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UNDERSTANDING THE SUPREME COURT*

ARCHIBALD COX **

I

One following the Supreme Court intimately cannot avoid being struck by the very special nature of its work. There are many cases which might arise in any court and which are not unusual except in their difficulty. More than half the docket, however—and much the most important half—is quite unlike the usual flow of litigation through State and inferior federal courts. In the United States we have developed the extraordinary but perhaps very useful habit of casting social, economic, philosophical and political questions in the form of actions at law and suits in equity, and in this way a large proportion of the most fundamental issues of our times ultimately go before the Supreme Court for judicial determination. They are issues upon which the community, consciously or unconsciously, is deeply divided. They arouse the deepest emotions. Their resolution—one way or the other—often writes our future history.

The school segregation cases,¹ the appeals from the conviction of “sit-ins,”² and the inevitable litigation over the “Freedom Riders”³ furnish prime examples. The lawsuits grow out of, and the decisions will profoundly influence, the conflict between the ideal of liberty and equality expressed in the Declaration of Independence, on the one hand, and, on the other, a way of life rooted in the customs of many of our people—North as well as South—since before the signing of the Declaration. The cases cannot be decided wisely without recognizing the underlying issue.

There are many other examples of my proposition. Some of the Court’s hardest cases during the past decade have emerged from the conflict between the pressures for conformity and the need for individual freedom.⁴ The Colorado River litigation will affect the growth of large areas in the Southwest.⁵ The decision in the so-called Tennessee Reapportionment case, in which the Court will decide whether the claim that gross malapportionment of representatives in both houses of a State legislature violates the Fourteenth Amendment presents a justiciable question, may write our governmental history for the next fifty years.⁶

¹ This article was originally delivered as a John Field Simms Lecture on February 8, 1962 at the University of New Mexico.

² Solicitor General of the United States.

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⁵ Arizona v. California, No. 8 Orig., October Term 1961.

The nature of Supreme Court litigation enhances an antimony which lies at the basis of the judicial process. The law is, in a sense, quite independent of, and superior to, the courts which declare and apply it. As the late Judge Learned Hand reminded us—

The judge's authority and immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate.

Yet judges make the law:

... the customary law of English-speaking people stands a structure indubitably made by the hands of generations of judges ...

The result is a dilemma both horns of which the judge must manage to escape—

... he must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his times.7

Judge Hand was speaking of the growth of the common law. The dilemma is sharper in constitutional law and the other branches of public law with which the Supreme Court is predominantly concerned. The pressure to keep the law in tune with the needs of men is stronger. Considerations of social and economic policy lie closer to the surface. The words of the Constitution seldom control the decision; they are binding, but such broad phrases as "due process of law" do not provide answers to borderline cases. Likewise, there are few instances in which Farrand's Debates or The Annals of Congress contribute anything useful to constitutional exegesis, except a deeper understanding of our national traditions and aspirations. All too often the Court must write upon a clean slate. And even when a precedent is logically in point, the Court must ask whether changed conditions may have sapped its vitality.8

The other branch of the antimony also presses more urgently. The grave public importance and emotional content of the issues which the Supreme Court decides make it even more important here than elsewhere that the Court's decisions summon a respect greater than mere men would command, if the Court "is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests [it] must frustrate." We would not long tolerate a Council of Nine Wise Men charged with deciding our most difficult and emotional questions according to their notion of what was just or wise or politic; this is the function of representatives chosen by the people. The justices

are charged with deciding according to law—a law which binds the judges no less than the litigants, the governors no less than the governed—and part of the "judicial merits" of any case—if I may use a barbarism—is the importance of preserving this ancient ideal.

How does the Court resolve this dilemma of having to render decisions according to law even as it makes the law by which it is governed? Even if I had the necessary wisdom, time would prevent a complete answer. Each judge strikes his own balance between the branches of the antimony, and thus achieves his own solution. But it is essential that we essay some comprehension of the process, for public understanding is the best bulwark against the strains and criticisms to which the Court is subjected because of the very nature of its work. And so I plan to discuss two kinds of limitation upon the judicial function which distinguish the Court from a Council of Wise Men. The necessity for giving them some weight is only one among many characteristics supporting the distinction, but their influence often explains why the Court renders decisions which are different from what you or I or Plato's philosopher kings, or even the Justices themselves, would consider fair, or just, or wise if they were vested with the sum total of all governmental power.

