Levellers in Judicial Robes

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By Frank R. Strong*

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Current developments disclose an upward thrust in basic conflicts over the economic fundamentals the Nation should embrace for its material well-being. The Reagan program for drastic reductions in spending in the public service sector while augmenting expenditures for the military, threatens a major dislocation in human services upon which millions of citizens have come to depend for a better life. The President's promise of protection of the "truly needy" under a "safety net" has not allayed fears of widespread deprivation. It is no surprise that there has emerged congressional opposition to this Republican cure for an ailing economy. For nearly half a century, since the early years of the New Deal, the economic teachings of John Maynard Keynes have dominated congressional policy; the use of governmental spending to undergird the purchasing power of the economically weak in society has been asserted to be the key to correction of society's economic ills. As an article of faith, Keynesianism has been experiencing growing challenge by economists such as Milton Friedman, yet it continues to command powerful acceptance in some quarters.

The Reagan program of heavy tax cuts over a three-year period has run into heavy flack in and out of Congress partly because of presidential insistence that the cuts be across the board. The justification offered for proportional tax reduction is that the wealthy must be encouraged by favorable treatment to provide the funds required to stimulate capital formation in the economy. The shorthand rhetoric is that capitalists are essential to a capitalistic system. This assertion cuts across the political grain; progressive income and estate taxation, predicated on the ability to pay, has long been a basic tenet of acceptable tax policy. For the less affluent in society this feature of "Reaganomics" exacts too high a price for invigorating an increasingly suspect type of economic organization.

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The Reagan program of revolutionary reductions in spending and taxes is also at odds with a political credo pressing for acceptance by the judiciary. It manifests itself as an extension of established constitutional guarantees: total recognition of a constitutional right is fulfilled only when accompanied by a concomitant constitutional requirement that government finance the enjoyment of that right even though individual inability to do so is not the fault of government but of attendant economic circumstances. Shortly stated, government must underwrite a recognized constitutional guarantee where its full realization cannot be achieved by the beneficiaries of the entitlement. A minority of the Supreme Court has recently embraced this historically foreign concept of judicial participation in setting the ranges of economic choice for the Nation.

**THE COURT AT THE CROSSROADS: RECEPTION OR REJECTION OF LEVELLING**

At issue in *Harris v. McRae*\(^1\) was the constitutionality of the Hyde Amendment\(^2\) to Title XIX of the Social Security Act.\(^3\) That Amendment forbids the use of federal funds to reimburse abortion costs under the Medicaid program except in certain circumstances which have somewhat varied with each congressional re-enactment since the original adoption in 1976. Unrestricted is funding of costs related to childbirth. In *Harris*, the federal district court entered judgment invalidating all versions of the Hyde Amendment for violation of the due process, equal protection, and free exercise (but not the establishment) provisions of the Constitution.\(^4\) On direct appeal, this judgment was reversed on the vote of five Justices, one concurring.\(^5\)

Both Justice Stewart's opinion for the Court and the four dissenting opinions dealt with the several constitutional issues raised. For present purposes, however, attention can be limited to judicial debate with respect to the fifth amendment guarantee of due process. A paragraph succinctly states the position of the prevailing Justices. Speaking with reference to the constitutional

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5. Three cases consolidated on appeal also held consistent with the equal protection clause state statutory programs incorporating the Hyde-type limitation. *Williams v. Zbaraz*, 448 U.S. 358 (1980). Dissents were entered in the consolidated cases. *Id.* at 369.
right to abortion in the early stages of pregnancy, vouchsafed by *Roe v. Wade*, the majority opinion asserts that

It simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why . . . [is that] although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.

Running through the dissenting opinions is attack on "the government's unequal subsidization of abortion and childbirth." Yet in result they implicate a governmental obligation to equalize the condition of rich and poor. For their premise must be that wherever the Constitution guarantees the kind of private right necessitating money for its enjoyment, government is required to finance the realization of that right for those in society who themselves have not the funds required to take advantage of it. This premise Justice Stewart rejected in a second passage:

To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer and not a matter of constitutional entitlement.

9. *Id.* at 318 (citation omitted). The concept that there is no constitutional requirement that government compensate for economic inequalities not of its own creation emerged from an interpretation of the protective limits of the equal protection clause. See text accompanying notes 10-20 infra. It might therefore be thought that by invoking the concept, Justice Stewart was relying upon the equal protection component of fifth amendment due process. However, he turns to that component only in asserting that congressional subsidization of other medically necessary services, while withholding federal reimbursement of most abortions, is not unconstitutional. But, despite Justice Stewart's failure to address the entitlement theory in equal protection terms, it is doubtful that the concept will lose its equal protection base so clearly apparent in decisions involving the financial obligations of the states.

With no equal protection clause formally applicable to Congress, the Justice may have reasoned it necessary to draw upon the equal protection component of fifth amendment due process in facing the equal protection issue cast in the familiar form of alleged invalid discrimination. This disposition would leave it to straight due process to absorb the concept, despite its origins in equal protection, that governmental responsibility stops with "limited liability." Note that in the companion cases, Justice Stewart equates "the equal protection component of the Fifth Amendment" with "the Equal Protection Clause of the Fourteenth Amendment" in the latter's prohibition of irrational classifications. *Williams v. Zbaraz*, 448 U.S. at 369.

*Loewy, A Different and More Viable Theory of Equal Protection*, 57 N.C.L.
Justice Stewart does not identify the source of the revolutionary view which he repudiates for the bare majority of the Court. However, he must have had in mind the Court’s opinion, written by Justice Douglas, in *Douglas v. California*, from which, in agreement with Justice Harlan, he vigorously dissented. The constitutional issue concerned the right of the criminally accused to assistance of counsel on first appeal from conviction. Assumed was the right to counsel on the part of those able to retain an attorney. The question concerned the predicament of the indigent.

In *Douglas*, controlling analogy for the prevailing view was found in *Griffin v. Illinois*, decided two years before Justice Stewart joined Justices Douglas and Harlan on the Court. At issue in *Griffin* was an Illinois practice that required a trial transcript or its equivalent for appeal on nonfederal grounds. The majority, of whom Justice Douglas was one, had found that both due process and equal protection guarantees required that the state provide indigents with transcripts free of charge. Justice Harlan dissented. He reasoned that since Illinois was not constitutionally required to provide criminal appeals there could be no due process requirement that the state furnish a transcript. With respect to equal protection he observed: “All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.”

