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EQUAL JUSTICE UNDER LAW

The role of the Supreme Court in our governmental structure has been a topic of discussion since the publication of the Federalist Papers. *Marbury v. Madison*¹ and *Dred Scott v. Sandford*² were high points in the opportunity for comment in the first century of the Court's history. In more recent years, the cases from *Plessy v. Ferguson*³ through *Brown v. Board of Education*⁴ and *Milliken v. Bradley*,⁵ with many others, have provided constant reminders of the crucial function of the Court in our legal and social structure.

Another line of controversial cases lies in the fields of social and economic legislation. In the first third of this century, the Court moved strongly in this area, holding state statutes invalid under doctrines of what came to be called "substantive due process." Thus, statutes limiting hours of labor,⁶ and statutes fixing a minimum wage,⁷ were held beyond legislative power, because they were said to deny the workman his "freedom of contract." Although there is no mention of "freedom of contract" in the Constitution, the Court found it to be a part of the "liberty" which is protected by the due process clause of the Fourteenth Amendment.

These particular matters have passed into history. I mention them simply to recall to mind that there has been an ebb and flow of

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¹ 1 Cranch 137 (1803).

² 19 Howard 393 (1857).

³ 163 U.S. 537 (1896).

⁴ 347 U.S. 483 (1954).

⁵ 418 U.S. 717 (1974).

⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

⁷ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

constitutional doctrine in the Supreme Court throughout its history.⁸ Sometimes the Court seems to go rather far in one direction. As a new case is decided, it becomes a foothold for a new decision establishing an even more novel doctrine. Eventually, though, the Court may conclude that it will go no further, or even withdraw a bit.

In recent months there have been some complaints that the present Court is "pulling back," and that this is an undesirable development. The Washington Post recently had a front-page article under the headline "Citizen Access to U.S. Courts Reduced,"⁹ in which it said that "the high court is making clear that it . . . feels the federal courts are too active." And even more recently, in connection with the conference held in St. Paul in commemoration of the Seventieth Anniversary of Dean Pound's Address on "The Causes of Popular Dissatisfaction with the Administration of Justice,"¹⁰ leading officers of a number of civil liberties organizations circulated a memorandum contending that "A series of Supreme Court decisions during the past few years . . . have radically reduced the ability of the lower federal courts to exercise their responsibilities under the Constitution to enforce the Bill of Rights."¹¹

Is there truth in the contention that the Court is pulling back? And if there is, what is its significance?

I

Under the pediment of the Supreme Court Building in Washington are carved the words "Equal Justice under Law." It is not known just where this phrase was found. It has overtones of the words from Bracton which Lord Coke addressed to Charles I: "*Non sub homine sed sub deo et lege.*" But that contains no reference to "justice." Diligent search has failed to find a prior use of "Equal Justice under Law," though President Jefferson used the phrase "equal and exact Justice" in his inaugural;¹² and Justice Matthews used "equal Justice" in his opinion in *Yick Wo v. Hopkins*.¹³ But the

⁸ Cf. Sharp, *Movement in Supreme Court Adjudication — A Study of Modified and Overruled Decisions*, 46 HARV. L. REV. 361, 593-95 (1933).

⁹ Washington Post, Sunday, April 4, 1976, 1, 8 (Sec. A).

¹⁰ 29 A.B.A. REP. 395, 40 AM. L. REV. 729, 14 AM. LAWYER 445 (1906), 20 J. AM. JUD. SOC. 178 (1937). See also Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUD. SOC. 176 (1937).

¹¹ "Memorandum to Participants in the 'Pound Revisited' Conference," dated April 7, 1976, signed by Aryeh Neier, Executive Director, American Civil Liberties Union, and nine others.

¹² 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 323.

¹³ 118 U.S. 356, 374 (1886).

phrase itself has not been found in literature, or in earlier opinions of the Court. We are told by Mr. Justice Burton that it apparently was suggested by or through the distinguished architect of the Supreme Court building, Mr. Cass Gilbert.¹⁴ He proposed it to Chief Justice Hughes, and he, after consulting with Justice Van Devanter, a co-member of the Commission, approved the wording which is now carved so firmly and boldly at the main portal to the building.

Though the origin of "Equal Justice under Law" may be obscure, it is fair to say that the Court has so far adopted it as its own standard that it has become a commonly accepted symbol for the Court.¹⁵ On that basis, I am going to consider the two elements in the phrase, and to ask whether each has been given appropriate weight over the past twenty years. This is obviously a difficult and delicate task. This is an area where no one can know the right answer, and where all differences, within wide limits, are differences of degree. But, as Holmes said: "Most distinctions . . . are of that sort, and are none the worse for it."¹⁶ Nor is it possible to demonstrate what is "right" or "wrong" in this area. The questions are matters of judgment, and all that one can hope to do is to bring out factors which may appropriately bear on the resolution of that question of judgment.

In what I say here, I am not being critical of anyone. There is no doubt that the persons constitutionally authorized to make decisions are the Justices of the Supreme Court. And there is no doubt that the members have been ably and conscientiously devoting themselves to their assigned task. Any comment made is offered only in the hope that it may be relevant and helpful in the process of understanding the work of the Court.

With this background, I come to the question: Have adequate and appropriate weight been given in the decisions of the Court to "Equal Justice" and to the other element in the phrase — "under Law"? Perhaps the inquiry can be given color by referring to a question attributed to Chief Justice Warren. He is said to have asked a lawyer, with his benignant smile: "I have heard your argument, but is it fair?" This remark has received a measure of public acclaim.¹⁷ The question remains, though whether justice alone is enough, whether there can be real justice except "under Law."¹⁸ Seeking "justice" as

¹⁴ See the statement by Mr. Justice Burton in 37 A.B.A.J. 735, 738, n. 17 (1951).

¹⁵ Cf. Warren, C.J., in *Cooper v. Aaron*, 358 U.S. 1, 19-20 (1958) (The Constitution created a government directed to equal justice under law).

¹⁶ *Haddock v. Haddock*, 201 U.S. 562, 631 (1906).

¹⁷ WEAVER, WARREN—THE MAN, THE COURT, THE ERA 9 (1967).

¹⁸ "But I know of no way we can have equal justice under law except we have some law." Jackson, J., in *Brown v. Allen*, 344 U.S. 433, 546 (1953).

the only objective points to a road which leads to anarchy. Unless the decision is likewise made "under Law" there can be no certainty of even-handed justice, no way to rely on decisions of the past.¹⁹ Each case will be decided by wise men — to whom Judge Learned Hand referred as "Platonic Guardians"²⁰ — but, without law, there will eventually be no justice.

On a cursory examination, this may seem to be simply an example of the age-old tension between stability and change in the law. The basic historical example is law and equity, where equity was developed by the English chancellors in an effort to alleviate the rigidity of the early common law system — in a word, for the purpose of introducing "justice" into the law. It was Dean Pound who observed more than fifty years ago: "Law must be stable and yet it cannot stand still."²¹ And this was quoted approvingly, and developed, by Cardozo in his *GROWTH OF THE LAW* a few years later.²² As these examples show, it is a question of balance. No one contends that the law should be rigid or unchangeable.