II

The first limitation is the principle that a Supreme Court decision must take into account the fundamental distribution of power in our constitutional system—the division of authority between States and Nation and between the legislative, executive and judicial branches.

STATE AUTONOMY

One division of authority between the State and federal governments is by subject matter. The national government, for example, is assigned responsibility for regulating interstate commerce, while the States deal with such local matters as school, health and building codes. One of the two great constitutional issues of the past half-century was concerned with the extent of federal authority under the power to regulate interstate commerce. The issues have critical importance and are sometimes very hard to decide, but so long as it is concerned solely with the allocation of functions between the State legislatures and the Congress the role of the Court is easily determined. The Court—and it alone—must make the allocation. Conversely it has no concern with the merits of the legislation adopted by either sovereignty.

The Constitution also divides authority over the same subject matter by limiting what a State may do even within its allocated sphere and then vesting in the Supreme Court, a branch of the national government, authority to determine

whether a limitation has been exceeded. Thus, the States establish public education but the Supreme Court, a branch of the national government, is charged with deciding whether a State's educational system denies a litigant "equal protection of the law."11 The States have general authority to prosecute crimes against persons and property, but the Court has the responsibility of determining whether a State has deprived a criminal of life, liberty or property "without due process of law."12

In this area almost every case involves two questions: (1) what are the merits or demerits of the rule the State has adopted, (i.e., what should the rule be); and (2) how far may the Supreme Court properly go in restricting a State's power to adopt whatever rule it chooses. One who asks only the first question in a given case will often come to a quite different answer from him who also puts the second; and those who put both questions may assign different degrees of importance to each.

Perhaps I can clarify these generalizations by specific examples. A few years ago one Mallory, who was suspected of rape in the District of Columbia, was arrested and taken to police headquarters about noon. He was held all afternoon and through the night without being informed either of his right to counsel or that any statement made by him might be used against him. The detention without arraignment was plainly illegal, for the law requires a federal officer making an arrest to bring his prisoner before the nearest United States Commissioner for arraignment without unnecessary delay. After Mallory had been held for nine hours, he signed a written confession. The confession was admitted in evidence during the subsequent trial, and on this basis Mallory was convicted and sentenced to death. Upon appeal the Supreme Court reversed the conviction, holding that confession given while the defendant is unlawfully detained without prompt arraignment cannot be used as a basis for a criminal conviction.13

Contrast with the Mallory case the decision a few years earlier in Gallegos v. Nebraska.14 Gallegos was convicted of manslaughter and sentenced to ten years imprisonment by a Nebraska court. The principal basis for his conviction was two confessions, one given during a 48-hour period in which he was held incommunicado for interrogation, again without advice concerning his legal rights. The total period between Gallegos' arrest and arraignment ran to twenty-five days. When his case was taken to the Supreme Court upon his claim that this procedure had denied the due process of law guaranteed by the Fourteenth Amendment, the Supreme Court affirmed the conviction by a vote of seven to two.

How can these two decisions be reconciled? One who was concerned only with the result—what is desirable criminal procedure—could not rationally vote to reverse the Mallory conviction but affirm the conviction of Gallegos.

12. Ibid.
Gallegos had been unlawfully held for a very much longer period. The explanation, of course, is that the Supreme Court has a general supervisory authority over the rules of evidence and conduct of trials in the federal courts; its responsibility is complete and therefore it has a corresponding freedom to adopt the right rule, subject to the commands of congressional legislation and normal judicial restraints, including the force of precedent. But this is not true in reviewing State action. The State was wrong in Gallegos’ case in the eyes of all nine Justices—Mallory shows that—but the phrase “due process of law” in the Fourteenth Amendment, read in the light of the constitutional division of authority between State and Nation allows a State to be wrong within limits. For the Supreme Court to cross over this line in the interests of better criminal justice would impair the balance of our constitutional system.