*Douglas v. California* extended the *Griffin* ruling to embrace an indigent’s right to counsel on first appeal. Again dissenting, this time with Justice Stewart in agreement, Justice Harlan expanded on his thesis with particular reference to equal protection:

> The States, of course, are prohibited by the Equal Protection Clause from discriminating between “rich” and “poor” as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.

> Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine

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Rev. 1, 40-42 (1978), regards due process as a sounder basis than equal protection for the *Griffin* and *Rodriguez* decisions that, as considered infra, bear on the position taken by Justice Stewart in *Harris*. Under Loewy’s theory, the Court would ultimately predicate its position on firmer constitutional ground.

12. Id. at 34.
for criminal violations, or to establish minimum bail for various categories of offenses. Nor could it be contended that the State may not classify as crimes acts which the poor are more likely to commit than are the rich. And surely, there would be no basis for attacking a state law which provided benefits for the needy simply because those benefits fell short of the goods or services that others could purchase for themselves.

Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances." To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.

In *Ross v. Moffit*, a full decade after *Douglas v. California*, Justice Douglas was unable to muster a majority for extension of that holding to further largely discretionary appeals. Meantime, indigents were successful in forcing state payment for required transcripts but only partially so with respect to filing fees. However, these decisions were reached on the technical choice of nexus under the two-tier analysis by then fastened onto interpretation of the equal protection clause. The deeper issue adumbrated in *Douglas v. California* did not rise to the surface, possibly because of the small amounts of money normally involved in transcripts and filing fees.

A decision of this period but in quite different context did, on the other hand, again thrust to the fore the issue of judicially forced levelling in the name of the Constitution. In *San Antonio Independent School District v. Rodriguez*, involving financially disadvantaged school districts rather than individual indigency, conflict within a badly split Court was revealed on the question whether the State of Texas was constitutionally required under the equal protection clause, in effect to correct by central expendi-

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14. Justice Harlan here quotes from his dissent in *Griffin*, 351 U.S. at 34.
tures the disparity in property tax base among the state's various school districts. Opinions pro and con were cast in fadish terms: whether the classification was suspect, whether the state interest must be compelling, what degree of nexus must be shown. But withal, a clearer case of debate over constitutionally enforced levelling could not arise. Justice Powell wrote the prevailing opinion rejecting the demand. Justice Stewart, who was to write the majority opinion in *Harris*, by separate concurrence joined "the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment."  

**JUDICIAL LEVELLING IN ECONOMIC CONTEXT**

There is of course nothing new in demands for levelling. One recalls from English history the Levellers of the time of the Cromwellian Interregnum. Basic to this group was the inalienability of natural rights, from which flowed the principle of popular sovereignty and the reservation of certain fundamental powers from the control of the elected assembly. The Levellers' doctrines called mainly for political reforms such as extension of the voting franchise. Yet their opposition to the monopolies of the trading companies of that period and their criticisms of such provisions of the existing land laws as primogeniture, had an economic base. The True Levellers, otherwise known as the Diggers, centered their objections on the existing economic and social order. For them, attainment of political democracy would be inadequate without corresponding economic democracy, their goals were therefore the elimination of social and economic inequalities.

Similar goals were espoused by the several brands of socialism spawned by the increasing disparities in economic circumstance that were a concomitant of the Industrial Revolution. Among them may be identified Fabian Socialism, Marxian Socialism, Guild Socialism, and the cooperative socialism of Robert Owen. Although differing in program and procedure, a common thread was the curse of mounting inequality of wealth and income. Proposals for some variant of socialism continue today. Native to this country is the populist movement which, commencing with Jefferson and Paine, has had its champions in every era of our nation's history.

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20. *Id.* at 59.
21. A concise statement of the views of Levellers and Diggers may be found in James, *Levellers*, 9 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 421-23 (1933). More extensive studies are available.
A modern outcropping is *A Populist Manifesto*. In the preface to this volume the authors declare that the “fundamental argument” of the Manifesto “is wholly unoriginal: some institutions and people have too much money and power, most people have too little, and the first priority of politics must be to redress that imbalance.” To rephrase, “Its goal is a more equitable distribution of wealth and power.”

That gross economic disparities exist is indisputable. Statistics on wealth concentration are available for post-World War II. A Pennsylvania State University economist found among the richest one per cent of the population a relative constancy somewhat below thirty per cent for the period 1953-1972: 27.5% in 1953, 29.2% in 1965, 25.9% in 1972. Authors of the *Manifesto* claimed a mounting concentration from twenty-one per cent in 1949 to almost forty per cent in 1972. Figures such as these latter fuel the growing belief that the rich are getting richer and the poor poorer. But even if this is not so, gross disparity in the distribution of wealth obtains when over one-quarter is held by one per cent of the population. Income distribution, it was said in 1972, “has not changed for a generation: the bottom fifth of American families gets 6 per cent of the national income, the top fifth gets 40 per cent.” Carrying the statistics forward from 1972 through 1977, a current volume entitled *The Zero-Sum Society* presents data from the Bureau of the Census showing that for those years “there has been essentially no change in the distribution of money income between rich and poor.” Distressingly, however, the data from this later source, calculated on a different basis of measurement, disclose a greater income disparity for 1972 than do data quoted above from *The Populist Manifesto*: from 4.1% for the bottom quintile to 43.7% for the top quintile. The situation may worsen in the 1980’s. A Wall Street economist, Gary Shilling, predicts greater growth of income among the top one-third of income receivers.

The explanation for stability in income differentials lies in the massive income transfer payments made by government in recent
Economist Lester Thurow is authority for the statement that in 1978 "[o]ver 10 percent of our GNP was devoted to taking income from one private individual and giving it to another private individual." Yet elsewhere he states that for an unidentified but recent year "welfare constitutes only 1.2 percent of the GNP." Furthermore, Thurow predicts that income transfer payments cannot continue to hold the line during the 1980's and 1990's:

Given rising inequality, direct income distributions are apt to become even more divisive than they are now. The zero-sum economic game [income transfers to some groups necessarily disadvantage others] is going to become harder to play since more direct income transfers are going to be demanded. These demands may not be met, but they will have to be faced.

LACK OF PRECEDENT FOR JUDICIAL LEVELLING IN INTERPRETIVE CONSTITUTIONALISM

By no stretch of justifiable interpretational freedom can either text or context of the Constitution warrant Court entry into this political thicket. As Justice Stewart observed in Harris, whether federal subsidization of the poor is to be undertaken "is a question for Congress to answer, not a matter of constitutional entitlement." Equally legislative in character is the issue of redistribution of income or wealth by the states. That this has been the unquestioned operative principle in our governmental scheme is attested by the vast transfers of economic buying power that have been made through socialized legislation. In planting the germinal seed for the constitutional doctrine that government must correct economic inequality though not of its own doing, Justice Douglas was true to his preference for "creating precedent, not finding it."