Despite an analogy, the problem we are discussing is fundamentally different. Dean Pound and Chief Judge Cardozo were referring primarily to the common law, the law which grows and develops under the guidance of the courts. In that field, there is a constant tension between the need for growth to meet new conditions on the one hand, and the claim of precedent, as a means of stability and certainty on the other. Generally speaking, in this area, there is no written text to construe. The problem is illustrated by such a case as

¹⁹ "I have said to my brethren many times that I hate justice, which means that I know that if a man begins to talk about that, for one reason or another, he is shirking thinking in legal terms." Mr. Justice Holmes, in a letter to John C. H. Wu in 1929, reprinted in *JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED PAPERS* 201 (1936).

Cf. The following passage from the Diaries of Felix Frankfurter, for October 20, 1946 (p. 276):

"At the core of such an attitude was, of course, the assumption of belief that there is no such thing as law and that law and opinions are just ways of clothing themselves in legal jargon. Schlesinger said that there is a school of legal thought . . . which believes that and believes it is a question of whether your side or the other side is going to use the Supreme Court for its purposes. I told him that such an attitude was of course just as wicked as it was dishonest."

²⁰ HAND, *THE BILL OF RIGHTS* 73 (1958): "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

²¹ POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923).

²² CARDOZO, *GROWTH OF LAW* 2 (1924).

McPherson v. Buick Motor Co.,²³ where the question turned on adjusting the common law relating to negligence to new circumstances and needs.

But the Supreme Court decides very few cases in any area of the common law. Indeed, for most cases, it has determined that the federal courts must apply the common law of the states in which they sit.²⁴ The problems with which we are concerned, in contrast, relate primarily to the construction of written instruments, either the Constitution, or relevant statutory provisions. This does not mean that there is always a clear and precise text. There are some things in the Constitution which have to be inferred, as, for example, the law relating to separation of powers,²⁵ or the law relating to intergovernmental immunities,²⁶ or some of the law relating to interstate commerce.²⁷

But most constitutional law, and virtually all of the application of statutory law, finds its foundation in a text. Often the text is by no means clear as applied to the particular situation. Nevertheless, the result reached, if it is to be acceptable, must be tied in some persuasive way to the text. Some texts may be more expandable than others,²⁸ but, all would agree, I suppose, that the Court's conclusion cannot be legitimate unless it can be derived in some valid and reasoned way from the text.

A further factor in the constitutional field is that the Court is not subject to any sort of review, for practical purposes, except for whatever weight there may be in professional criticism. It is true that the *Dred Scott* case was overruled by the Fourteenth Amendment; and the income tax case of 1894²⁹ was overruled by the Sixteenth Amendment. More recent efforts to overturn Court decisions by constitutional amendment have not been successful, as in the case of the Bricker Amendment, and proposed amendments designed to overturn the decision of the Court with respect to reapportionment, and prayers in school. Thus, there is much foundation for the observation of Justice Jackson that: "We are not final because we are infallible,

²³ 217 N.Y. 382, 111 N.E. 1050 (1916).

²⁴ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²⁵ *Cf. United States v. Nixon*, 408 U.S. 683 (1974).

²⁶ *Cf. New York v. United States*, 326 U.S. 572 (1946).

²⁷ *Cf. Bikle, The Silence of Congress*, 41 HARV. L. REV. 200 (1927).

²⁸ *Cf. Mr. Justice Frankfurter's* observation in his concurring opinion in *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956): "Due process is, perhaps, the least frozen concept of our law — the least confined to history and the most absorptive of powerful social Standards of a progressive society."

²⁹ *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429 (1895), *on rehearing* 158 U.S. 601 (1895).

but we are infallible only because we are final."³⁰ This remark is often treated as a quip. There can be no doubt, though, that it is taken very seriously by members of the Court, who are, of course, conscientious not only in the exercise of their duties, but in confining their work to its proper scope. If questions are raised, here as to whether they have always succeeded in that effort, it is not from any lack of respect for the work of the Justices, but is derived from an effort to evaluate what they have done. If it should be said that it is an effort to "second guess" their work, it can be replied that that is something they must be doing all the time.

In considering the question of the balance between "Equal Justice" and "under Law" in the Court's decision, I am going to try to focus on three aspects of the questions. These are not the only questions that could be raised, but they will serve to indicate the nature of the issues. The areas which I am advancing for consideration can be put under the following headings:

1. The influence of "discretion" on the cases which the Court decides.
2. The influence of personal views and predilections in construction of the Constitution.
3. Has the Court fostered developments which allocate essentially legislative functions to the judiciary?

II

The Influence of "Discretion" on the Cases Which the Court Decides

A. *The discretionary nature of appeals.*

Until 1891, the Supreme Court had no discretionary jurisdiction. It had to decide every case which came to it in accordance with the Acts of Congress providing for appeals or writs of error. The concept of certiorari was introduced in 1891, when the circuit courts of appeals were established.³¹ It was then provided that decisions of the circuit courts of appeals in cases where federal jurisdiction rested solely on diversity of citizenship should be reviewable by the Supreme Court only on writs of certiorari. Thus, discretionary jurisdiction entered the Supreme Court appellate tent in a very small way. It has now pretty well occupied the premises.

A considerable part of this development was doubtless inevitable.

³⁰ *Brown v. Allen*, 344 U.S. 443, 540 (1953).

³¹ Act of March 3, 1891, c.517, 26 Stat. 826.

At the close of the period of mandatory review by the Supreme Court, with no intermediate appellate courts, in 1891, the Court was years behind on its docket. Even earlier, its Justices had been forced to limit or give up circuit duties, which they had continued into the 1870s.³²

Discretionary jurisdiction was greatly extended in 1925, by the so-called Judges' Bill.³³ Nevertheless, Congress still provided that a substantial part of the Court's jurisdiction should be by appeal.³⁴ This was the term which had been used from the beginning to designate the Court's obligatory jurisdiction, that is, the cases which the Court must hear, if they fall within the terms prescribed by Congress.

Under Article III, Section 2 of the Constitution, the Supreme Court has original jurisdiction in cases involving ambassadors, and where a state is a party. The Constitution then provides:

In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Thus, the control of the Supreme Court's jurisdiction lies with Congress, and the court recognized this long ago.³⁵ Congress has exercised this power by providing for review by certiorari of certain decisions of the courts of appeals, and of state courts, and of the Supreme Court of Puerto Rico,³⁶ and of all decisions of the Court of Claims and of the Court of Customs and Patent Appeals.³⁷ But it has also provided for a review by appeal of some decisions of the courts of appeals,³⁸ of the state courts,³⁹ and of the Supreme Court of Puerto Rico;⁴⁰ and, in addition, it has provided for direct appeal to the Supreme Court from all decisions of three-judge district courts,⁴¹ and from any decision of a United States court holding an act of Congress unconstitutional.

The significant thing to note here is that though Congress has

³² FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* 75-77 (1928).

³³ Act of February 13, 1925, c.229, 43 Stat. 936.

³⁴ This soon came to be the term applicable to both appeal and writ of error. *See* Act of January 31, 1928, c.14, 45 Stat. 54.

³⁵ *Ex parte McCardle*, 7 Wall. 506 (1869).