But the State is free to do wrong only within limits. The point is illustrated by Payne v. Arkansas.\(^\text{15}\) Payne, a mentally dull Negro, was convicted of first degree murder and sentenced to death. He too had been arrested without a warrant and not advised of his right to have counsel and to remain silent in the face of interrogation. He was held without counsel and with very little food. He was refused permission to make telephone calls, and members of his family who came to the jail were turned away. After three days the Chief of Police told Payne that thirty or forty people outside the jail were trying to break in and lynch him. The Chief could probably save him, the Chief said, if he could tell the people that Payne had made a confession. In this atmosphere of terror Payne confessed. The Supreme Court held, seven to two, that the use of this confession violated the Fourteenth Amendment.

Note that Payne’s case differs from Gallegos’ only in degree. It was thought more unfair to use a confession made out of the fear of mob violence by a man held incommunicado than to use a confession given by one held incommunicado but without other coercion—enough more unfair to justify intervention when allowance was made for State autonomy.

Our constitutional law is filled with parallel examples of the weight of State autonomy. In the federal courts an indigent defendant charged with crime is entitled to the assistance of counsel assigned by the court;\(^\text{16}\) the Supreme Court decisions do not presently require the States to supply counsel unless the case is unusually difficult or the crime is capital or the defendant is manifestly unable to conduct his own defense even with the aid of an impartial judge.\(^\text{17}\) Last spring the Supreme Court reversed an earlier decision and held by a vote of five to four that a State cannot constitutionally convict a man of crime on the basis of evidence obtained by an unconstitutional search and seizure;\(^\text{18}\) if the trial had been

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held in a federal court the vote would have been unanimous.\textsuperscript{19} Nor is the deference to the State confined to criminal procedure.

Perhaps some of you will ask why so much value should be placed upon State autonomy. The answer is partly historical. We began our national political life as a federation of sovereign States which surrendered only a little of their sovereignty to the national government. The Court could not survive as a court if it were to sweep the claims of tradition into discard, even if the tradition did not have a current place in our national consciousness. The answer is partly practical. We are too big a country and too diverse a people, and we have too many local customs, for complete national uniformity. Nor should we forget Justice Brandeis' reminder "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."\textsuperscript{20} The dispersion of power is also a safeguard of freedom.

Perhaps another important part of the answer lies somewhat deeper in our inherited philosophy. Freedom is precious not merely in its own right; it is valuable because it carries concomitant personal responsibility for exercising wisely the power of choice that freedom gives. State autonomy brings the government, and therefore the responsibility for its conduct, closer to the individual.

Of course, there are no standards by which to measure the weight to be given to the values of State autonomy. I have no doubt that every Justice gives it weight, perhaps some give it more weight than others. Its affect upon the final balance must also depend upon how unfair the State's action appears to him who must pass the final judgment. The reformer ready to remake the world closer to his heart's desire would inevitably give it less weight than he who was content to allow time for local self-improvement. Judges are less extreme but each may lean a little to one temperament or the other.

It also seems likely that the degree of deference owed a State will vary according to subject-matter; the judgment of a State is entitled to less weight in passing upon a law which curtails the circulation of magazines or books than one which deals with local economic conditions. Here the question shades into the problem in constitutional adjudication of making a division of authority between the Supreme Court and the Congress.

\textbf{The Court and the Congress}

\textit{Legislation.}—There is no real difficulty in separating the legislative and judicial functions so long as the Supreme Court is called upon only to determine whether the Congress has stayed within the limited sphere assigned by Article I.\textsuperscript{21}

The distinction between the legislative and judicial functions becomes very troublesome, however, when the Court is called upon to decide whether Con-

\textsuperscript{20} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).
gress, although it has exercised a legislative power granted by the Constitution, has nevertheless violated one of the general restrictions such as the Fifth Amendment's command that no person shall be deprived of life, liberty or property without due process of law. I can explain the difficulty best by a concrete example.

Suppose that a Congressman, concerned with the cost of building and highway construction, especially of homebuilding, and also with the number of strikes, introduced a bill outlawing all strikes in the construction industry and fixing maximum wages for bricklayers, electricians, carpenters and other mechanics and laborers. Before voting upon such a bill Congress would have to weigh the economic needs of the country, the cost of housing, the waste of strikes, the need for homes and commercial buildings, the adequacy of existing construction wages, both in terms of purchasing power and in comparison with the wages of other workers, the value of freedom to contract and of freedom of association in the pursuit of self-advancement, the risks of interfering with a free market, and a host of other factors. If the statute, once enacted, were attacked as a violation of due process of law under the Fifth Amendment, how could the Supreme Court decide whether the statute was constitutional without asking exactly the same questions? Yet, if the Court held the law unconstitutional, would it not be acting as a supra-legislature, instead of a Court, and trespassing in the domain of Congress?

