CHAPTER THIRTEEN

THE JUDICIARY

THE SUPREME COURT

While few would contend that the Supreme Court should not have the power to interpret the Constitution, there is considerable disagreement over how the nine justices should approach this awesome responsibility. On one side of this debate are those who advocate "judicial restraint," while on the other are those who favor "judicial activism."

Sam Ervin, a former U.S. Senator from North Carolina and for a time a member of that state's Supreme Court, comes down hard on the side of judicial restraint. He argues that the justices of the Supreme Court are obligated to interpret the Constitution solely on the basis of the langugae contained therein. Where the language is ambiguous, the justices must put themselves in the place of the framers of that document and interpret such language as they believe the framers would have. If provisions of the Constitution are inadequate and require change, then it must come solely through a constitutional amendment, and not through judicial fiat. In this connection, Irvin is highly critical of the Warren Court which he feels substituted its own ideological preferences for the true meaning of the Constitution.

Ramsey Clark, the U.S. Attorney General during the Johnson administration, sides with those who would take a more activist approach to interpreting the Constitution. Noting that the Founding Fathers could not have anticipated the fundamental political, social and economic alterations which have occurred in our society, Clark argues that interpretation of the Constitution must be made in light of these changes. To this extent, the Constitution may be viewed as an evolving document. To interpret the Constitution literally, is to wed us to the past, thereby denying us the ability to cope with the present.

In Support of Judicial Restraint

Sam J. Ervin, Jr.

In discussing the question whether the role of the Supreme Court is that of policymaker or that of adjudicator, I will use the term "Founding Fathers" to designate the men who drafted and ratified the Constitution.

The Constitution answers this question with unmistakable clarity. There is not a syllable in it which gives the Supreme Court any discretionary power to fashion policies based on such considerations as expediency or prudence to guide the course of action of the government of our country. On the contrary, the Constitution provides in plain and positive terms that the role of the Supreme Court is that of an adjudicator, which determines judicially legal controversies between adverse litigants.

In assigning this role to the Supreme Court, the Founding Fathers were faithful to the dream which inspired them to draft and ratify the Constitution, and to their action in rejecting in the Constitutional Convention repeated proposals that the Supreme Court should act as a council of revision as well as a court and, in its capacity as a council of revision, possess discretionary power to veto all acts of Congress the justices deemed unwise, no matter how much those acts harmonized with the Constitution.[1]

These things do not gainsay that some Supreme Court justices have been unhappy with the role assigned them by the Constitution and have undertaken to usurp and exercise policymaking power. But their usurpations have not altered the rightful role of the Supreme Court. Murder and larceny have been committed in every generation, but that fact has not made murder meritorious or larceny legal. . . .

From Sam J. Ervin, Jr., "First Lecture," in *Role of the Supreme Court: Policymaker or Adjudicator?* pp. 1-16 (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1970).

THE CONSTITUTION

Let me indicate what the Founding Fathers did in the Constitution to give our nation a government of laws and to preserve for themselves and their posterity the blessings of liberty.

To make our nation "an indestructible union composed of indestructible states,"[2] they delegated enumerated governmental powers to the federal government, and reserved all other governmental powers to the states. To further fragmentize political power, they allocated federal legislative power to the Congress, federal executive power to the President, and federal judicial power to the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish."[3]

To further forestall tyranny, they forbade federal and state governments to do specified things inimical to freedom, and conferred upon individuals enumerated liberties enforceable against government itself. And, finally, to make government by law secure, they made the Constitution and laws enacted by Congress pursuant to it the supreme law of the land, and imposed upon all public officials, both federal and state, as well as upon the people the duty to obey them.[4]

While they intended the Constitution to endure throughout the ages as the nation's basic instrument of government, the Founding Fathers realized that useful alterations of the Constitution would be suggested by experience. Consequently they made provision for its amendment in one way, and one way only, i.e., by concurrent action of Congress and the states as set forth in Article V.[5] By so doing, they ordained that "nothing new can be put into the Constitution except through the amendatory process" and "nothing old can be taken out without the same process."[6]

THE ROLE OF THE SUPREME COURT

A policy is a definite or settled course of action adopted and followed by government. The power to make policy is discretionary in nature. It involves the making of choices on the basis of expediency or prudence among alternative ways of action.