34. L. Thurow, supra note 29, at 155.
35. Id. at 11.
36. Id. at 157.
37. Harris v. McRae, 448 U.S. at 318.
38. W. Douglas, The Court Years 179 (1980). Douglas' precise wording in his posthumous volume is that "I said I would rather create a precedent than find one." Id. His explicit reference is to his Cardozo Lecture of 1949. See Address by William O. Douglas, The Eighth Annual Benjamin N. Cardozo Lecture, New York City Bar Ass'n (Apr. 12, 1949), reprinted in 4 Record of the Association of the Bar of the City of New York 152 (1949). Although a reading of that lecture in great part suggests this preference, there is no outright assertion to this effect. In the Cardozo Lecture of 1972, Erwin Griswold took the Justice to task for his views, quoting him as having said "I'd rather create a precedent than find one." Address by Erwin N. Griswold, The Twenty-Ninth Annual Benjamin N. Cardozo Lecture, New York City Bar Ass'n (Nov. 21, 1972), reprinted in 28 Record of the Association of the Bar of the City of New York 14 (1973). However, Griswold's citation for this statement was to "Transcript of Television Interview, CBS Reports, September 6, 1972." Id. at 27 n.45. A third source for the Douglas assertion comes
One of his creations was the concept of the leveller in judicial robes. In the words of Robert Bork, reviewing the Douglas volume, "Mr. Douglas's urge, which became the dominant theme of the Warren Court, was the redistribution of society's wealth, prestige and political power." 39

In Marbury v. Madison, 40 Chief Justice John Marshall staked out for the judiciary the province of exclusive constitutional enforcement, whether defensive in the protection of the third branch of government, or affirmative with respect to all other limitations on governmental power imbedded in the Constitution. 41 In the framing of that Instrument James Madison sought an effective

from Professor Thomas Emerson, a close friend and one-time colleague of the Justice at Yale. "He told Eric Severeid that he would rather create a precedent himself than find one." Emerson, Justice Douglas and Lawyers With a Cause, 89 Yale L.J. 616, 622-23 (1980).

A possible explanation for Griswold's criticism lies in what seems an inconsistent passage in the Justice's lecture. In a closing paragraph appears the following:

From age to age the problem of constitutional adjudication is the same. It is to keep the power of government unrestrained by the social or economic theories that one set of judges may entertain. It is to keep one age unfettered by the fears or limited vision of another. There is in that connection one tenet of faith which has crystallized more and more as a result of our long experience as a nation. It is this: If the social and economic problems of state and nation can be kept under political management of the people, there is likely to be long-run stability. It is when a judiciary of life tenure seeks to write its social and economic creed into the Charter that instability is created. For then the nation lacks the adaptability to master the sudden storms of an era. It must be remembered that the process of constitutional amendment is a long and slow one.


At this point one is tempted to ask, "Will the real William O. Douglas please stand up?" Yet the answer is clear from his judicial opinions and his autobiography. In a paragraph near the close of The Court Years, there is a clear hint that as contended in the text of this article one of the "creative precedents" he sought to impose was a redistribution of existing economic and political power "under which the poor got poorer and the rich richer." W. Douglas, supra, at 391. Emerson, however, does not list levelling per se as one of the major "themes" of this unique Justice although he stresses Douglas' penchant for social change. Emerson, supra, at 622-23.

40. 5 U.S. (1 Cranch) 137 (1803).
41. Here I accept the broader reading of Marbury by Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1, 34-36. However, I continue to insist that on its facts this famous case involved only a form of defensive constitutional review, and to assert that correctly viewed, full constitutional review in the affirmative sense was not established until the end of the 19th century. Strong, Judicial Review: A Tri-Dimensional Concept of Administrative-constitutional Law, 69 W. Va. L. Rev. 111, 119-20 (1967).
mechanism for enforcement of both direct and indirect limitations. In the Federalist Papers he had evaluated the five devices incorporated in one or another of the original eight state constitutions, to find each unsatisfactory. This finding appears to have been rather general, based on state experience with the devices, leaving it open for the Chief Justice to put in his bid on behalf of the Supreme Court. The Court's successful move into the political vacuum through exercise of constitutional review cannot be said to have been judicial usurpation; on the other hand, supporters of this momentous development cannot point to any authoritative popular acceptance beyond gradual toleration. Of some background support was the view circulating in the New World that in Dr. Bonham's Case Sir Edward Coke had asserted the power of English courts to invalidate Acts of Parliament. The sounder view of that landmark decision is that Coke was asserting only judicial authority to disregard legislation of uncertain import; but this fact did not lessen the impact of supposed precedent from the great Chief Justice of England.

Whatever part Dr. Bonham's Case played in bringing about the acceptance in this country of the power of courts to determine constitutionality as the means for enforcement of constitutional limitations, it identifies a major source of our constitutional heritage. It was from England, despite the American Revolution, that America inherited the concept of direct constitutional restraints, epitomized by assurances against deprivation of life, liberty, and property without due process of law. French contribution had been Montesquieu's emphasis on the independence of judges that elevated the judiciary to a plane of equality with the legislative and executive powers of government. From this evolved the concepts of separation of powers and federalism, which provided through

42. The Federalist Nos. 48-50 (R. Fairfield ed. 1961). The devices were: annual elections of the legislative branch, oath of constitutional support by legislators, Council of Censors, Council of Revision, and admonishment against constitutional violation by legislators. Strong, Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes, 55 N.C.L. Rev. 1, 12-17 (1976). The five devices are further examined in that article, as are the implications of the trend to resort to the judiciary for performance of the enforcement function.

43. With respect to "indirect congressional and presidential authority that may serve as political brakes on the power of judicial [i.e., constitutional] review, it may be fairly concluded that their highly infrequent and largely ineffective use gravely undermines the view that the people have continuously approved of the Court's function simply because, in the main, they have allowed the Court to operate without constraints." Choper, The Supreme Court and the Political Branches: Democratic Theory and Practice, 122 U. Pa. L. Rev. 810, 854-55 (1974).

44. 77 Eng. Rep. 646 (K.B. 1610).

45. Strong, supra note 42, at 18.
friction among the several branches of government an indirect method of constitutional restraints. Levelling was alien to this background. Nearly fifteen years ago Professor Harold Berman insightfully suggested that one hundred and fifty years after the American Revolution, sentiments of the French Revolution were washing the shores of American political thought, flying the tri-colors of liberty, equality, and fraternity. With such conceptions levelling is quite compatible, and the inclusion meantime of a constitutional provision sounding in terms of equality has offered seductive means for attempted legitimation of radical social views respecting economic and political arrangements within the national community.