My example is an old problem clad in modern trappings. If the first great constitutional question of the Twentieth Century concerned the scope of national power under the commerce clause, the second was whether the Fifth and Fourteenth Amendments left Congress and the States power to enact the social and economic legislation which a majority of the people thought to be required by the transition from a nation of farmers, artisans and shopkeepers into a modern industrial and predominantly urban community. When laws were enacted to provide workmen's compensation, to limit hours of work, establish minimum wages and abolish child labor, to require payment in cash instead of scrip or to protect the rights of workers to organize labor unions and bargain collectively, they were challenged as deprivations of property and of freedom to contract, in violation of those amendments. For the most part the courts, including the Supreme Court, sustained the challenge, thus holding that the phrase "due process of law" not only relates to procedure but also carries substantive protection against legislative regulation.22

The resulting constitutional struggle covered almost half a century. The principal attack upon the judicial decisions was that the Court was passing legislative judgments—that the statutes were held unconstitutional only because the predilections of the judges led them to appraise quite differently from the legislature the conflicting interests affected by the legislation. In the end this view

prevailed to a remarkable degree but its victory set the stage, as I shall show in a moment, for a new constitutional debate.

The most extreme conclusion was that the Fifth and Fourteenth Amendments should be held to impose no restrictions upon the kind of legislation which Congress or a State might enact in the field of business activity. Due process, it was said, relates only to procedure. If the courts undertake to decide whether the legislature had a sufficient reason for curtailing the rights of property and economic freedom, they will inevitably be passing a legislative judgment, for the very task of the legislature, as I sought to show by my example, is that of balancing the costs of the restriction against the needs of the community. The Court's sole task, it was argued, should be to determine whether the Congress was exercising a power delegated to it by the Constitution.

This view has never prevailed in its extreme form but constitutional law has moved a long way down the road. The current formula, applicable to economic regulation, is that—

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\text{... if the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. ...}
\]

and the judicial power is exhausted. The formula hardly provides a definite answer to a borderline case but it articulates a definite attitude. In the field of economic regulation the Court will grant the greatest deference to the legislative judgment, recognizing that it is for the Congress to evaluate and strike a balance between conflicting interests. Only when the legislative judgment seems utterly irrational will the Court interfere.

The adoption of this rule of self-restraint—a rule implicit in the great constitutional divisions of function and therefore akin to the self-imposed deference to State autonomy—set the stage for a current and unresolved constitutional controversy. Today the great constitutional cases lie in the field of civil liberties. The crucial question is whether the same degree of restraint which has become conventional in dealing with social and economic legislation should be exercised in dealing with restrictions upon personal liberties. And a judge's answer to this question may have more influence upon the outcome of any given case than his sympathy or distaste for the legislation which Congress has enacted.

Let me once again try to put the problem concretely. The Smith Act subjects to criminal prosecution any person who organizes any group or assembly of persons who "teach, advocate or encourage the overthrow" of the government "by force or violence; or becomes or is a member of" such a group. The wisdom of this statute as applied to organizations like the Communist Party, is open to

debate. The Congress, when it enacted the law in 1940, had to estimate the
degree of danger to the Nation and the imminence of the risk against the costs
of any tendency the law might have to suppress freedom of discussion and political
association. The choice is not an easy one in a nation born of violent revolution
and dedicated to the proposition that freedom for the views we hate offers the
strongest safeguard of liberty and best hope of human progress. When Congress
passed the Smith Act and the front-line Communists were convicted of violation,
its constitutionality was attacked upon the ground that the statute violated the
command of the First Amendment that Congress "shall make no law . . . abridg-
ing the freedom of speech, or of the press . . ." 27 How could the Supreme Court
answer the constitutional question without balancing the same competing inter-
ests that Congress had already evaluated? And if the Court made its own evalua-
tion, would it not be repeating the mistake of the old Court in dealing with
economic legislation?