The power to make policy in a government of laws resides with those who are authorized to participate in the lawmaking process.

The Founding Fathers made policy when they ordained and established the Constitution, which determines the fundamental policies of our country.

Since Article I of the Constitution grants Congress the power to make laws and requires every bill passed by it to be presented to the President for his approval or disapproval before it takes effect, the Congress and the President have policymaking power. Moreover, Article V confers upon the Congress and the states, acting in conjunction, limited policymaking power, i.e., the power to amend the Constitution.

Article III denies the Supreme Court policymaking power in plain and positive terms. It does this by making the Supreme Court a court of law and equity and by granting to it "judicial power" only. Under this Article, the Supreme Court has no power whatever except the power to hear and determine cases between adverse litigants, which are within the scope of its original or appellate jurisdiction.

Article III denies the Supreme Court policymaking power in another way. When it is read in conjunction with the supremacy clause of Article VI, Article III obligates Supreme Court justices to base their decisions in the cases they hear upon the Constitution, the laws, and the treaties of the United States, and thus forbids them to take their personal notions as to what is desirable into account in making their rulings.

For this reason, Supreme Court justices are endowed with power to interpret any provision of the Constitution or any law or treaty which is determinative of the issue arising in a case coming before them.

THE POWER TO INTERPRET THE CONSTITUTION

The power to interpret the Constitution is an awesome power. This is so because, in truth, constitutional government cannot exist in our land unless this power is exercised aright.

Chief Justice Stone had this thought in mind when he stated this truth concerning Supreme Court justices:

> *While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint.*[7]

The power to interpret the Constitution, which is allotted to the Supreme Court, and the power to amend the Constitution, which is assigned to Congress and the states acting in conjunction, are quite different. The power to interpret the Constitution is the power to ascertain its meaning, and the power to amend the Constitution is the power to change its meaning.

Justice Cardozo put the distinction between the two powers tersely when he said:

> *We are not at liberty to revise while professing to construe.*[8]

Justice Sutherland elaborated upon the distinction in this way:

> *The judicial function is that of interpretation: it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase "supreme law of the land" stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections.*[9]

America's greatest jurist of all times, Chief Justice John Marshall, established these landmarks of constitutional interpretation:

1. That the principles of the Constitution "are designed to be permanent."[10]
2. That "the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood . . . to have intended what they have said."[11]
3. That the Constitution constitutes a rule for the government of Supreme Court justices in their official action.[12]

Since it is a court of law and equity, the Supreme Court acts as the interpreter of the Constitution only in a litigated case whose decision of necessity turns on some provision of that instrument. As a consequence, the function of the Court is simply to ascertain and give effect to the intent of those who framed and ratified the provision in issue. If the provision is plain, the Court must gather the intent solely from its language, but if the provision is ambiguous, the Court must place itself as nearly as possible in that condition of those who framed and ratified it, and in that way determine the intent the language was used to express. For these reasons, the Supreme Court is duty bound to interpret the Constitution according to its language and history.[13] . . .

THE WARREN COURT

During most of our history, Supreme Court justices were faithful to the dream of the Founding Fathers. They accepted the Constitution as the rule for their official action, and decided constitutional issues in accordance with its precepts.

Unfortunately, however, this has not been true during recent years. Shortly before 1953, Supreme Court justices began to substitute their personal notions for constitutional provisions under the guise of interpreting them, and provoked one of their colleagues, Justice Robert H. Jackson, into making this righteous outcry:

> *Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of the Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.*[14]

With the advent of the Warren Court, this practice increased in frequency and intensity; and the Supreme Court decisions irreconcilable with the Constitution became in Milton's colorful phrase as "thick as autumnal leaves that strow the brooks in Vallombrosa."