SUGGESTIVE ANALOGY FOR JUDICIAL LEVELLING IN NONINTERPRETIVE CONSTITUTIONALISM

Among constitutional lawyers today the great debate is whether the Supreme Court should adhere to its accepted function as exclusive enforcer of the Constitution or assume by its own ipse dixit the oligarchic role of Constitution maker. On other pages I have twice tilted a lance against the unorthodox view. The more recent article identifies and examines the major predicates that have been advanced in justification of Platonic Guardianship. One of these calls for judicial intervention when a major foundation of the American experiment in a free society of self-governed citizens is judged to be in peril.

The classic illustration is the Reapportionment Cases, requiring for all congressional and state legislative districts literal equality in numbers of potential voters. The equal protection clause

46. "The doctrine of separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Federalism is also predicated on the theory of limitation of governmental power through fractionization.

47. This insight was offered during celebration of Independence Day, 1967, at the Orientation Program in American Law conducted on the Graduate Campus of Princeton University under the auspices of the Association of American Law Schools.


was forced to do service in the cause of representative democracy, despite demonstration by dissenters that constitutional policy was being made, not enforced. If the threat of malapportionment was as serious as a majority of the Court believed, there is a temptation to join the revolutionary ranks for this one type of exception to traditional grounds for Court intervention. The absolute preconditions to this exception are: (1) breakdown in governmental polity is threatened and (2) the political system offers no other means of remedial action.

Informed judgment is at hand that maldistribution of income and wealth approaches these preconditions. Some years ago an experienced member of the federal judiciary declared: “Commission after commission on crime, race, violence, or children has recommended some sort of income redistribution as the only way to solve our toughest social problems. I am convinced that nothing else can begin to work without it.” Reinforcing this judgment as to the ultimate causation of crime, the authors of the Manifesto have stated: “We share the belief that the fundamental sources of crime are rooted in the pathology of poverty: jobless, purposeless men and women, broken families, a school system that does not educate, and the consequent epidemic of alcoholism and drug ad-

51. On several occasions Chief Justice Warren orally stated that in his judgment Baker v. Carr, rather than Brown v. Board of Education, 347 U.S. 483 (1954), was the outstanding decision of his chief justiceship. This view is recorded in his memoirs. E. Warren, The Memoirs of Earl Warren 306 (1977). In explaining this judgment Warren went on to write that “[t]he reason I am of the opinion that Baker v. Carr is so important is because I believe so devoutly that, to paraphrase Abraham Lincoln’s famous epigram, ours is a government of all the people, by all the people, and for all the people.” Id. at 308 (emphasis in original). But this was not Lincoln’s language in the Gettysburg Address; there were no “alls” let alone any italicization. With due respect it must be said that Warren altered, rather than paraphrased, the meaning of Lincoln’s celebrated words. Lincoln’s concern was the preservation of the American experiment with citizen sovereignty. It is inconceivable that his mind was on the perplexing issue of choice among competing theories as to the proper basis of legislative representation in a democracy.

To my satisfaction there is here further indication that the majority in the Reapportionment Cases went beyond any faithful enforcement of the written Constitution by embracing a radical theory that the Court somehow has the “creative” duty to make constitutional law when a basic pillar of the American plan of government is by it judged to be in peril. The remainder of this article tests this theory in the context of growing evidence that maldistribution of wealth and income in the United States is a much more serious ultimate threat to the American scheme.

Of many assertions of the seriousness of the situation is this paragraph in a pamphlet of the League of Women Voters:

But real welfare reform must remedy the current system's most flagrant flaw—the failure to provide adequately for the nation's poor. The real question cannot be whether or not to end poverty but how best to proceed. For a nation as rich as ours can no longer tolerate a system that allows 26 million people, including 11 million children, to live in "official" poverty—suffering malnutrition and poor health, deprived of a decent start in life, and outside the mainstream of American society.

To the extent that there is a relationship between income and wealth inequality on the one hand and increasing crime, street violence, racial unrest, and broken homes with "lost" children on the other, economic disparity becomes a serious national problem. If, as may legitimately be feared, there is in this predicament a true threat to the open society that has been a prized value of the American lifestyle, then we face a likely breakdown in political governance more disruptive than were the hazards of extreme malapportionment.

The Reapportionment Cases provide a close precedent for Court-enforced levelling not only because the underlying justification for judicial involvement would be the same, but also for the reason that voter inequality is involved in each instance. Consumer demand expressed in the marketplace represents economic voting as surely as does political voting at the polling place. When inequalities in income and wealth skew levels of purchasing power within the citizenry, the result is, functionally, identical to malapportionment in voting districts. In terms of demand for goods and services registered through exercise of purchasing power, the "vote" of those with greater economic substance weighs heavier than the "vote" of the poorer classes. The total resulting market demand no more registers societal economic need than does political voting in malapportioned districts achieve accurate registration of political preference. Socialist theory has long pointed out the fallacy of correct identification of social needs where the economic expression of wants is distorted by inequality of voting power in the marketplace. In each instance there is "malapportionment" in the sense of maldistribution of economic/political power.

The only distinction between the two situations, from the point

of view of Court intervention, lies in the remedial rather than sub-
stantive sphere. Judicial insistence upon voting districts of equal
population was achieved through exercise of the familiar act of ju-
dicial nullification. However, this remedy would often not suffice
in Court-enforced levelling. Invalidation would not itself have
been sufficient in *Rodriguez* and *Harris*; there would have also
been the question of judicial power to redirect appropriations
against legislative judgments. Fully affirmative decrees would
often be requisite to involuntary transfer payments of governmen-
tal funds. But while remedial measures at first blush pose an ob-
stacle to full-scale judicial levelling, review of developments over
the past twenty years reveals such major expansion in judicial
remedies for effectuation of constitutional determinations as to
leave the issue open.