Consider one other example. The Communist Control Act forbids the State
Department to issue a passport to any member of the Communist Party. 28 There
are some party members who have passports, and the Department has recently
called for their surrender. Suppose that a Communist refused to surrender his
passport and sought to travel upon it to a foreign country. When stopped he
might take the resulting case to the Supreme Court contending that freedom of
travel is part of the liberty guaranteed by the Fifth Amendment. How could the
Court pass judgment upon the constitutionality of the statute without balancing
the interest in freedom to travel at will against the danger that spies, saboteurs
and Communist trouble-makers would use United States passports on missions en-
dangering our national security? If the Court made such an inquiry, would it
not be going over the ground covered by Congress before it enacted the statute
and thus exercising not a judicial but a legislative function? If so, should it not
defer to a reasonable congressional judgment?

In both cases, and in others like them, it would be hard to deny that the
Supreme Court was reviewing the same ground that Congress could, and perhaps
should, have covered; but it is entirely possible that the role of the Court in pass-
ing judgment upon the constitutionality of alleged violations of personal liberty
is altogether different from its function in reviewing economic legislation.

One ground of difference that has been strenuously pressed upon the Court,
although it has not yet commanded the assent of a majority, is that the commands
of the Constitution securing personal liberty are so absolute that no balancing of
the interests is required and therefore there is no occasion for loading the scales
with deference to Congress; the only question is whether Congress has imposed
a restriction that the Bill of Rights prohibits. The First Amendment, it is pointed
out, provides that Congress shall enact "no law respecting the establishment of
religion;" "no law . . . abridging the freedom of speech, or of the press;" and

“no law... abridging... the right of the people peaceably to assemble...” And if Congress has enacted any such law, according to this view, the Court has a duty to invalidate it whenever the issue arises in a justiciable controversy. Mr. Justice Black has stated the reasoning with great persuasion:

I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process.

To apply the Court's balancing test under such circumstances [to repression of beliefs, not action—to reprisals for ideas and associations, not conduct] is to read the First Amendment to say, “Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.” This is closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes that it is reasonable to do so.29

There are others who have difficulty with this approach. They argue that even the guarantee of freedom of speech and of the press is not absolute. In Justice Holmes' famous phrase, one has no constitutional right to cry fire in a crowded theater,30 and other restrictions can be imposed to preserve the public peace and order.31 It may be said too that whatever support this view finds in the absolute words of the First Amendment in dealing with freedom of religion, of expression and of assembly, there is no mention of other aspects of personal liberty such as freedom of political association and freedom of travel; their protection depends upon the due process clause of the Fifth Amendment.

Yet these answers—if they are answers—are not the end of the argument. Most of the community, I believe, values personal liberties more highly than property or economic freedom, and surely this carries some higher degree of constitutional—which means judicial—protection. Mr. Justice Stone suggested that “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.”32 Freedom of speech, of the press and of political activity is essential to the existence of democratic self-government. Upon its exercise depends the integrity of the legislative process. These personal liberties, it may be urged, are therefore entitled to a higher place in the constitutional hierarchy and any restriction requires greater justification.

Even this reasoning does not altogether avoid the underlying problem. If the Court is to engage in any balancing, must it not place in the scales in favor of

constitutionality some degree of deference to the Congressional judgment? Whether it should give any weight, and if so, how much weight it should give, can be answered only by achieving a consensus upon this aspect of the constitutional division of power between the legislative and judicial functions. None exists today. In searching for it some germ of truth may perchance be found in an inquiry as to whether the legislative process functions as effectively when personal liberties are at stake as when it is adjusting conflicting economic interests. Even if some balancing be inevitable the high value of these liberties leaves less room for legislative adjustment; and by the very nature of the case dissenters whose views are liable to suppression and for whose protection the Bill of Rights was intended are so small and unpopular a number that their weight will not be felt in an elected chamber. I wonder, too, whether experience has not led the American people, rightly or wrongly, to rely upon the Court and not the legislatures for the protection of individual freedom and the right of dissent. If this be the people's instinct, perhaps a judge should guide himself accordingly, even though his own political philosophy might call for greater reliance upon the political process.

I do not mean to suggest an answer—indeed I have none—but I invite your attention to the problem and its impact upon the processes of constitutional adjudication.

Congressional Investigations.—The power of Congress to conduct investigations in aid of the legislative process is beyond dispute.aa Investigations supply Congress with information indispensable to intelligent legislation. They focus public attention upon evils for which a legislative remedy may be needed. For example, the hearings of the McClellan Committee into improper practices in the field of labor management relations uncovered facts which were not theretofore known either to Congress or to expert students of the field; there was no other way in which the information necessary to legislation could have been developed.