I use the terms "Warren Court" and "justices of the Warren Court" to designate Chief Justice Warren and Justices Douglas, Brennan, Goldberg, Fortas, and Marshall who repeatedly undertook to revise the Constitution while professing to interpret it. Candor compels the confession that despite his eloquent protests against their misuse of the due process clauses of the Fifth and Fourteenth Amendments, Justice Black often aligned himself with the justices of the Warren Court; and that although the other justices who served at various times during the incumbency of Chief Justice Warren, namely, Justices Reed, Frankfurter, Jackson, Burton, Clark, Minton, Harlan, Stewart, and White, were rather steadfast in their adherence to the Constitution, some of them joined the Warren Court on some occasions in handing down revolutionary decisions inconsistent with the words and history of that instrument.[15]

The tragic truth is that under the guise of interpreting them, the Warren Court repeatedly assigned to constitutional provisions meanings incompatible with their language and history.

By so doing, it has impeded the President and his subordinates in the performance of their constitutional duty to execute the laws.

At times it has undertaken to abridge the constitutional powers of Congress as the nation's lawmaker, and at other times it has undertaken to stretch the legislative power of Congress far beyond their constitutional limits. And sometimes it has thwarted the will of Congress by imputing to congressional acts constructions which cannot be harmonized with their words.

What the Warren Court has done to the power allotted or reserved to the states by the Constitution beggars description. It has invoked the due process and equal protection clauses of the Fourteenth Amendment as *carte blanche* to invalidate all state action which Supreme Court justices think undesirable.

This is tragic, indeed, because nothing is truer than this observation attributed to Justice Brandeis by Judge Learned Hand:

> *The States are the only breakwater against the ever pounding surf which threatens to submerge the individual and destroy the only kind of society in which personality can survive.*

Besides, the Warren Court twisted some constitutional provisions awry to deny individuals basic personal and property rights.

All of the decisions of which I complain have tended to concentrate

power in the federal government in general and the Supreme Court in particular.

The time presently allotted to me does not permit me to analyze or even enumerate these decisions.

These things mean little or nothing to those who would as soon have our country ruled by the arbitrary, uncertain, and inconstant wills of judges as by the certain and constant precepts of the Constitution. But they mean everything to those of us who love the Constitution and believe it evil to twist its precepts out of shape even to accomplish ends which may be desirable.

If desirable ends are not attainable under the Constitution as written, they should be attained in a forthright manner by an amendment under Article V, and not by judicial alchemy which transmutes words into things they do not say. Otherwise, the Constitution is a meaningless scrap of paper.

Nobody questions the good intentions of the justices of the Warren Court. They undoubtedly were motivated by a determination to improve and update the Constitution by substituting their personal notions for its principles. But candor compels the confession that their usurpations call to mind these trenchant observations of Daniel Webster:

> *Good intentions will always be pleaded for every assumption of power. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.*

Those who champion or seek to justify the activism of the Warren Court assert with glibness that the Constitution is a living document which the Court must interpret with flexibility.

When they say the Constitution is a living document, they really mean that the Constitution is dead, and that activist justices as its executors may dispose of its remains as they please. I submit that if the Constitution is, indeed, a living document, its words are binding on those who pledge themselves by oath or affirmation to support it.

What of the cliché that the Supreme Court should interpret the Constitution with flexibility? If those who employ this cliché mean by it that a provision of the Constitution should be interpreted with liberality to accomplish its intended purpose, they would find me in hearty agreement with them. But they do not employ the cliché to mean this. On the contrary, they use the cliché to mean that the Supreme Court should bend the words of a constitutional provision to one side or the other to accomplish an objective the provision does not sanction. Hence, they use the

cliché to thwart what the Founding Fathers had in mind when they fashioned the Constitution.

The genius of the Constitution is this: the grants of power it makes and the limitations it imposes are inflexible, but the powers it grants extend into the future and are exercisable with liberality on all occasions by the departments in which they are vested.

SAVING THE CONSTITUTION

As the result of the assumptions of power of the Warren Court, the people of our nation are now ruled in substantial areas of their lives by the partial wills of Supreme Court justices rather than by the impartial precepts of the Constitution. . . .

It is obvious to those who love the Constitution and are willing to face naked reality that the Warren Court took giant strides down the road of usurpation, and that if the course set by it is not reversed, the dream of the Founding Fathers will vanish and the most precious liberty of the people—the right to constitutional government—will perish.