³⁶ *See* 28 U.S.C. § 1254(1), § 1257(3), and § 1258(3) (1974), respectively.

³⁷ *See* 28 U.S.C. § 1255(1) and § 1256 (1974), respectively.

³⁸ 28 U.S.C. § 1254(2) (1974).

³⁹ 28 U.S.C. § 1257(1) & (2) (1974).

⁴⁰ 28 U.S.C. § 1258(1) & (2) (1974).

⁴¹ 28 U.S.C. § 1253 (1974).

assigned an extensive discretionary jurisdiction to the Supreme Court, it has also provided specifically, pursuant to a power expressly granted to it by the Constitution, for appeals as of right in another substantial group of cases. It may well be that this legislation by Congress is unwise, or that it is now outmoded. It may well be that if the Court followed the statutes as enacted by Congress it would inevitably fall way behind in its docket, as it did before 1891 and before 1925. One can readily sympathize with the problem confronting the Court. But the fact remains that the Court has in this area, for all practical purposes, converted review by appeal into a somewhat more complicated species of certiorari. Under its rules, it requires the filing of a "jurisdictional statement" in all appeals, and it treats the jurisdictional statements in most of the cases brought on appeal as essentially the equivalent of a petition for certiorari.⁴³

This practice began forty years or more ago. Often the question of appeal turns on whether there is a constitutional question. The Court early concluded that there must be a "substantial" constitutional question. One could not invoke the jurisdiction of the Supreme Court merely by asserting that there was a constitutional question, or by asserting a constitutional question if that question had already been clearly and definitely decided.⁴⁴ Thus the practice developed that the Court need not hear the case unless the question raised is "substantial." But what is "substantial"? It is easy to see how this question shades off into a discretionary jurisdiction. A case may well seem to raise a "substantial" question if it is one which a Justice wants to hear, or thinks that it might be in the public interest for the Court to hear. The conclusion may be reached not on the substantiality of the legal issue raised, but in terms of the importance of the case to the public interest. And on such a question, the views and predilections of the Justice may have, consciously or not, a significant impact.⁴⁵

⁴² 28 U.S.C. § 1252 (1974). Until 1971, there was a right of appeal by the United States to the Supreme Court in certain criminal cases. See 28 U.S.C. § 3731 (1974). Now all such appeals must be taken to the court of appeals.

⁴³ Rules 13(2) and 15 of the Rules of the Supreme Court. Rule 15 requires a statement of "the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their consideration."

⁴⁴ In Rule 15(1)(e), the Court cites *Zucht v. King*, 260 U.S. 174, 176-77 (1922), which involved a city ordinance requiring vaccination as a condition of attendance at school. The validity of such a provision had been upheld in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). One can only say that the Court no longer limits the practice to questions which have already been directly decided.

⁴⁵ Cf. BLACK, MY FATHER: A REMEMBRANCE 187 (1975): "My father recognized the

As I have indicated, it is understandable that the Court should seek to find ways to fend off appeals. Accustomed as the Justices are to the freedom which they have under the certiorari system, it must be vexing to have to give consideration to many appeals, even though a sizable proportion of them are clearly not of the significance and importance of many cases which are declined when they can only come to the Court on certiorari. The fact remains, though, that Congress, which clearly has constitutional power in this area, has prescribed that certain classes of cases shall be heard on appeal, without any allowance of discretion to the Court.

The situation which has developed can only be called irregular, and has recently led to some discussions which are rather amusing, if they did not involve the Court's unwillingness to abide by the statutory law as prescribed by Congress. A number of lower courts, both federal and state, had come to the conclusion that the practice was so loose that it was a fair appraisal that dismissal of appeals by the Supreme Court should be given no more effect than a denial of certiorari.⁴⁶ And this view was apparently accepted in considerable measure by the Court in its opinion in *Edelman v. Jordan*,⁴⁷ decided in 1974, where the opinion was written by Mr. Justice Rehnquist. The claimant there relied on three recent *per curiam* affirmances by the Supreme Court of district court decisions in favor of claimants who were similarly situated,⁴⁸ as well as a prior decision⁴⁹ by the Court where the issue was clearly raised, though the Court "did not in its opinion refer to or substantially treat the Eleventh Amendment argument."⁵⁰ Similarly, the Court observed in *Edelman* that the three *per curiam* affirmances did not "contain any substantive discussion of this or any other issues raised by the parties."⁵¹

process of selecting cases as the heart of a Justice's job, for he believed that whoever has the power to decide what cases will appear has the power of the Court"

⁴⁶ See, e.g., *Dillenberg v. Kramer*, 469 F.2d 1222, 1225 (9th Cir. 1972); *National Liberty Life Ins. Co. v. Wisconsin*, 62 Wis.2d 347, 364, 215 N.W.2d 26, 35 (1974), cert. denied, 421 U.S. 940, 946 (1975).

See also, Gunther, *The Subtle Vices of the 'Passive Virtues' — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964); Comment, *The Significance of Dismissals For Want of a Substantial Federal Question: Original Sin in the Federal Courts*, 68 COLUM. L. REV. 785, 791 (1968).

⁴⁷ 415 U.S. 651 (1974).

⁴⁸ *State Dep't of Health v. Zarate*, 407 U.S. 918 (1972); *Sterrett v. Mothers' and Children's Rights Organization*, 409 U.S. 809 (1972); *Wyman v. Bowens*, 397 U.S. 49 (1970). In the *Zarate* case, for example, the entry reads: "Judgment affirmed. Mr. Justice White is of the opinion that probable jurisdiction should be noted."

⁴⁹ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁵⁰ The quotation comes from the opinion in *Edelman v. Jordan*, 415 U.S. at 670.

⁵¹ *Id.*

On this basis, the Court reexamined the question, and now reached the opposite conclusion. It said:

This case, therefore, is the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion. *Shapiro v. Thompson* and these three summary affirmances obviously are of precedential value. . . . Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. . . . Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holding of those cases. . . .⁵²

Thus the Court sought to keep its options open. But one may fairly ask: Is this justice "under Law"? Or is it an unwarranted yielding by the Court to the exigencies of its vastly crowded docket, despite the valid laws made by Congress?

The next item in this little procedural (or is it only procedural?) drama came just a year later in the Court's opinion in *Hicks v. Miranda*.⁵³ That case involved the constitutionality of a California obscenity statute. In an earlier case, *Miller v. California*,⁵⁴ on appeal from the Supreme Court of California, which sustained the validity of the statute, the United States Supreme Court had dismissed the appeal "for want of a substantial federal question" — with two dissents. But in the *Hicks* case, the lower court held that it was not bound by the decision in the *Miller* case, since that was simply a dismissal, not very different from a denial of certiorari.⁵⁵

The Supreme Court did not look with favor on this enterprise of the three-judge district court. In an opinion by Mr. Justice White, the Court observed that "we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obliged to grant the case plenary consideration and we did not; but we were required to deal with its merits." The Court did so, in the earlier case, by dismissing the appeal "because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement."⁵⁶

⁵² *Id.* at 670-71.

⁵³ 422 U.S. 332 (1975).

⁵⁴ 418 U.S. 915 (1974).