Nonetheless there have been grave misgivings about the conduct of some Congressional investigations. It is said that we are developing new forms of prosecution for unpopular conduct—legislative trials in which Senators or Congressmen prosecute and then enter a judgment of conviction. The ensuing punishment by holding up to public obloquy is not unlike the pillory of Puritan New England. The procedure of some committees has been questioned; for example, one of the Justices asked counsel during the argument of a case involving an alleged contempt of Congress, whether counsel thought it was “fair” for a congressional committee to pull a man off the street under current conditions and, without any information about him, ask whether he is a member of the Communist Party, whether he does not know prominent Communists, etc.aa Furthermore, many observers believe that there can be little doubt about the tendency

34. The example was purely hypothetical although it was argued by opposing counsel that this was in principle what had happened in the case at bar.
of hearings by the Un-American Activities Committee and the Senate Internal Security Committee to discourage freedom of thought, association and expression.

During the last two or three years numerous cases have come before the Supreme Court on appeal from judgments convicting the petitioners of contempt of Congress for refusing to answer questions and sentencing them to short terms of imprisonment. In each instance the Court is asked to hold that the conduct of the investigation violated the Bill of Rights because of one or more of the shortcomings just mentioned. The cases raise in another form the Court's central problem of defining its own function in relation to other branches of government. How far is the conduct of investigations the responsibility of the Supreme Court? How far are Congressional investigations solely the responsibility of Congress?

According to one view the only function of the Court is to see that Congress has stayed within its constitutional field of action. The Court should ask whether the question which the witness refused to answer was relevant to some subject into which the congressional committee was authorized by Congress to inquire and whether the inquiry pertained to some subject upon which Congress was authorized by the Constitution to legislate. Under this view the witness is entitled to have the pertinency of the question explained to him and of course his specific rights such as his privilege against self-incrimination must be respected. But here the judicial function would terminate. Judicial restraint is essential in dealing with so vital an element of the legislative process. It is not for the Court to tell a coordinate and equal branch of the government how to conduct its business.

This view may be the wiser, but note that there is no logical compulsion in the words of the Constitution which prevents the Court from going farther and reasoning that when Congress comes to the judiciary and asks the judiciary to use its power to punish as a way of supporting the investigative powers of Congress, then the courts are entitled to ascertain independently whether Congress is asking them to support it in what is in reality a legislative trial rather than a true inquiry. If the Congress wishes to avoid this degree of judicial scrutiny, let it rely upon its own powers to punish for contempt of Congress.

Perhaps I state both views in more extreme fashion than anyone would accept, but since the issue is involved in current cases it would be unseemly to comment further. Probably the Court always inquires somewhat into the merits of the

balance which Congress has struck between the needs of an investigation and
the rights of the individual, but its judicial task is not complete until it also
asks how far our constitutional system commits the responsibility, and therefore
the choice, to Congress. And such divisions as arise between the Justices will often
turn upon differences, not in their views concerning the wisdom or fairness of
the investigation, but in their conception of the nature of the Court's constitu-
tional functions.

III

In emphasizing the role of the division of power between States and Nation,
and between the legislative and judicial branches, in distinguishing the Supreme
Court from an omnipotent Council of Wise Men we should not minimize other
equally important differences. The list is too long to canvass but, as illustrations,
I may dwell for a moment upon two precepts inherent in our historic concep-
tion of the judicial power. The Supreme Court is a court. There are some things
which a court may properly do. It may not do others.

Case or Controversy.—The federal courts, including the Supreme Court, sit
to decide cases and controversies—disputes in which something material is at
stake between the rival litigants. They do not decide abstract issues or give
advisory opinions. A much debated example is the decision last term in Poe v.
Ullman, the Connecticut birth control case. Connecticut has a statute which
provides that any person using contraceptives shall be fined not less than $50.00
or imprisoned for not more than a year. Two separate actions were brought in
the State courts asking for a decision as to whether the statute could constitu-
tionally be applied to the plaintiffs. The plaintiffs in one action were a couple
who had given birth to three congenitally abnormal and short-lived children and
a housewife whose life would be seriously endangered by pregnancy. These
plaintiffs claimed that their need of advice on methods of contraception and their
right to use contraceptives were seriously impaired by the Connecticut law. In
the other action, a Dr. Buxton objected that the State statute deprived him of
the liberty to practice his profession as he saw fit.

