some evidence that access to the political process figures large in determining which cases the Supreme Court takes for review. During the last Term, for example, claims considered came from, among others, children,[71] aliens,[72] social security recipients,[73] blacks,[74]

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expressed and defended. Thus, proponents of the freer sort of interpretative standards adopt the guise of modern antinomians, admitting no limits to the sway of conscience in adjudicative reasoning itself. It is curious to find this old conundrum of the political fringe near the center of today's spectrum. At the same time, even judges whose reputations suggest activism, such as Judge J. Skelly Wright, have questioned a judicial disposition "to act as final arbiters of the public good. . . . We should, I think, be more reluctant than we have been to fault the other agencies of government and, also, more hesitant about filling the void when, in our judgment, the elected branches of government should have acted and failed." NAT'L L. J., October 29, 1979, at 10.

Professor White characterizes one influential group of perspectives on the Supreme Court's role as "intraprofessional," by which he means that these views "[attempt] to link the Court's proper role with commonly held assumptions about how lawyers and judges should perform." White, *supra* note 23, at 163. He observes that, when pressed to identify "some 'currently held values' that are sufficiently 'professional,' or sufficiently widely shared, to act as effective constraints on an expansive, revisionist Court," the intraprofessionalist literature has selected three: Structure, process, and participation. *Id.* at 166. The last of these seems most closely related to the principle Justice Powell formulates. "[T]he value of participation emerges from a reading of the constitutional design as promoting participatory democracy by vesting sovereignty in the people." *Id.* The views advanced in this lecture therefore seem to belong to Professor White's intraprofessionalist category.

68. See text accompanying note 66 *supra*.

69. 369 U.S. 186 (1962).

70. 377 U.S. 533 (1964).

71. *See, e.g.*, Bellotti v. Baird, 99 S. Ct. 3035 (1979); Parham v. Hughes, 99 S. Ct. 1742 (1979); Parham v. J.L., 99 S. Ct. 2493 (1979); Secretary of Public Welfare v. Institutionalized Juveniles, 99 S. Ct. 2523 (1979).

72. *See, e.g.*, Ambach v. Norwick, 99 S. Ct. 1589 (1979); Toll v. Moreno, 99 S. Ct. 2044 (1979) (mem.).

73. *See, e.g.*, Califano v. Westcott, 99 S. Ct. 2655 (1979); Califano v. Boles, 99 S. Ct. 2767 (1979); Califano v. Yamasaki, 99 S. Ct. 2545 (1979); Califano v. Asnavorian, 439 U.S. 1970 (1978).

74. *See, e.g.*, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979); Gladstone v. Village of Bellwood, 99 S.Ct. 1601 (1979).

alleged victims of wrongs by Congressmen or the press,[75] those accused of crime,[76] and women.[77] The degree of access enjoyed by each of these groups varies widely; but my point is that focusing on access will identify those situations in which its absence, or limited nature, provides added legitimacy to overturning legislative dispositions.

Do not misunderstand my point. The Constitution secures to all of us, winners and losers in the political process alike, fairly explicit guarantees. The courts cannot abridge these. The point I make is that it is improper for the courts to venture beyond those guarantees clearly within the Original Intent absent a showing that in some manner a claimant and the group to which he belongs is not accorded reasonable access to the political process. The required showing should be as precise as circumstances permit. A proper showing is not made merely by demonstrating that so far one has been unable to achieve his purposes in the political marketplace. A showing of exclusion is required — not merely a limited political bank account.

Lack of access may be due to many causes. Small numbers, de jure or de facto exclusion, and advocacy of fringe viewpoints are all marks that suggest, taken singly or in conjunction, the need for a careful examination of a challenged legislative resolution. Judicial rejection of these resolutions may be proper when factors like these are present, although without them it would not. In any event, a focus upon access to the political process is far better than a focus merely on such imprecise phrases as due process, equal protection, and privileges and immunities. Perhaps this is all that the famous footnote in *United States v. Carolene Products Co.*[78] was intended to say.

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75. *See, e.g.*, Hutchinson v. Proxmire, 99 S. Ct. 2675 (1979); Davis v. Passman, 99 S. Ct. 2264 (1979); Wolston v. Reader's Digest Ass'n, 99 S. Ct. 2701 (1979); Herbert v. Lando, 99 S. Ct. 1635 (1979).