**THE PROBLEM WITH REMEDIES IN JUDICIAL LEVELLING**

It will be recalled that one reason for Justice Frankfurter’s dis-
sent in *Baker v. Carr*, the precursor of the *Reapportionment Cases*, lay in his concern over the difficulty or impossibility of de-
vising effective judicial remedies in this class of case.66 “Surely,”
he thought, “a Federal District Court would not itself remap the
State” in the face of legislative resistance. Yet exactly that has
occurred, with no eyebrow raised over judicial behavior earlier
thought to be quite inappropriate, if not beyond judicial authority.
Judge Ruth Bader Ginsburg has called attention to another type of
remedial situation, one in which the Court restructures legislation
in order to save it from invalidation.68 Her analysis concerns gen-
der-based legislation that is unconstitutional by reason of underin-
clusiveness. The choice before the Court as a matter of remedy is
either to invalidate or to extend the reach of the offending law to
achieve validity, even though the latter alternative involves “a bit”
of judicial legislating. In some fact patterns repair by extension
adds burden to the state or federal fisc, yet this has not deterred
the Court.

Instanced is the decision in *Weinberger v. Wiesenfeld*, involving
a provision of the Social Security Act. As enacted by Congress,
the law authorized monthly payments to a surviving widow and
child where the wage earner had been the father. To save the pro-
vision from invalidation the Court extended it to include like pay-

55. 369 U.S. 186 (1962).
56. Id. at 327 (Frankfurter, J., dissenting).
57. Id. at 328 (Frankfurter, J., dissenting).
ments to a surviving father and child where the wage earner had been the mother. Judge Ginsburg states that "HEW price-tagged the 'child in care' benefits at stake in Wiesenfeld at 20 million dollars annually, a figure escalating to some 500 million, the Solicitor General claimed, if very closely analogous social security gender lines should be held unconstitutional and repaired by extension." 60

Decisions in the Fifth Circuit provide outstanding examples of judicial direction of money payments by government. Some have concerned existing disparity between blacks and whites with respect to municipal services; others, inadequacies in state care of mental illness and mental retardation. 61 In the latter the remedial decrees enforcing the judicial standards set were not only administratively detailed, but impinged upon legislative prerogative by directing the voting of appropriations and threatening levy of taxes and the sale of state property. The comment of Professor Cox is pointed: "Thus, an individual federal judge became, in effect, the chief executive or administrator of Bryce Hospital. He also superseded the judgment of the Alabama Legislature in appropriating funds and, indirectly, in issuing bonds or levying taxes." 62

With the Swann v. Charlotte-Mecklenburg Board of Education 63 decision, forced busing to achieve racially integrated schools became a familiar judicial remedy in the Supreme Court's drive to destroy the dual system of public schooling, an effort begun with Brown v. Board of Education I and II. 64 Such judicial decrees re-

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60. Ginsburg, supra note 58, at 305 (footnote omitted).
62. A. Cox, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 97 (1976). The latest instance from the Fifth Circuit of federal judicial intervention in state political affairs is Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981). Involved was the question whether an unoccupied seat on the Georgia Supreme Court could be filled by gubernatorial appointment or required a special election. The cost of the latter was estimated at one million dollars. Decision turned on whether a justice had withdrawn from or had vacated his office. By Georgia statute withdrawal called for special election, whereas the Georgia constitution specified gubernatorial appointment in case of vacancy. Challenge of appointment to the open position was sustained by the federal district and appellate courts. In so holding, the statute was judicially stretched to include the term "vacancy" within that of "withdrawal," an explicit provision of the constitution disregarded, and due process invoked. It is reliably reported to me that the state is depending on delays in enforcement until the general election of 1982. Meantime, an interim successor sits, as decreed by the court of appeals.
64. 347 U.S. 483 (1954); 349 U.S. 294 (1955).
quire expenditure by local authorities of great sums of tax revenue. A direct order for pay-out of tax revenues came with *Milliken v. Bradley II*, in litigation concerning the Detroit dual school system. There the federal district court required, as a means toward achievement of a unified school system, introduction into the program of four educational components—reading, in-service teacher training, testing, and counseling. Sustainment of this directive is of especial significance because the Supreme Court rejected, in addition to other contentions, attack on the requirement that the state defendants pay prospectively one-half of the additional cost attributable to the four components. Defendants had argued that the requirement was, "in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials" and therefore constituted an award violative of the eleventh amendment. *Milliken II* thus effects a clear differentiation between money awards of prospective application and those of retrospective application. Whatever the lingering obstacle to enforcement of the latter type, the bar of the eleventh amendment is down for prospective money judgments—the type pertinent to levelling by judicial mandate. Similar atrophy may be expected in the sovereign immunity of the United States historically found in the constitutional design.

A more serious impediment to judicially forced transfer payments does remain. Article I, section 9, clause 7 of the Constitution of the United States reads in forepart: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." Provisions to like effect are to be found in some state constitutions. Unquestionably, the reference is to appropriations made by the legislative branch; there is therefore no doubt of the constitutional existence of outright condemnation of direct judicial demands on the public fisc. The very explicitness of the constitutional wording probably accounts for the paucity of relevant case authority. Only a few decisions of the last century, together with three recently from lower federal courts, warrant attention.

*National Association of Regional Councils v. Costle* involved a
dispute over the reach of judicial jurisdiction with respect to the availability of federal funds after statutory lapse of budget authority. An able bench of circuit judges determined that courts possess the power to enforce further payments "if equity so requires," provided the unobligated budget authority has not lapsed before suit is brought.\textsuperscript{71}

If, however, budget authority has lapsed before suit is brought, there is no underlying congressional authorization for the court to preserve. It has vanished, and any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorization in the Congress. Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities.\textsuperscript{72}

\textit{Costle} leaves no doubt as to where lies the exclusive power of appropriation of moneys in the United States Treasury.

More relevant are the two federal district court decisions that faced the question in attacks on the Hyde Amendment itself. In \textit{Doe v. Matheus}\textsuperscript{73} a temporary restraining order to prohibit implementation of the Hyde Amendment was denied on several grounds, one being the pertinent language of Article I, section 9, clause 7. The court noted that neither in this challenge nor in cited precedent had plaintiffs raised the constitutional issue: "Yet, it cannot be avoided because, on the record before the Court, the Congress simply has not appropriated any moneys for fiscal 1977 to reimburse Medicaid States with a federal share for elective abortions."\textsuperscript{74} Sua sponte the court observed:

\begin{quote}
[I]t has long been the law, as it must be in light of the clear and explicit language of the constitution, that no officer may pay an obligation of the United States without an appropriation for that purpose, and no mandamus may issue to that end. \textit{Reeside v. Walker}, 11 How. 272, 52 U.S. 272, 13 L. Ed. 693 (1851); \textit{Collins v. U.S.}, 15 Ct. Cl. 22 (1879); \textit{Contracts of Extension of Capitol}, 6 Op. Atty. Gen. 28 (1853).\textsuperscript{75}
\end{quote}

This precedent would seem to have concluded the constitutional issue. For even if the district judge were to find the Hyde Amendment invalid, he was troubled over his authority to require the disposition of appropriations that the congressional action had sought to forbid. However, the judge's familiarity with New Jersey law recalled to him the highly analogous situation in \textit{Robinson v. Cahill}, 70 N.J. 155, 358 A.2d 457 (1976). There, the Supreme Court of New Jersey was faced with the prob-

\textsuperscript{71} \textit{Id.} at 588.