It is not always necessary to violate a statute in order to obtain Supreme Court
review of the constitutionality of the statute. There are a number of cases in
which a person merely threatened with criminal prosecution if he followed a
proposed course of conduct has been able to obtain a Supreme Court decision on
the constitutionality of punishing him for the proposed conduct. But in each
of these the risk of prosecution was far more immediate than for the Connecticut
plaintiffs. The Connecticut anti-contraceptive statute had been on the books for
over seventy-five years, and there was only on recorded prosecution—a prosecu-
tion of a birth control clinic twenty years ago. Not only was there no record of

42. See, e.g., Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Euclid
any prosecution of mere users of contraceptives or of doctors who had advised their private patients, but it was admitted by both counsel that contraceptives were freely sold in drug stores throughout the State.

With these facts before it the Supreme Court refused to exercise its admitted power to pass upon the constitutionality of the Connecticut statute. In the view of the majority, the Connecticut anti-contraceptive law simply had no such immediate and substantial effect on any of these plaintiffs as to justify the Supreme Court in passing on its constitutionality. The plurality opinion of Justice Frankfurter stated that “eighty years of Connecticut history demonstrate a . . . tacit agreement” not to prosecute and that “to find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality.” Realistically, none of the plaintiffs had any basis for a fear of prosecution if they did the acts they proposed. And neither the effects of an unrealistic fear nor the plaintiffs’ desire to obey a State law until it was held unconstitutional would, the Court held, justify it in passing on the validity of the statute.

One may ask whether it would not be better to have had a constitutional decision upon the constitutionality of the Connecticut birth control law even in these contrived cases, so that the people of Connecticut would know where they stood. Similarly, an argument can be made that the country would be helped by an advisory Supreme Court decision upon whether federal aid to parochial schools would violate the First Amendment’s declaration that “Congress shall make no law respecting an establishment of religion.” The highest courts of a number of States are authorized to give advisory opinions upon the meaning of the State constitutions.

The rule carries its costs. Like other rules its application to particular circumstances such as the Connecticut birth control case is also open to debate. But restraint in the exercise of the enormous power to invalidate an act of the representatives elected by the people is one of the attributes of a judicial decision—it is essential, I suspect, to the preservation of the Court’s place in our constitutional system. The Court’s role is controversial enough; we could hardly tolerate a roving commission to strike down any act of any governmental body or official which, abstractly viewed, might be thought to violate someone’s constitutional right under some circumstances. The only justification for the doctrine of judicial review is that the courts must decide the cases which come before them according to law. If the plaintiff, in seeking property or damages from the defendant, bases his claim upon a statute and the defendant replies that the application of the statute under these circumstances would deprive him of a right guaranteed by the Constitution, the Court is forced to decide a constitutional question in order to resolve the claim in litigation. But if no concrete case is pending involving the constitutional rights of a litigant whose situation will be substantially affected by the ruling, a decent respect for coordinate branches of government requires the judiciary to stay its hand.
This kind of restraint also affects the quality of decisions. No one can know in advance exactly what the issues will be; no one can cover all the contingencies. A trial brings out the facts with a clarity and completeness quite impossible in giving an abstract opinion. More important, perhaps, is that giving advisory opinions or deciding moot cases would entangle the Court in political processes. The timing of an opinion, the points covered or omitted, the language and emphasis, all would tend to become parts of the process by which law was made. The processes would become more political and less judicial. We should have more judicial law-making and less judgment according to law.