⁵⁵ *Miranda v. Hicks*, 388 F. Supp. 350, 364 (C.D. Calif. 1974). The court said that "this court cannot attach plenary precedential value to the summary treatment."

⁵⁶ 422 U.S. at 344.

Thus the rule is now clear. It can be stated somewhat crudely in these terms: You lower courts must do what you are told. These decisions are binding on you. But we are free to do what we want, when we take a second, or third, or fourth look.

This is understandable. It may be a means of handling an impossible docket, which Congress has so far been unwilling to alleviate, and which indeed the Court, or some members of it, have not been willing to recognize.⁵⁷ But is it "Equal Justice under Law"? *Non sub homine sed sub deo et lege*. Why should not the Supreme Court be bound by the law?

The latest episode in this strange saga came less than a year ago in a case decided in this circuit. This is *Hogge v. Johnson*,⁵⁸ a case involving the edifying question of the constitutional validity of an ordinance of Hampton and Newport News forbidding the operation of massage parlors where the treatment is given by a person to a person of the opposite sex. In an earlier case, the Supreme Court of Virginia had held a similar ordinance adopted in Falls Church to be constitutional.⁵⁹ On appeal of that decision to the Supreme Court of the United States, the appeal was dismissed for want of a substantial federal question.⁶⁰ While the *Hogge* case was pending in the Fourth Circuit the Supreme Court decided *Hicks v. Miranda*, to which I have referred above, where it held that the lower courts are bound by the Supreme Court's summary decisions on appeals. On this basis, the Fourth Circuit, in an opinion by Judge Craven, upheld the validity of the ordinance from Hampton and Newport News. The interesting aspect of the matter is that one of the members of the panel of the Fourth Circuit was, by designation, Mr. Justice Clark, retired Justice of the Supreme Court of the United States. He wrote an opinion which can fairly be called remarkable. He said:

The Supreme Court's statements in *Hicks v. Miranda*, . . . seem to me to fly in the face of the long-established practice of the Court at least during the eighteen Terms in which I sat. During that time, appeals from state court decisions received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight. . . . I cannot

⁵⁷ See letters from the Justices in the Report of the Commission on Revision of the Federal Court System, Structure and Internal Procedures: Recommendations for Change 172-188 (1975); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973).

⁵⁸ 526 F.2d 833 (4th Cir. 1975).

⁵⁹ *Kisley v. City of Falls Church*, 212 Va. 693, 187 S.E.2d 168 (1972).

⁶⁰ 409 U.S. 907 (1972).

believe that the Court in 1972 gave such serious consideration to the merits of that case as to justify the precedential value now assigned to it.⁶¹

This is a view from inside rarely vouchsafed to members of the bar or the general public.

Clearly Congress has not provided for a completely discretionary docket for the Supreme Court. Is it fitting — or desirable — that the Court should nevertheless make its docket essentially discretionary? Should decisions of the Supreme Court, in cases which Congress has said can be taken there of right be ones which a member of the Court “cannot believe that the Court . . . gave such considerations to the merits . . . as to justify the precedential value now assigned to it”? Of course we have known that this has been happening for a long time. As Justice Clark said, it has become a “long-established practice of the Court.” Is it a proper practice? Does it lead to “Equal Justice under Law”?

B. *Non-final judgments which are “final.”*

There is another area where the Court has seemed to be rather free in its reading of Acts of Congress. Ever since the first Judiciary Act, Congress has limited Supreme Court review of the highest court of a State to a “final judgment or decree.”⁶² Congress thus has always recognized that interference with state court decisions was a serious matter, and has provided from the beginning that this should be done only when the state procedures are exhausted, that is, when the judgment of the state court is a “final judgment.”

Despite this clear language, the Supreme Court has little difficulty in deciding cases from state courts even though it is far from clear that the state court’s decision is “final.” There are two recent illustrations of this practice. In *North Dakota State Board of Pharmacy v. Snyder’s Drug Stores, Inc.*,⁶³ the question turned on the validity of a state statute which provided that the owner of a pharmacy must be “a registered pharmacist in good standing.” The state supreme court held the statute unconstitutional, relying on an earlier decision of the Supreme Court,⁶⁴ and remanded the case to the state

⁶¹ 526 F.2d at 836.

⁶² Act of September 24, 1789, c.20, sec. 25, 1 Stat. 73, 85. This is now found in 28 U.S.C. § 1257 (1974).

⁶³ 414 U.S. 156 (1973).

⁶⁴ *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928).

Board of Pharmacy for further consideration, without restraint from the ownership statute. It is hard to see how this was in any real sense a final judgment, since the matter was remanded for further proceedings. Nevertheless, the state Board of Pharmacy brought the case to the Supreme Court of the United States. That Court held that it had jurisdiction, overruled its earlier decision, and reversed the judgment of the state court.

The other case is *Cox Broadcasting Corp. v. Cohn*.⁶⁵ Involved there was a Georgia statute making it a misdemeanor to broadcast the name of a rape victim. In a suit for damages, brought by the victim's father, the Supreme Court of Georgia upheld the validity of the statute, and sent the case back to the lower court in Georgia for trial. Here again, it is hard to see how the decision was a final judgment, since the case was remanded for trial. Nevertheless, when the broadcasting company filed an appeal in the Supreme Court of the United States, the Supreme Court held that the judgment was final, and that the Court had jurisdiction to review it. Again it reversed the state court decision.

C. *Other examples of the Court's tendency to increase its discretion.*

Another area where the Court has taken jurisdiction restrictions somewhat lightly is that of jurisdictional amount. Congress has provided that in certain classes of cases the federal court shall have jurisdiction only when the amount involved is in excess of \$10,000.⁶⁶ In some cases, particularly where civil rights are involved, the failure to make such a showing has not prevented the Court from reaching a decision on the merits.⁶⁷ These limitations may be unwise and unfortunate, but it is not clear that that is a sufficient reason for not giving them effect.⁶⁸

⁶⁵ 420 U.S. 469 (1975).

⁶⁶ 28 U.S.C. §§ 1331, 1332 (1974).

⁶⁷ *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 239 (1968).

⁶⁸ Another case of this genre is the recent decision in *Thermtron Products, Inc. v. Hermansdorfer*, 96 S. Ct. 584 (1976). Section 1447(d) of Title 28 of the United States Code provides that "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with an exception which is not relevant. Despite this clear provision by Congress, the Court held that a remand order was reviewable by a writ of mandamus. The Court reached this result by holding that section 1447(d), despite its breadth, was applicable only to remands under section 1447(c), which applies only where the case was "removed improvidently and without jurisdiction."

See also *Commissioner v. Shapiro*, 96 S. Ct. 1062 (1976), where the Court found a way to get around the clear provision of section 7421(a) of the Internal Revenue Code,

D. *Commentary*

All of these matters may be thought to be rather technical, and they are. Why do I bring them up in a lecture like this?

My concern is that the broad approach taken by the Court in these cases operates to increase the area within which the Supreme Court's authority is in essence discretionary — the area in which the Court can decide a case when it wants to do so, or leave it alone at its discretion. What is wrong with that? The Court cannot decide all of the appellate cases in the country. It has too many cases to consider now. These things are true, and they are arguments to be addressed to Congress. I think that Congress should take steps to narrow the Court's jurisdiction, and to expand the appellate capacity of the country.⁶⁹ But this should, I think, be done by Congress, and not by the Court doing what seems to be little more than ignoring the prescriptions which Congress has made under its clear constitutional power.