Despite their perilous state, the dream of the Founding Fathers can be rekindled and the precious right of the people to constitutional government can be preserved if those who possess the power will stretch forth saving hands while there is yet time.

Who are they that possess this saving power?

They are Supreme Court justices, who are able and willing to exercise self-restraint and make the Constitution the rule for the government of their official action; Presidents, who will nominate for membership on the Supreme Court persons who are able and willing to exercise self-restraint and make the Constitution the role for the government of their official action; and senators, who will reject for Supreme Court membership nominees who are either unable or unwilling to exercise self-restraint and make the Constitution the rule for the government of their official action.

And, finally, if Supreme Court justices, Presidents, and senators fail them, the people may employ their own saving power. Through Congress and the states, they may adopt a constitutional amendment similar to my proposal which would compel Presidents and senators to make appointments to the Supreme Court from among persons recommended to them by the chief justices of the states. The people can rely upon the chief justices of the states to restrict their recommendations to persons who revere the federal system ordained by the Constitution and who will not sanction the concentration of power which always precedes the destruction of human liberties.

Let me add that lawyers who love the Constitution can aid the cause by practicing this preachment of Chief Justice Stone:

> *Where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpations, is careful scrutiny of their action, and fearless comment upon it.*

In closing I make a conditional prophesy. If those who possess the power to rekindle the dream of the Founding Fathers and to preserve the right of the people to constitutional government do not act, Americans will learn with agonizing sorrow the tragic truth taught by Justice Sutherland:

> *The saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.*

NOTES

1. United States: Formation of the Union, pp. 147, 152, 165, 167, 422, 429, 548, 752, 753, 756, 848, 849, 852.
2. Texas v. White, 7 Wall. 700
3. Article III, Section 1.
4. Article VI.
5. James Madison: The Federalist, No. 43.
6. Ullman v. U.S., 350 U.S. 422.
7. U.S. v. Butler, 297 U.S. 1, 78-79.
8. Sun Printing and Publishing Association v. Remington Paper and Power Co., 235 N.Y. 338, 139 N.E. 470.
9. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 404, 81 L.ed. 703, 715.
10. Marbury v. Madison, 1 Cranch. 137, 175.
11. Gibbons v. Ogden, 9 Wheat. 1, 188.
12. Marbury v. Madison, 1 Cranch. 137.
13. Gibbons v. Ogden, 9 Wheat. 213, Ex Parte Bain, 121 U.S. 1; Lake County v. Rollins, 130 U.S. 662.
14. Brown v. Allen, 344 U.S. 443, 535.
15. See e.g., Justice White in Reitman v. Mulkey, 387 U.S. 369 (1967); and Justice Stewart in Jones v. Mayer Co., 392 U.S. 409 (1968).

In Support of Judicial Activism

Ramsey Clark

We demean the Constitution of the United States by this endless metaphysical debate over "strict construction." There are real constitutional issues to be faced, perhaps even constitutional crises. They will require all the vision and courage we can muster. The false notion that men who wrote those words 183 years ago—distant age—could foresee the unforeseeable, or that we can look back and in words alone, or from their intent in the context of 1787, divine the authors' precise meaning as applied to current facts is contrary to all human experience. Our problems, actual and immense, cannot be solved by such conjury. We are fortunate that nature spares us from the foresight that would be required to give truth to the doctrine of strict construction, because the only thing worse than such an impossibility would be its possibility.

Change is the dominant fact of our times. Population and technology, the major dynamics, create more change in a decade than centuries witnessed heretofore. Life changes, the meanings of words change, the needs of man change. The Constitution, born in a fundamentally different epoch, must have the durability and wisdom to grow, to encompass essentially new situations, to meet new needs. It can.

To invoke the Founding Fathers against change is to charge them with seeking to deny subsequent generations that to which they were wholly committed for their own. To vest the Supreme Law of the Land with some religious attachment to the status quo is to deny its very meaning and disable the Ship of State in the turbulent seas of change. The purpose behind the doctrine of strict construction as utilized today is not to find specific guidance where none can exist. It is to resist change: to stay where

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we are, do as we have done and offer no hope. We can no longer afford this.