Political Questions.—The most important case now pending before the Supreme Court raises the question of how far the Court should seek to preserve its judicial character by refusing to decide what might be denominated a "political question" even though the question is presented in the context of actual litigation. Before the Civil War the Court had declined to rule which of two competing claimants was the lawful government of Rhode Island. On later occasions it refused to consider the claims of litigants that a State had violated the constitutional guarantees of a "republican form of government." The present case involves the apportionment of representatives in the Tennessee legislature. The State constitution provides that seats in both the House of Representatives and the Senate shall be apportioned among districts in direct ratio to population. The State constitution also directs the legislature to make a new apportionment every ten years. Despite this command the Tennessee legislature has made no reapportionment since 1901, and a majority made up of representatives from the sparsely populated districts has consistently defeated reapportionment bills. The result is that the representatives from some districts represent ten and even twenty times as many people as the representatives from others; put another way, the votes of some citizens count ten or twenty times as much as others. After efforts to obtain relief in the State courts proved fruitless, the plaintiff brought suit in a federal court seeking a declaration that the malapportionment was so gross as to deny the under-represented Tennessee voters equal protection of the law, in violation of the Fourteenth Amendment. The lower court held that the federal courts have no power to consider this kind of constitutional controversy. The question is now pending before the Supreme Court on Appeal.

Essentially the same situation could be duplicated in New York, Indiana, Oklahoma and any number of other States. If the courts have jurisdiction to enforce a reasonable degree of equality in representation in the State legislatures, the decision will change our political history.

The pending case is a fascinating example of the distinction between a court and a Council of Wise Men. No one would defend the merits of the Tennessee

43. Luther v. Borden, 7 How. 1 (1894).
44. See, e.g., Pacific States Tel. & Tel. Co. v. Oregon, 223, U.S. 118 (1912).
malapportionment or similar inequities in other States either as a matter of abstract justice or sound government. The State legislatures have in very large part failed to adapt themselves to modern problems and majority needs, especially to the burgeoning problems of urban and metropolitan regions. This failure has resulted in public cynicism, disillusionment and loss of confidence. A primary reason is that in many States the majority of the people, even large majorities, do not control the legislature. There is a growing tendency to bypass the States because of the lack of understanding in governments elected by rural minorities, and to turn to the national government. Reapportionment would in fact be one of the best methods of encouraging vigorous and responsible State and local government. A Council of Wise Men would unquestionably blot out the present evil.

The Court cannot carry the whole burden of government. There are wrongs, and perhaps reapportionment is one, which can be righted only by executive or legislative action or by the people exercising political rights. Since the Constitution does not require exact numerical equality there would be grave difficulty in establishing standards by which the Court could determine what is a fair apportionment; perhaps legislative representation is an area which, in the words of one commentator, is better left “unprincipled on principle” because “the job is better done without rules.” There is also doubt about the feasibility of judicial relief; assuming the plaintiffs are correct, it is said, a court cannot lay out new legislative districts or issue process to compel a legislature to legislate the districts according to judicial rules. Furthermore, a court should not embroil itself in the politics of elections, and nothing in our history has been more peculiarly political than the laying out of representative districts. The Court could seriously impair its own effectiveness by assuming purely political functions that ought to have been performed by others.

In response, it was argued that relief could be obtained only through the courts because one vice of existing malapportionments is that they prevent the majority of the people from successfully invoking the legislative process to secure a new apportionment. Various forms of judicial relief were suggested. But the main thrust of the argument was that the force of a Supreme Court decision is greater than the formal reach of judicial process. A decision holding the issue justiciable would help to open the doors of State tribunals upon which the primary burden should fall in dealing with controversies of State apportionment—a burden to be carried partly in terms of State constitutional law. A decision denying jurisdiction would help to close the doors, for even when the Court purports merely to stand aside, its opinion allowing the challenged measure to stand, because of the Court's prestige and the spell it casts as a symbol, tends "to entrench and solidify measures that may have been tentative in the conception

or that are on the verge of abandonment in the execution. Conversely, the power of the principle of legitimacy and the moral force of a decision by the Supreme Court focusing attention upon an indispensable condition of a free society would extend the influence of the decision beyond the scope of a judicial decree into the realms of legislative and political action. Granting the need for judicial self-restraint on appropriate occasion, it was said, judicial inaction through excessive caution or a fancied impotence in the face of admitted wrong might do our governmental system, including the judicial branch, still greater damage.

It is not for me to say where the balance lies. The Tennessee Reapportionment Case epitomizes one aspect of the dilemma. The Court's constitutional authority depends upon its self-restraint, but excessive restraint, while it conserves the Court's power, would deny its usefulness. That the dilemma should have been solved so successfully for 170 years is testimony not only to the soundness of the institution but to the courage, wisdom and intellectual integrity of the Justices who have shaped its history, including those who now sit upon the Court.