Why am I concerned about discretionary jurisdiction? It is one thing for a court to sit and decide the cases which are brought before it by litigants, taking the cases as they come — big cases, little cases, important cases, and cases of no general concern. The decisions in these cases constitute the stream of law, coming as they do in direct consequence of the cases brought into the judicial system by litigants.

Where, however, the Court can decide such cases as it wants, there is inevitably a selection, and a distortion of the stream of law. Certain kinds of cases are decided. Other types of cases can almost never get a hearing before the Supreme Court. And there is almost inevitably a tendency to "reach out," and bring in certain types of cases for decision, because the Court is interested in such cases, or regards them as important for the country, or simply because the Court finds a certain satisfaction in moving the country along by making new law.⁷⁰ Increasing discretion in selecting cases for review

which says that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . ." This statutory provision has a long history of judicial escape. See *Enochs v. Williams Parking Co.*, 370 U.S. 1, 7 (1962). It has been suggested that Congress should amend the statute by adding the words "and we mean it" at the end.

⁶⁹ See Griswold, *Rationing Justice — The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1975).

⁷⁰ As Justice Douglas once said in a television broadcast, "I'd rather create a precedent than find one." Transcript of Television Interview, CBS Reports, September 6, 1972. See also, Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949). This is doubtless exhilarating, but may give considerable opening for the personal views of the person involved.

inevitably tends, I think to encourage "reaching out," and this may have the effect of substantial distortion in the Court's handling of cases, and in its choosing of cases for decision.⁷¹

On this subject Professor Lusky has written that the Court has "acted on the 'prudential' — one might say, more bluntly, opportunistic — basis of deciding questions if and when it thought the public welfare (as discerned by the Justices themselves) would be furthered."⁷² And he added that "the 'prudential' approach in the selection and mode of adjudication of cases . . . is by no means a trivial assumption of power. It is a very large assumption of power indeed; . . . it raises a serious question as to whether the Court has shaken itself free from all external restraint and begun to function as a continuing constitutional convention."⁷³

A Justice of the Supreme Court has been quoted as saying: "When I see something I do not like, I want to hit it." This is an understandable reaction. But is "do not like" a proper basis for the choice of cases for decision, particularly when the determination whether a case should be heard is made summarily without full opportunity for consideration? Is this a situation where "Equal Justice" gets too much consideration, while "under Law" is pushed too far in the background?

III

Personal Views and Predilections — Rewriting the Constitution

I turn now to what is doubtless an even more controversial subject. To what extent has the Court imposed its own views on the country, creating new constitutional law based more on the personal views and outlook of the Justices than on anything that can be found in the Constitution? There are several areas in which the Supreme Court over the past twenty years has "made" constitutional law, reaching conclusions for which it is extraordinarily difficult to find any adequate base in the Constitution itself. These matters have

⁷¹ A petty illustration of this, some years ago, was the taking for review and summary reversal of many cases under the Federal Employer's Liability Act, and other negligence cases. See MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 22-30 (1961); From the Diaries of Felix Frankfurter 330-333 (1975) (entry for November 22, 1947).

⁷² LUSKY, BY WHAT RIGHT? 5 (1975). The word "prudential" comes from BICKEL, THE LEAST DANGEROUS BRANCH, c.4 (1962).

⁷³ *Id.*

been thoughtfully and thoroughly examined in a recent book by Professor Louis Lusky of the Columbia Law School, entitled *BY WHAT RIGHT*. In this book he asks "the question whether the United States Supreme Court is still the law's servant or has become its master."⁷⁴ Professor Lusky examines the cases in greater detail than is possible in this lecture and his book should be read by anyone who is interested in the problems which are raised by the Supreme Court's approach and by its decisions.⁷⁵

A. *Incorporation*

A striking example of this sort of constitution making is to be found in the process by which nearly all of the provisions of the Bill of Rights found in the first eight amendments to the Constitution have been declared to be literally applicable to the states. Of course, these provisions are by their terms, and by their history, directed against Congress alone. The First Amendment begins "Congress shall make no law. . . ." And there are numerous decisions in our constitutional history holding that other provisions of the first eight amendments are not applicable to the states.⁷⁶ Yet, over the past generation, nearly every provision of the Bill of Rights — though not all of them — has been imposed on the states.⁷⁷ How has this been brought about? The instrument has, of course, been the Fourteenth Amendment, which makes no reference to free speech, or jury trials, or self-incrimination. It does, however, provide that no state may deprive a person of life, liberty, or property "without due process of law"; and

⁷⁴ LUSKY, *BY WHAT RIGHT?* 1 (1975).

⁷⁵ Reference should also be made to the stimulating article by Professor Monaghan on *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975), where he advances the thesis that many constitutional decisions of the Supreme Court are really statements of "constitutional common law," and that they are subject to change by Congress. Examples may readily be found in the decisions under the commerce power, and in *Miranda v. Arizona*, 384 U.S. 436 (1966), where the Court recognized that legislatures could make changes in the Court's rules — if Congress or the state legislatures could do a better job.

⁷⁶ See, e.g., *Twining v. New Jersey*, 211 U.S. 78 (1908), holding that the privilege against self-incrimination, provided by the Fifth Amendment, is not binding on the states, and *Walker v. Sauvinet*, 92 U.S. 90 (1875), and *Maxwell v. Dow*, 176 U.S. 581 (1900), both holding that the jury trial provisions of the Bill of Rights are not applicable to the states.

⁷⁷ An excellent review of the course of development in these areas may be found in GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (9th ed. 1975). See, especially, pp. 506-547, on "incorporation," and pp. 548-656, on "substantive due process." Another fine summary, from a different point of view, is ALDISERT, *THE JUDICIAL PROCESS* (1976), especially pp. 493-599.

it further provides that the states shall not deny to anyone the equal protection of the law. Obviously, the Fourteenth Amendment has some meaning, though its terms are quite general; and it is binding on the states. Although the process has earlier roots, it was perhaps first clearly recognized in the opinion of Mr. Justice Cardozo in *Palko v. Connecticut*.⁷⁸ He there summarized a number of situations, including freedom of speech and of the press, or the right of one accused of crime to the benefit of counsel, where —

immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment become valid against the states.⁷⁹

Since that time, the process has moved relentlessly ahead. In 1940, the Court referred to the “absorption of the First” Amendment by the Fourteenth.⁸⁰ The great leap forward began with Justice Black’s dissenting opinion in *Adamson v. California*.⁸¹ Justice Black strongly objected to the “absorption theory” because he said that it provided no appropriate standard. In his view, it amounted to an assertion —

that this Court is endowed by the Constitution with boundless power under “natural law” periodically to expand and contract constitutional standards to conform to the Court’s conception of what at a particular time constitutes “civilized decency” and “fundamental liberty and justice” . . . I think . . . the “natural law” theory of the Constitution upon which it relies degrade[s] the constitutional safeguards of the Bill of Rights and simultaneously appropriate[s] for this Court a broad power which we are not authorized by the Constitution to exercise.⁸²

Justice Black was not willing to accept this responsibility on a retail basis. He felt that he was being a “strict constructionist,” and that he was fending off a dangerous “natural law.” Yet, he was entirely willing to reach the same goals — and more — on a wholesale basis, without realizing or conceding that he was making a very similar, but

⁷⁸ 302 U.S. 319 (1937).