The results of efforts to invoke the doctrine of strict construction dot our legal history. Their consequences have often been disastrous.

A high water mark came in *Scott* v. *Sandford*, the "Dred Scott" decision, in 1857. There, the Supreme Court held that it lacked jurisdiction to determine whether Congress had power to ban slavery in the territories north of Missouri, or whether a slave voluntarily taken into a free state by his master thereby became free, because on a narrow and technical reading of some of the words of the Constitution, it concluded that no slave could be a "citizen" for purposes of federal jurisdiction. The language of the Constitution as readily read otherwise. Having disclaimed jurisdiction, the Court then proceeded, because strict constructionists are human and have their purposes, to answer these nation-shattering questions in the negative, ruling out not only a judicial, but a legislative solution to the slavery issue and thereby failing to do what it could to prevent the most calamitous war in our history. The majority sought to justify these tragic rulings, by pleading obedience to strict construction, saying:

> *No one, we presume supposes that any change in public opinion or feeling, in relation to this unfortunate race . . . shall induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.*

In 1918, a bare majority of the Supreme Court again showed what strict construction can mean. Reading the Commerce Clause alone, it said the federal government is powerless to prevent interstate shipment of the products of child labor. *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918). The Constitution by that construction—unsupported incidentally in the language of the charter—did not empower the Congress to prevent virtual slave labor of ten- and 12-year-old children working in sweatshops 70 hours or more a week for subsistence wages. These men were not deciding issues on the basis of some clear understanding of intentions from 1787. The men in the Hall at Philadelphia could not foresee such questions, much less their answers. They were cruelly used by justices who would decide by fiat what words meant to them, then grace themselves in the mantle of the Founding Fathers. The experience and sympathies of the Court's majority were closer to the cotton mill owners who destroyed children than to justice and humane concerns, and they resisted change. If the majority opinion in *Hammer* v. *Dagenhart* prevailed today, the union would be a shambles. Can the commerce of 1787 be equated with the commerce of 1970? . . .

. . . The words of the Constitution matter greatly, but they do not suffice to solve the problems of another day. They are the place of beginning, not of ending. To begin and end, poring over words to find

meanings they do not contain denies us the benefits of experience, the strength of growth and the wisdom of the spirit of the Constitution.

Strict construction is at best a convenient argument with which to support or attack particular judicial decisions. How many of us are really prepared to have our Constitution construed solely by its words and their intention when written? There is, after all, not a word in the Constitution about many of our most important protections. The hallowed presumption of innocence, and the requirement that guilt in criminal cases be proven beyond a reasonable doubt are not found in the words of the Constitution. Nor does the Constitution say that state governments may not trample upon freedom of speech or press or religion, that state legislatures must be fairly apportioned, or that any of us have any "right to privacy."

Even the most distinguished advocates of strict construction do not interpret the Constitution from its words when they address principles where words fail. Thus the Supreme Court's most prominent advocate of strict construction has fought tirelessly to preserve our First Amendment freedoms against interference by state governments and to require fair apportionment of state legislatures. The Constitution does not say this. And our foremost senatorial spokesman for strict construction champions the cause of the "right to privacy," believing that the Constitution itself prevents intrusion into the private lives of government employees by government snoopers armed with wiretaps, bugs, or computers. On these crucial issues, even the strict constructionists must look to the spirit of the Constitution and to the requirements of a free society.

It is hardly surprising that the words of the Constitution, even supplemented by their historical context, do not resolve the great questions of our time. In 1791, when the ink on the Constitution was hardly dry, President Washington, who had chaired the Convention, Thomas Jefferson, and Alexander Hamilton were unable to agree among themselves on whether the "necessary and proper clause" authorized the federal government to charter a national bank. Eventually the matter was resolved not on the basis of some nonexistent "plain meaning" of the constitutional language, but on the best judgment the statement of the day could make as to what was an appropriate rule for a constitutional federal government considering the general powers delegated to it. The crises which we face today, the great constitutional questions which are put to the Supreme Court for resolution, are far more difficult. Mass society, urban poverty, racism, vast industry, huge labor unions, tall skyscrapers, automobiles, jet aircraft, television, nuclear energy, environmental pollution, mass assemblies and protests, the interdependence of nations and individuals create issues undreamed of in the philosophies of the Founding Fathers.