76. *See, e.g.*, Arkansas v. Sanders, 99 S. Ct. 2586 (1979); United States v. Caceres, 99 S. Ct. 1465 (1979); North Carolina v. Butler, 99 S. Ct. 1755 (1979); Smith v. Maryland, 99 S. Ct. 2577 (1979); Lo-Ji Sales, Inc. v. New York, 99 S. Ct. 2319 (1979); Delaware v. Prouse, 99 S. Ct. 1391 (1979); Dunaway v. New York, 99 S. Ct. 2248 (1979); Brown v. Texas, 99 S. Ct. 2637 (1979); Michigan v. DeFillippo, 99 S. Ct. 2627 (1979); Parker v. Randolph, 99 S. Ct. 2132 (1979); Rakas v. Illinois, 439 U.S. 129 (1978); Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 99 S. Ct. 2100 (1979); Gannett v. DePasquale, 99 S. Ct. 2898 (1979); Sandstrom v. Montana, 99 S. Ct. 2450 (1979); County Court v. Allen, 99 S. Ct. 2213 (1979); New Jersey v. Portash, 99 S. Ct. 1292 (1979); Kentucky v. Whorton, 99 S. Ct. 2088 (1979) (mem.); Burch v. Louisiana, 99 S. Ct. 1623 (1979); Corbitt v. New Jersey, 439 U.S. 212 (1979).

77. *See, e.g.*, Caban v. Mohammed, 99 S. Ct. 1760 (1979); Cannon v. University of Chicago, 99 S. Ct. 1946 (1979).

78. There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

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

Nor need we enquire whether similar considerations enter into the review of stat-

Avoid Wide Ranging Supervisorial Responsibilities

My fourth and final suggestion to improve constitutional coherence is very practical. It is that, unless the Original Intent, as revealed by history, requires otherwise, a strong presumption against constitutional change exists when the change would require the courts to assume wide ranging supervisorial responsibilities. Justice Stevens' dissent in *Jackson v. Virginia*, to which reference was made earlier, relied heavily on the fact that the change embraced by the majority would generate heavy supervisorial responsibilities with little benefit to litigants.[79] This tension between potential supervisorial responsibilities and the perceived benefit of the change clearly emerges from two cases decided last Term by the Supreme Court involving investigatory stops by police. These decisions, *Delaware v. Prouse*[80] and *Brown v. Texas*,[81] established that these stops "must be based on specific, objective facts indicating that society's legitimate interests require the seizure of a particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."[82] The number of what John Frank has called "decision points"[83] embodied in this new test manifestly increases the supervisorial burden of the courts and is an interpretation not required by the Original Intent. A general standard of reasonableness would have permitted the exclusionary rule to deter unreasonable stops, provided a standard easily communicated and understood, and reduced supervisorial responsibilities.

Admittedly, however, these are instances in which the added supervisorial responsibilities are only marginally significant. Decisions requiring busing, certain employment practices by large public authorities, or management of land use planning for a large scenic area pose the problem in a much more substantial form indeed. Their magnitude underscores vividly how far the judiciary has come from Hamilton's description of it as the "least dangerous" of the "different departments of power."[84] Contrary to his view of the judiciary, the federal courts of today do have influence over both the "sword" and the "purse" and do

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utes directed at particular religious . . ., or national . . ., or racial minorities . . .; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . .

304 U.S. 144, 152 n.4 (1938).

79. 99 S. Ct. at 2793-2800 (Stevens, J., concurring in the judgment).

80. 99 S. Ct. 1391 (1979).

81. 99 S. Ct. 2637 (1979).

82. *Id.* at 2640.

83. *See generally* J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM (1969).

84. A. HAMILTON, THE FEDERALIST No. 78, at 483, 484 (Lodge ed. 1888).

undertake "active resolutions" of fundamental issues concerning the "strength" and "wealth of the society."[85] To me this is more a cause for concern than for rejoicing.

CONCLUSION

My four suggestions no doubt would retard constitutional change. No apologies are offered for that consequence. The necessity of courts not subject to ordinary political pressures to articulate to the extent possible the Original Intent, to trace the movement away from that Intent, to focus on the possibility that the change could be achieved by political means, and to weigh the magnitude of any concomitant supervisorial burden, and, in all events, to give "powerful" reasons for any change would, taken together, reduce the rate of constitutional change. No longer would the third branch be viewed by many as a fairly inexpensive source of legislative change in the guise of constitutional interpretation. Such is the prospect I have sketched for you.

Nonetheless, as I close I must share with you an anxiety that it arouses. Can the Supreme Court and the inferior courts serve us in time of true need if their process of constitutional change is revealed and rationalized as I have suggested? Is the myth that the Constitution is merely what the Framers said it was the fragile source of judicial power? Must hypocrisy be the tribute we pay to preserve our institutions?

I should hope not. My paper presents an argument that it does not. And yet, would *Brown v. Board of Education* have been more readily accepted had the opinion forthrightly confronted the ability of the Southern States to block for years national legislation aimed at correcting school segregation as well as the enormous enforcement problems the decision did in fact create? To ask this and to ponder the proper answer is to share my anxiety.

Despite my concern, I close by repeating an earlier assertion. The people know that much of the Constitution is made by the judges. Under such circumstances, the effective power of the judiciary depends upon its doing the job properly. My remarks have been intended to contribute to that undertaking and to indicate when, at least in my opinion, the lions should be on the throne.

85. *Id.* at 483.