⁷⁹ *Id.* at 324-25 (footnote omitted).

⁸⁰ *Minersville School Dist. v. Gobitis*, 319 U.S. 586, 593 (1940).

⁸¹ 332 U.S. 46, 53 (1947).

⁸² *Id.* at 69, 70.

more sweeping, natural law construction of the Fourteenth Amendment. On this he said:

In my judgment [the history of the Fourteenth Amendment] conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights.⁸³

The historical foundation for this view seems unpersuasive.⁸⁴

Although Justice Black spoke in dissent in the *Adamson* case, and although his thought that he was free from a "natural law" approach seems unwarranted, it is a tribute to the force of his character and will that before long he had persuaded a majority of the Court to make most of the provisions of the Bill of Rights binding on the states. Thus in *Jacobellis v. Ohio*,⁸⁵ Justice Black, speaking for the Court, said that "The First Amendment is made obligatory on the states by the Fourteenth." Similarly, in *Terry v. Ohio*,⁸⁶ Chief Justice Warren referred to "the Fourth Amendment, made applicable to the states by the Fourteenth," and in *Stanley v. Georgia*,⁸⁷ Justice Marshall referred to the "First Amendment as made applicable to the states by the Fourteenth Amendment."

There is a tendency in court decisions to build upon each other, and for subsequent decisions to go further than may have been contemplated when an earlier case was decided. As I have said elsewhere:

There is a sort of decisional leap-frogging [which] takes over as a principle expands: the first decision is distilled from the language of the Constitution. But the next expansion begins from the reasoning of the last decision, and so on down the line until we reach a point where the words of the Constitution are so far in the background that they are virtually ignored. In the end we may be left with a rationale that comes to little more than "Well, it really is a good idea. We want a free society

⁸³ *Id.* at 74, 75.

⁸⁴ See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1941). See also Justice Black's responses in *Duncan v. Louisiana*, 391 U.S. 145, 165-171 (1968).

⁸⁵ 378 U.S. 184, 196 (1964).

⁸⁶ 392 U.S. 1, 8 (1968).

⁸⁷ 394 U.S. 557, 559 (1969).

where all of these things can be done and we want to keep the Government off the backs of the people."⁸⁸

There are governmental procedures for bringing such results about, but it is hard to think that such adumbrations of the Constitution are an appropriate exercise of judicial power.⁸⁹

There are many problems with these results. We now have a very different Constitution, as far as the powers of the states are concerned, from that which was adopted in 1789 and 1791, and from any understanding of the Fourteenth Amendment in two or three generations after it was adopted. The limitations on the power of the states may well be desirable. Do they, though, represent an application of the proper balance between the two parts of "equal Justice under Law"? Should such changes have been brought about in a democratic country by judges holding life tenure, and deliberately isolated from all political influence? Are the expansions of the Constitution, and thus of the Court's power of oversight over many aspects of American life, legitimate functions of the judiciary? Do they allocate to the Court powers which, in a proper division of constitutional function would belong to the people, through their representatives? Has the Court paid too much attention to "Equal Justice" and too little to "under Law"?⁹⁰

B. *Privacy and "substantial due process."*

Another area in which the Court has gone well beyond anything

⁸⁸ Griswold, *The Judicial Process*, 28 RECORD OF THE ASSOCIATION OF THE BAR 14, 24-25, 31 FED. B. J. 309, 317 (1973).

⁸⁹ See also Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 950 (1965). Compare, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 351 (1974).

⁹⁰ One of the difficulties with the process which the Court has followed is that it may weaken the guarantees provided by the Constitution with respect to the federal government. For example, in *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that the provisions for jury trial contained in the Sixth Amendment are binding on the states through the provisions of the Fourteenth Amendment. Very shortly thereafter the Court held that a jury need not contain twelve members. *Williams v. Florida*, 399 U.S. 78 (1970). And in *Apodaca v. Oregon*, 406 U.S. 404 (1972), it held that a jury verdict might be rendered in a criminal case on less than a unanimous vote. Both of these conclusions seem almost surely contrary to the view which would have been held by the persons who adopted the Bill of Rights, if they had ever thought the question one which should be considered. Thus, it may well be asked whether safeguards which the Constitution provides against the federal government have not been weakened because these provisions were extended, contrary to contemporaneous understanding, to the states.

which may be found in the Constitution is that of privacy. There is nothing in the Constitution about privacy; the word is not used either in the Constitution or in any of its amendments. Nevertheless, a great constitutional structure has been erected in this area based upon the First Amendment. It will be recalled that this provides that Congress shall make no law abridging freedom of speech or of the press, and provides further that the people may peaceably assemble and petition the government for a redress of grievances. One thinks of Peter Zenger and Faneuil Hall.

In *NAACP v. Alabama*,⁹¹ the Court referred to "freedom of association and privacy in one's associations." This was apparently the first modern appearance of privacy in a constitutional context.⁹² It will be recalled that the case held that the NAACP was not required to disclose its membership lists in Alabama. This seems to be reasonably derived from concepts of due process and of freedom of speech and of association.

The big step was taken in *Griswold v. Connecticut*.⁹³ That case involved a Connecticut statute which forbade the use of contraceptives, and made it an offense to assist in the violation of that statute. The petitioners in that case had given contraceptive information and advice to married persons. They were found guilty of an offense under the Connecticut statute, and that was affirmed by the Supreme Court of Errors of Connecticut.

When that case came to the Supreme Court of the United States, the decision was reversed on what were said to be First Amendment grounds. It is apparent, though, that the Court was conscious of the fact that it was reaching very far. What it said was that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."⁹⁴ Reference was made to the Third Amendment, and to cases arising under the Fourth Amendment. From this it was concluded that "These cases bear witness that the right of privacy which presses for recognition here is a legitimate one."⁹⁵

⁹¹ 357 U.S. 449, 462 (1958).

⁹² Proponents of a constitutional right of privacy have traced roots back as far as *Boyd v. United States*, 116 U.S. 616, 630 (1886), where the Court referred to the Fourth and Fifth Amendments as protections "of the sanctity of a man's home and the privacies of life."

⁹³ 381 U.S. 479 (1965).

⁹⁴ *Id.* at 484.

⁹⁵ *Id.* at 485. Cf. Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693 (1972).