\textsuperscript{72} \textit{Id.} at 588-89 (footnote omitted).

\textsuperscript{73} 420 F. Supp. 865 (D.N.J. 1976).

\textsuperscript{74} \textit{Id.} at 870.

\textsuperscript{75} \textit{Id.} at 871.
lem of finding a constitutional vehicle for providing a remedy to carry out its underlying ruling that existing State arrangements for funding the free public schools did not comply with State constitutional requirements. Recognizing that it could not appropriate money (N.J.Const.1947, Art. 8, § 2 par. 2 contains a provision essentially the same as that involved here), it entered an order directing that no State, county or local official was to expend any moneys for the free public schools until the legislature had appropriated funds conforming to the standards laid down by the underlying ruling.⁷⁶

Challenges to discrepancies in the dollar-per-pupil input into public school education by different school districts within the same state were a familiar facet of the general drive for greater equality that marked a decade ago. Two leading decisions were *Serrano v. Priest*,⁷⁷ affording relief under the equal protection clause of the California constitution, and *San Antonio Independent School District v. Rodriguez*,⁷⁸ in which the United States Supreme Court sustained deficiencies in the Texas school system against attack under the equal protection clause of the Federal Constitution. A third major decision was *Robinson v. Cahill*,⁷⁹ decided by the New Jersey Supreme Court in 1973. Although debating the predicates of both *Serrano* and *Rodriquez*, that court invalidated the New Jersey disparities as inconsistent with article VIII, section 4, paragraph 1 of the state constitution of 1947: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years."⁸⁰

By a supplemental opinion shortly thereafter, the New Jersey court, troubled by the question of remedies in case of legislative resistance, in effect gave the state legislature through December 31, 1974, to enact legislation consistent with its substantive judgment.⁸¹ When the legislature failed to meet this deadline, the court in early 1975 ordered full argument on the question of remedies but allowed existing financing to continue for 1975-76.⁸² In May of the same year, the court ordered a provisional remedy for the school year 1976-77 that would afford relief from the continuing unconstitutional system of financing.⁸³ It ruled that directions to

⁷⁶. *Id.*
⁸⁰. *Id.* at 515-20, 303 A.2d at 295-98.
state officers to allocate monies in accordance with this relief program did not violate the appropriations clause of the state constitution.84 "The funds, ex hypothesi, will be appropriated by the Legislature. They will still be used for educational purposes, but in a manner we have concluded to be an essential and minimal interim step in the enforcement of the Education Clause."85 The court ruled that should there be deemed a conflict between the two constitutional clauses, the education clause would control. There were three dissents. Two justices opposed the court's entrance into the business of financing public education.86 To them, the majority action was violative not alone of the appropriations clause but also of the separation of powers clause of the state constitution.87 The other justice dissented out of dissatisfaction with the majority position believing it was not sufficiently curative. For him, stalemate within the executive and legislative branches did not excuse the judiciary from eliminating the existing educational inequalities. "We, too are bound by the mandates of the Constitution... To vindicate the rights guaranteed by the education clause we must make great breakers, and, if need be, tidal waves."88

The response of the New Jersey Supreme Court to this clarion call came in the 1976 decision of that court89 to which the federal district judge had called attention in Doe v. Mathews. The tidal wave that ensued, forcing the closure of all the state's public schools if the legislature did not do the judicial will, was too much even for the dissenter who had called for sweeping action. However, he did not abandon his earlier position that dollar equality among school districts must be achieved in compliance with the state constitution's education clause. Again dissenting, he avoided conflict with the appropriation clause by proposing to order local tax assessors to assess "ratables" to the extent necessary to fund local school budgets at levels "essential for the maintenance of a thorough and efficient system of education."90 His solution reminds of the orders issued in the Fifth Circuit, described earlier in this analysis of judicial remedies.91

As for the federal district judge in Doe, the ultimate action of

84. N.J. CONST. art. VIII, § 2, para. 2.
86. Id. at 374, 339 A.2d at 215 (Mountain, J., and Clifford, J., dissenting).
87. N.J. CONST. art. III, para. 1.
88. 67 N.J. at 374, 339 A.2d at 214 (Pashman, J., concurring in part and dissenting).
89. Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976). It is known as Robinson v. Cahill V, in light of the four previous decisions identically styled.
90. Id. at 171, 358 A.2d at 465 (Pashman, J., dissenting).
91. See text accompanying note 61 supra. A broad ranging account of Fifth Circuit activity is presented in Bass, UNLIKELY HEROES (1981).
the New Jersey Supreme Court was too radical, at least in the circumstances he faced:

The *Robinson v. Cahill* order initiated a constitutional confrontation whose reverberations will echo for decades to come. Such confrontations erode the foundations of the constitutional structure in ways and to an extent that no one can forecast. The judicial branch, in particular, being that branch which decides issues of constitutional law in the last resort, is exposed to the greatest risk of all the branches if it goes too far; if it goes beyond that indefinable line where its judgment has no force and cannot be carried out. And, if it attempts to design a remedy like that in *Robinson v. Cahill*, it may find that it has destroyed the pattern of accommodation between the branches of government upon which the working of government depends. The doctrine of separation of powers in no way prevents all three branches from pulling together toward the same common goal. But when the three branches pull apart in separate and different directions, the structure of government itself is at risk.92

Very significantly, nonetheless, the New Jersey Supreme Court stuck to its guns, and the state legislature capitulated within two months. Thereupon, the court entered an order vacating its injunction.93 Clearly, here is judicial levelling approximating the ultimate in remedial measure.