The Constitution guides by general principle—a light that recognizes the existence of change. By its very nature it must embody a whole theory in a quick phrase—to regulate commerce—the general welfare—due process of law—the equal protection of the laws. Hundreds, thousands of cases are required to give the phrase a growing content, but the Constitution sets the tone. If it were to be specific, it could not be a Constitution nor hope to maintain a theory and framework of government with general powers and limitations.

The nature of the Constitution and the decisional process by which its principles are extended to new conditions have been recognized from the beginning.

Perhaps the most famous and profound expression was by Chief Justice John Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819): "... we must never forget that it is a Constitution we are expounding.... [a] Constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Words of immutable meaning cannot be adapted to crises, and nations bound to them fail. But in truth there are no immutable words. To say there are is only to place the power to divine their meaning in some high priest. This has never led to truth. As Benjamin Cardozo observed in *The Truth of Law*, "Magic words and incantation are fatal to our science (law) as they are to any other." Learned Hand, a blunt man, said "There is no surer way to misread any document than to read it literally." *Guiseppe* v. *Walling*, 144 F.2d 608, 624 (2d Cir. 1944).

Cardozo demonstrated in *The Nature of the Judicial Process* that "The great generalities of the Constitution have a content and significance that vary from age to age.... A *Constitution* states... principles for an expanding future," pp. 17, 83....

The essential qualities to give integrity, force, and vitality to the Constitution are deep commitment to its spirit, stern self-discipline in relating that spirit to present facts, understanding of the history and function of law in society, and sensitivity to the expanding future. A dictionary, smallness of spirit, and fear of change will not empower an old piece of parchment to curtail conduct of people that new conditions compel.

Perhaps the major question of our times is whether institutions can change to cope with the vast dynamics of mass urban population and burgeoning technology. The answer is far from clear. Can government be responsive to the needs of its people? Will technology master man? Can violence as an international and interpersonal problem solver be conditioned from human capability? Can we assure human dignity? Will racism divide people who must live together with dignity, respect, and love?...

The United States Supreme Court, inherently the most conservative institution within our system of government, has addressed itself to the present and future more effectively than any other agent of our society. Somehow, these last 20 years, it has detected the greatest needs of our

times in the cases that have found their way to its forum and has acted to meet those needs.

The reapportionment cases, beginning with *Baker* v. *Carr*, 369 U.S. 186 (1962), in essence liberate government from the nineteenth century. Without that liberation, legislative bodies could not possibly address themselves meaningfully to the crushing problems of the people. The decisions were constitutional necessities. To have held otherwise would have crippled the spirit of a constitution that serves the people.

In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and a multitude of other civil rights cases, the Court addressed itself to the one huge wrong of the American nation—racism—and caused us to begin to do what decency and justice require. The spirit of the Constitution was clear on this subject. What other meaning can the Thirteenth, Fourteenth, and Fifteenth Amendments have? The failure was in the people. To now blame the Court for upholding the Constitution is hardly to respect that document or to seek fulfillment of its word.

Finally, in a whole series of cases we sometimes describe under the heading of civil liberties, the Supreme Court, enforcing the Constitution, recognized the great crisis in the meaning of the individual in our times—in human dignity. It said things we should have known all along. If we are to have equal justice, the poor, the ignorant, the sick, and despised as well as the rich and powerful must have "the assistance of counsel for his defense." *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). No longer can police question persons in their custody without advising them of their rights. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Fulfillment of constitutional rights is no mere game. We insist on them. Government has an obligation to give them vitality, not seek their waiver. The educated know their rights, the rich have their lawyers; the powerful, however capable of crime, will be protected. So must the poor, the ignorant, and the powerless. So Danny Escobedo and Ernest Miranda could not be convicted by their own confessions when they were denied constitutional rights.

If we care for the future, our concern must not be that the Supreme Court had the wisdom and courage to face the central issues of our times, but that other institutions have done so little not only to seek solutions but to fulfill the critically important constitutional rights decreed by the Court. . . .