It is hard to tell just how far a penumbra reaches in the constitutional area, and it may be thought that the detection of "emanations" is a highly personal matter. Some might think that the real meaning of these words in this context is "that the Constitution does not cover the subject but ought to because it does so much else that is desirable."⁹⁶ The least that can be said of this is that it is going rather far from the constitutional text.⁹⁷

Another, though less striking, expansion of the concept of privacy is found in *Stanley v. Georgia*,⁹⁸ where officers, holding a search warrant in connection with alleged bookmaking activities, found three reels of pornographic film in a desk drawer in an upstairs bedroom. The case might well have been decided on standard Fourth Amendment grounds (now that the Fourth Amendment has been incorporated in the Fourteenth), since the search went far beyond anything covered by the search warrant. But the Court went on to say that:

It is now well established that the Constitution protects the right to receive information and ideas . . . This right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society. . . . [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.⁹⁹

And then the Court concluded that "The States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."¹⁰⁰ It is an appealing decision. But where can it be found in the Constitution? Did the Court give adequate consideration to its duty not just to decide the case in a heart-warming manner, but to decide it "under Law"?¹⁰¹

The culmination of this development to date is found in the still rather startling decision in the abortion cases, *Roe v. Wade*,¹⁰² and

⁹⁶ Griswold, *The Judicial Process*, 28 RECORD OF THE ASSOCIATION OF THE BAR 14, 24, 31 FED. B. J. 309, 317 (1973).

⁹⁷ See Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965). Cf. Karst, *Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due-Process Formula'*, 16 U.C.L.A. L. REV. 716 (1969).

⁹⁸ 394 U.S. 557 (1969).

⁹⁹ *Id.* at 564.

¹⁰⁰ 394 U.S. at 568.

¹⁰¹ Cf. Greenawalt, *Discretion and Judicial Decisions: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975); Hastie, *Judicial Role and Judicial Image*, 121 U. PA. L. REV. 947 (1973).

¹⁰² 410 U.S. 113 (1973).

Doe v. Bolton.¹⁰³ The Court held there that antiabortion statutes of Texas and Georgia were unconstitutional. The Court recognized that "The Constitution does not explicitly mention any right to privacy." But the Court continued, citing several cases, including the *Griswold* and *Stanley* cases mentioned above, saying that "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."¹⁰⁴ On this basis, it quickly reached the conclusion that:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.¹⁰⁵

Again we find the clear dichotomy between "Equal Justice" and "under Law." I need not here go into all the details of the decision, with its elaborate discussion of what it calls the three stages of pregnancy, with greatest power being reserved to the woman during the first three months of pregnancy. (The woman involved in the case was held to have standing to raise these questions, even though her pregnancy had long since terminated by the time of the decision, and there was nothing whatever to show that she had been within the first three months of pregnancy at any time the suit was pending.) Even then the Court did "not agree" that the woman's right is "absolute".¹⁰⁶ Though the decision is based on the woman's right of privacy, she can act only with the approval of her physician. During the first three months, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated."¹⁰⁷

Verbally, that is surely a great deal to be found in a Constitution that was created by "sovereign states," and does not mention either abortion or privacy. But substantively, it may be even more difficult to fathom. Justice Stewart concurred in the result, pointing out that in 1963 the Court "purported to sound the death knell for the doctrine

¹⁰³ 410 U.S. 179 (1973).

¹⁰⁴ 410 U.S. at 152.

¹⁰⁵ *Id.* at 153.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 163.

of substantive due process."¹⁰⁸ He quoted the opinion of Mr. Justice Black, who had written: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws."¹⁰⁹ But, as Justice Stewart said, the *Griswold* case came "Barely two years later," and it can only be rationally understood "as one in a long line of pre-Skrupa cases decided under the doctrine of substantive due process, and I now accept it as such."¹¹⁰

There has been a good deal of thoughtful commentary on the abortion decision, most of it adverse. Professor John Hart Ely has written that it is a "a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."¹¹¹ Professor Gerald Gunther has written: "The abortion ruling, whatever one's view of the result, appears an insupportable constitutional interpretation."¹¹² Professor Charles L. Black, Jr., has written: "In my view, no decision of the Warren Court was as problematic, when it comes to discerning a constitutionally rooted ground for the choice made."¹¹³ And Alexander Bickel wrote that, on abortion, "The Supreme Court prescribed a virtually uniform statute of its own." He continued:

. . . if the Court's model statute is generally intelligent, what is the justification for its imposition? . . . One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject. It simply asserted the result it reached . . . Should not the question . . . have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change?¹¹⁴

¹⁰⁸ *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

¹⁰⁹ *Id.* at 730.

¹¹⁰ 410 U.S. at 167, 168.

¹¹¹ Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 947 (1973) — emphasis in the original.

¹¹² Gunther, "Supreme Court in Eclipse?" 3 *Stanford Mag.* 40 (Fall/Winter, 1975).

¹¹³ Black, Book Review of Cox, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT*, in *N.Y. Times Book Review*, February 29, 1976.

¹¹⁴ BICKEL, *THE MORALITY OF CONSENT* 27, 28 (1975). See also LUSKY, *BY WHAT RIGHT?* 15-20, 100 (1975).

IV

Judicial Action Which is Essentially
Legislative in Character

There is a final aspect of some of the Court's decisions to which I would like to make reference, and this is applicable, too, to the abortion decisions.

The Constitution divides the Government into three branches. One of these is the legislative branch, and to it is assigned the responsibility to make the law. We all know that this line is not precise, and that there are various sorts of delegated legislation, and that both the executive branch and the judiciary have appropriate powers. But the function of the Federal judiciary is limited by the terms of the Constitution to the decision of "Cases" or "Controversies," and over the years there has grown up a large body of law, accepted until recently by the Supreme Court, which limited the function of the courts to the decision of specific cases between parties, and generally involving relatively narrow issues. Such decisions would serve as precedents, and thus would have an impact on the development of the law. But they were very clearly distinguishable from the generally applicable legislative enactments passed by Congress.

In recent years, the Court has more and more been willing to resolve "great issues," affecting large numbers of people, rather than confining itself to the important but narrower task of deciding cases between defined parties. Reference may be made, for example, to the Court's decision in *Miranda v. Arizona*,¹¹⁷ where the Court not only decided the case before it, but laid down an elaborate series of rules which the police must follow in interrogating a person who has been taken into custody. One may agree that these are wise rules, but the question remains whether under our constitutional scheme they should have been made by a court or by a legislature. It is hardly an answer to say that legislatures are slow to move in this area. The Court could have considered *Miranda's* case without developing formulated and elaborate rules for all cases in the future. Indeed, the fact that the Court almost contemporaneously decided that the

¹¹⁵ 198 U.S. 45 (1905). Cf. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 54-55 (1976): "Is there any general judgment for the result of the political process when dealing with abortion but not with hours of work? To read liberty of abortion into the Fourteenth Amendment but not liberty of contract?" (Emphasis in original).

¹¹⁶ 261 U.S. 525 (1923).

¹¹⁷ 384 U.S. 436 (1966).

Miranda rules should not be applied retroactively¹¹⁸ shows that the Court understood that it was acting in an essentially legislative fashion.

Some aspects of this development have gone very far in the lower Federal courts, where decisions have been reached which involve the courts in substance in taking over large functions of the executive branch of the government. Thus, in *Wyatt v. Stickney*,¹¹⁹ a federal district judge in Alabama has entered an elaborate decree providing in detail for the staffing and management of a mental hospital, specifying the number of persons on each floor on each shift, and covering many pages of details in the operation of the facility. This really has to be seen to be believed. One may have great sympathy for the provocation which led to this decision. One may recognize the utter failure of the executive branch, and of the legislative branch which did not appropriate adequate funds. But there is room to question whether the actions taken were appropriate for a judge. It is clearly true that there were parties before the court who had legitimate complaints under the statutes of the United States. Could this possibly have been handled by a decree providing for the release of these wronged persons, with a provision for a stay while the state was given time to make its own proper arrangements? The situation is surely a difficult one; and one may have great sympathy with and admiration for the judge, while finding it difficult to resist the conclusion that what he undertook was beyond the proper function of the judiciary.