In the second challenge to the constitutionality of the Hyde Amendment, plaintiffs were more successful in the federal district court. Litigation in *McRae v. Mathews*94 resulted in obtainment of an injunction against withholding of reimbursement for elective abortions. Clearly predisposed to the view of the Amendment’s invalidity, which later eventuated in such a holding in *McRae v. Califano*,95 the district court found a way to reconcile with the Constitution judicially decreed redirection of congressional appropriations under Medicaid. The court concluded:

The contention that an order requiring continued payment for lawful abortions would be an illicit attempt to appropriate funds from the Treasury cannot be sustained. The language of the Act makes clear that Congress has appropriated what it judges sufficient money for carrying out Title XIX and that it has sought only to restrict the circumstances in which the funds can be used to pay providers of lawful abortional services. If that prohibition of use transgresses constitutional rights, it cannot be given effect. Payment of funds will follow, but not by an act equivalent to appropriation. *United States v. Lovett*, 1946, 328 U.S. 303, 66 S. Ct. 1073, 90 L.Ed. 1252, dealt with a section of an appropriation act which, similarly, forbade the use of any part of the money appropriated by the Act for a specific purpose—in that case, the payment of salaries to three federal employees who had been accused of being “subversives.” The Court held that the prohibitory section did not bar the payments of the employees’ salaries because the section was unconstitutional as, in substance, a bill of attain-
Counsel for the Congress argued unsuccessfully the exclusive and complete control of the Congress over the disbursements process and that the issues raised by the section were not justiciable. So here, the section is a constraint on the use of appropriated funds, and, if the constraint here is one that cannot be lawfully imposed for constitutional reasons, as it was in Lovett, then there is here no bar to the payment of the money for abortion services.

One may question, however, whether Lovett constitutes valid precedent in the present circumstances. Although the congressional move to cut off governmental compensation of Lovett, Watson, and Dodd took the form of a section of an Urgency Deficiency Appropriation Act, the Court refused to regard it as "a mere appropriation measure" because of overwhelming evidence of House suspicion that the men were "subversives." The Court made it clear that the run of congressional appropriations is beyond judicial scrutiny. However, finding constitutional taint in the form of a bill of attainder, the Court ruled that Congress could not lawfully prevent the three from enforcing their contractual rights by suit for their salaries in the Court of Claims. Those seeking funds for elective abortions possess no such underlying legal rights. Invalidity of the congressional action in the Lovett situation also lay in its invasion of presidential removal power. Functionally, the case is of a pattern with the leading decision in Humphrey's Executor v. United States, where dismissal of a member of the Federal Trade Commission had been attempted by President Franklin Roosevelt. With the shoe on the other foot, that effort was held to be beyond the removal power of the Chief Executive, which must be shared with the Congress. Nevertheless, Commissioner Humphrey's Executor was successful in suit in the Court of Claims for salary owing through the end of the seven-year term for which Humphrey had been appointed by President Hoover.

But even if this distinction be passed over, and Lovett treated as full precedent in support of a lower federal court's order "for continued payment of lawful abortions," it remains true that judicial authority to intervene in fiscal matters has been pressed only to the extent, already reached by the Supreme Court, of partial re-

98. 295 U.S. 602 (1935).
99. Congress cannot exercise the whole of the removal power as it attempted to do in Lovett, or even share it with the President in the case of presidential appointees exercising only executive authority. Myers v. United States, 272 U.S. 52 (1926). But it can affect removal policy by restricting the conditions on which the President may remove where the appointee is exercising quasi-legislative or quasi-judicial authority. Wiener v. United States, 357 U.S. 349 (1958); Humphrey's Executor v. United States, 295 U.S. at 610-11.
100. Estate of Humphrey, 81 Ct. Cl. 969 (1935).
direction of monies previously appropriated by Congress. If the Court is to attempt bolder levelling, it must test its power to exercise far greater authority over appropriations of public monies. It may never attempt a direct order to the Treasurer of the United States to pay out revenues on its commands, employing the contempt power as an enforcement mechanism. Yet there are means of indirect achievement of similar goals, such as the radical steps taken by the New Jersey Supreme Court and the daring directives in the Fifth Circuit. In view of the degree of judicial ingenuity disclosed by legal history with respect to the fashioning of innovative remedies for new rights at common law and in equity, it would be shortsighted to underestimate the possibilities with respect to constitutional law. Here, preeminently, the future is not likely to tolerate "a right without a remedy."

JUDICIAL LEVELLING IN POLITICAL CONTEXT

Less than twenty years now separate us from a new century. Formally, the intervening period will be marked by recognition of two hundred years since "the miracle at Philadelphia," the Instrument's ratification, the launching of the new Government, the addition of the Bill of Rights, and the first recall by constitutional amendment of a constitutional determination by the United States Supreme Court. But the period promises to be far more one of soul searching about the future. There exists great concern respecting the operation of the legislative branch of the federal government. The quality of representation, as envisioned by the Founders, has seemingly lost its effectiveness. Lester Thurow reflects the view of many that legislative paralysis in treating our ec-

101. Columnist Anthony Lewis has related the facts of the Boston School shutdown dilemma in the Spring of 1981 to illustrate an instance of bold judicial intervention in the political arena. He commends the action of Federal Judge Morse in forbidding closure before the end of the school term, thus forcing public officials to find funds for continuation. Undoubtedly recalling the decrees of Judge Johnson in the Fifth Circuit, Lewis observes that "[t]here is particular criticism of court orders requiring state financial action, for example, to relieve bestial conditions in mental hospitals and other institutions." Yet when there is stalemate in the political process, as there was in Boston, he suggests "that careful judicial intervention can actually help, not hinder, the political process." However, he concludes that "in the end" courts cannot resolve the financial problems of governmental units. Lewis, When Politicians Fail, N.Y. Times, May 7, 1981, at A35, col. 1. The column was reproduced in at least one local newspaper under the title Lewis, Judges Step in Where Politicians Fear to Tread, The Chapel Hill Newspaper, May 8, 1981, at 4, col. 2. Shades of Alexander Pope!

onomic and social problems has already set in.103

One apparent cause of congressional stalemate is the dominance of one-issue political action committees. Their effect appears to be the polarization of positions on legislative policy that results in either inadequate resolution of conflicts or, worse, none at all (zero sum). Former Senator George McGovern laments the appearance in the New Right of an intolerance and vindictiveness that destroys the quality of flexibility which makes possible the compromises essential to policy-making in our pluralistic society.104 To the extent this criticism is valid, it could provoke a like reaction in a New Left that would then surely sap the representational mechanism of all vitality. Thurow is convinced that to get off dead-center with respect to needed economic objectives, such as guaranteed full employment, requires abandonment of the presidential system for the parliamentary.105 Such drastic restructuring of our political framework has long been debated on the level of political theory but never seriously considered operationally. Yet there has emerged a deeper dissatisfaction with the representational vehicle for registering voter preference. Today there is afoot a proposal for a constitutional amendment to authorize direct national initiative. Wide-ranging disaffection with the extent to which Congress is influenced by special interest groups has brought about strong, bipartisan support for the proposal, now cast in the form of resolutions before Congress.106

A weakened Congress if not somehow revitalized can be a temptation toward aggrandizement by other power sources in the governmental scheme. While return to the threat of an imperial presidency seems unlikely, expansion of executive authority is nearly inevitable.107 Events of the past year are indicative of the popular appeal of a strong, managerial executive. In politics as in physics there is abhorrence of a vacuum. Older citizens will recall the first two presidential terms of Franklin Roosevelt, when Congress, faced with the Great Depression, surrendered its authority

103. L. Thurow, supra note 29, at 24-25.
105. L. Thurow, supra note 29, at 212-14.
to become a rubber stamp for Rooseveltian direction of the nation. Professor Arthur Miller has recently written:

The President is not merely primus inter pares in the tripartite division of powers; he is primus. Period. Whoever lives in the White House, of whatever party, will continue to be the focal point of attention—and of actual governing power. The troubles of President Carter, so obvious in 1978, should not be taken as the norm.

Presidents will, to be sure, have to negotiate with Congress and with the bureaucracy, which is a force in its own right. But there can be no doubt that, in terms of formal authority as well as effective control, the reins of government are in the hands of the man [sic] living at 1600 Pennsylvania Avenue, not in the hands of those who work on Capitol Hill. No government of any consequence in the world is run otherwise. The spare generalities of Article II do not begin to demonstrate the range and nature of presidential power. Executive power, of course, has come without amendment; it has both been seized by the Executive and delegated to the public administration, including the President, by a Congress only too willing to forego scrutiny of the myriad details of routine problems of governance.108

Less apparent because more subtle would be judicial aggrandizement. The times seem favorable for expanding judicial power. Despite criticism of the administration of the criminal law, one senses in society great faith in courts as dispensers of substantive justice. There is encouragement by influential writers of the view that the decisional methodology of the common law is equally satisfactory for constitutional adjudication.109 No concern is evident over the crucial difference that when exercised at the constitutional level neither electorally accountable representatives nor the voters in direct action by initiative have, short of the cumbersome process of constitutional amendment, the power to reject judicially announced policy.110 The explanation for this indifference seems to lie in the existence of a growing persuasion that policy formulation by judicial action is little less democratic than that of repre-

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sentation-based organs of government. Some years ago Judge J. Skelly Wright was hailed by many for his candid assertion of this view. More recently Archibald Cox in his Lectures at Oxford enlarged on the same view in a paragraph that warrants continued thought. Cox was challenging Learned Hand's celebrated statement that he would find it "most irksome to be ruled by a bevy of Platonic Guardians," that however little his exercise of the franchise weighed, "when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture." Declared Cox:

I should be no less irked than Judge Hand if the Supreme Court were to void an ordinance adopted in the open town meeting in the New England town in which I live—a meeting in which all citizens can participate—but I should have little feeling about a statute enacted by the Massachusetts legislature in the normal political pattern, and none about a law made in that normal pattern by the Congress of the United States. Perhaps my sense of the matter is distorted by years of advocacy in constitutional cases, but it appears to me that modern government is simply too large and too remote, and too few issues are fought out in election, for a citizen to feel much more sense of participation in the legislative process than the judicial. Nor does the Supreme Court's intervention lessen my sense that we are all engaged in a common adventure.

With this reconciliation of constitutional review with democratic tenets, a basis is established for rationalizing advance from interpretive to noninterpretive constitutionalism. By this feat of legerdemain the Supreme Court is released from the constriction of traditional constitutional review, wherein permissible bounds are limited to enforcement of the text and context of provisions of the written Constitution. The new view, brought to full flower in Roe v. Wade, is that of the Court free to formulate policy for the country, employing the written document only as a starting point for deliberation, much as a court at common law proceeds from precedent to the creative task of reshaping doctrine to accommodate the law to changing circumstances. Whether this new dimension in judicial power will be tolerated has since Roe been said to be the great issue of today in constitutional law.

But "today" may already be yesterday in the fast-moving time frame with which constitutional theorists must be concerned. This is the significance of Harris, in which the Justices faced the momentous issue of whether government is obliged to implement Court decisions not only by traditional means but also through fiscal underwriting, even in those instances like Roe where economic circumstances rather than governmentally induced discrimi-

JUDICIAL LEVELLING

ination prevent full enjoyment by beneficiaries of a newly declared constitutional right. The majority position in Harris is strikingly similar to that of the majority in National League of Cities v. Usery. In each a halt was called to the seemingly relentless march of constitutional doctrine. And just as Usery has received biting criticism from within and without the Court, so has Harris. Professor Michael Perry's insistence that Harris is plainly wrong in light of Roe, if valid, but proves the point that somewhere there must be an end to the annihilation of those limits on judicial power intended by the Founders and accepted for nearly 200 years. Only one additional advance is required for the Court to enjoy boundless freedom to dictate economic as well as political and social policy for the nation: that is for the Court directly to order levelling appropriations without first bothering with the two-step process of creating ipse dixit new constitutional rights and then requiring in the name of the Constitution, the fiscal outlays necessary to implement those decrees.

LEVELLING: A THICKET TO BE JUDICIALLY ESCHEWED

It is datum that none can foretell how the coming years will unfold. Since 1973, the year of Roe, there has been but a single instance of Court indulgence in acknowledged noninterpretivism. Because this concerned a new area of exercise in constitutional creativity, it may augur further toying by the Court with noninterpretive review. On the other hand, the Court has recently rejected extended applications of its self-fashioned constitutional dictates, twice with respect to Roe v. Wade and once as to Reynolds v. Sims, in the face of strong internal dissent and outside criticism. If Mr. Dooley is correct that the Court follows the "iliction" returns, the prevalent conservative trend may counsel a waiting period before there is attempted another assertion of judicial power to "bring the Constitution up to date."

Of all further Court experiments in noninterpretivism, the one most at odds with historically grounded principles of constitutionally limited representative democracy would be Court intervention in the socioeconomic pattern of the country under the banner of judicially enforced fiscal egalitarianism. I am one who fears ultimate societal collapse from the growing disparity in income and wealth; the instability in those countries of the world where tre-

mendous disparity exists is not a lesson to be ignored. But I cannot believe that this dangerous dilemma can be wisely resolved through judicial levelling in the name of a Court-fashioned constitutional mandate. If and when disparity in our prevailing economic system becomes no longer tolerable, requiring that a more economically egalitarian society be substituted, the fundamental alteration should be made by society's citizens—hopefully by peaceful means through super-majority acceptance. Surely a nation founded on popular sovereignty will not in the end accept oligarchic judicial sovereignty as its governing predicate.