Judge Carl McGowan has observed that the prestige of the federal courts "can only suffer" if they "are made to carry too active a role in what is surely in large part simply day-to-day administration." He points out, though, that a measure of the difficulty comes from the tendency of the legislative branch "to finesse hard choice of policy," making broad delegations of authority to department heads or newly created commissions. In such a case, judicial review may be based upon an informal request or rulemaking, and he points out that such a record —

is indistinguishable in its content from the proceedings before a legislative committee hearing on a proposed bill, consisting as it does of letters, telegrams, and written statements from proponents and opponents, including occasional oral testi-

¹¹⁸ *Johnson v. New Jersey*, 384 U.S. 719 (1966).

¹¹⁹ 344 F. Supp. 373, 379-386, 344 F. Supp. 387, 395-408 (M.D. Ala. 1972), modified, sub nom. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). See *Developments: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1333-1344 (1974).

mony not subjected to adversary cross-examination. It is on that kind of record that a Congressman decides which way to vote on a bill, . . . No matter how the standard of review is articulated, there is great latitude for the judge to vote his policy views in the same manner as does the legislator. No matter how sensible the necessity for restraint by a life-time judge not accountable to the electorate, the opportunities, and the consequent temptations, are great to come down on the side of the judge's personal conceptions of policy. Even the humblest judge — and the most alert to the dangers of result-oriented adjudication — may slip, sometimes subconsciously, if his predilections are sufficiently engaged, and thereby risk nullification of the principle that democracies are to be run in accordance with the majority will.¹²⁰

Similar problems result from changes in the Rules of the Supreme Court which were adopted by the Court in 1966. These provided a greatly expanded scope for "class actions," that is, law suits in which one or more persons sue on behalf of all persons similarly situated.¹²¹ Some of the classes which have been brought to court are truly enormous — all persons who sold real estate in Los Angeles County over a period of several years,¹²² all persons who bought or sold odd lots on the New York stock exchange,¹²³ and so on. It is true that the law is still developing in this area, and the decisions of the Supreme Court have so far had a restraining influence on those who regard "class actions" as a panacea for all of society's ills.¹²⁴ It should not be overlooked, though, that cases of this sort turn the court proceeding into something not very different from a legislative hearing, where spokesmen for large and indefinite groups endeavor to persuade legislators to take action which would be beneficial to them.

The Supreme Court has indicated that it is aware of the problem of the proper scope of judicial function which lurks in this area. In *Laird v. Tatum*,¹²⁵ by a narrow margin, it reversed a judgment under which the United States District Court in the District of Columbia

¹²⁰ McGowan, "Congress and the Courts," an address delivered at the University of Chicago Law School, April 17, 1975, pp. 8, 9, and 10.

¹²¹ Rule 23 of the Rules of the Supreme Court, 383 U.S. 1039, 1047 (1966).

¹²² *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974).

¹²³ *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

¹²⁴ See *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

¹²⁵ 408 U.S. 1 (1973).

would have been put into direct charge of operations of the army with respect to citizen surveillance, making it necessary for a military commander to get the permission of the court before undertaking surveillance operations, even in times of great emergency. The surveillances which had occurred in that case were wrong. But they had been stopped. The Court placed its decision on lack of standing of the plaintiffs, but it may have been influenced by the Government's contention that matters of this sort should not be put into the hands of the courts in the first instance, but should remain in the primary control of the military. The courts will still be open if there should be further abuse.

In a sense we now complete the circle, for the Court's recent decision in *Rizzo v. Goode*,¹²⁸ about which complaint has been made, is another example of the Court's recognition that the judiciary cannot properly undertake the general operation of the government, both state and federal. In the *Rizzo* case, it appeared that certain members of the Philadelphia police department had abused a number of citizens. None of the wrong-doing policemen was a party to the case, though some of them appeared as witnesses. Mayor Rizzo was a party to the case, but he had not been mayor when the wrongful events occurred. The lower courts approved a decree requiring the mayor and other city officials (none of whom was shown to have done anything wrong) to set up elaborate machinery for police supervision and complaints. This was reversed in the Supreme Court, on the ground that the decree went beyond the proper function of the court. It went too far towards putting the court into the operation of the police department.

It should be noted that this decision does not say that people who were wronged cannot recover from the persons who did the wrong. What it says is that the courts should confine themselves to dealing with the actual wrongs, and that elaborate decrees designed to protect other persons against the police generally, and binding on city officials who are not shown to have committed any wrong, are not appropriate. In my view, the Supreme Court should be given appropriate credit for having recognized that there are limits to the judicial function. This was a case, it seems to me, where the Court did render "Equal Justice under Law."

Let me make it plain that I am not urging a passive role for the Court. As Professor Gerald Gunther has recently written:

¹²⁸ 96 S. Ct. 598 (1976).

Proper constitutional interpretation contemplates forward movement concentrating on those very important issues to which the Constitution speaks. It contemplates judicial self-denial as to those problems ultimately assigned to the political process.¹²⁷

And he concludes that it is "a characteristic of a healthy constitutional scheme that we do not look to the Court for the solution of all our problems."¹²⁸

I may conclude this portion of my paper by recalling a quotation from Charles Evans Hughes, which is an often overlooked portion of his observation that "We are under a Constitution, but the Constitution is what the judges say it is. . . ." He went on to say, however — and this is the relevant portion here: "Let us keep the courts for the questions they were intended to consider."¹²⁹

V

Conclusion

There has always been an ebb and flow in the doctrine and decisions of the Supreme Court, and one can say with confidence that there always will be. Its task of rendering "Equal Justice" but "under Law" is never an easy one. It is not really a question of "activism" or of "strict construction." Both approaches are always necessary if the proper balance is maintained. There are times when one may think that the Court is rather carried away by the concept of "Equal Justice." There are other times when it could be felt that the Court was too much restrained by the necessity that it reach its decisions "under Law." Some times these aspects appear in isolated cases. At other times they seem to run in periods. What is important is to recognize the inevitability of the process, the care and skill with which it is handled, and the desirability that there be independent commentary from outside the Court on the decisions of the Court, and their trends, as they are announced.

The line is not a clear one. There will be variations according to the outlook and abilities of each Justice. Over the years, though, we may be confident that the Court will continue to fulfill what I have regarded as its symbol — "Equal Justice under Law."

¹²⁷ Gunther, "Supreme Court in Eclipse?" 3 *Stanford Mag.* 40, 41 (Fall/Winter, 1975).

¹²⁸ *Id.* at 42.

¹²⁹ Speech by Governor Hughes before the Elmira Chamber of Commerce, on May 3, 1907, quoted by Judge Carl McGowan in his lecture at the University of Chicago Law School on April 17, 1975, entitled "Congress and the Courts," p. 8.