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PROFESSOR KURLAND, THE SUPREME COURT, AND POLITICAL SCIENCE*

Donald P. Kommers†

IN A SYMPOSIUM held at the Notre Dame Law School on February 29, 1964, on several constitutional amendments designed to limit the power of the Supreme Court,¹ Professor Philip B. Kurland of the University of Chicago Law School read a terse and delightfully witty paper in which he compared the Supreme Court to Caesar, sieged on the one side by the modern forces of Brutus, and championed on the other side by the contemporary Mark Antony.² There was no doubt in Professor Kurland's mind that the efforts of conspirators like the Council of State Governments, not to mention its less respectable co-conspirators like the John Birch Society, to circumscribe the Court's power and thus slay Caesar are going wide of the mark. But he was convinced that the defenses of Antony are equally harmful to Caesar. The irony is that while the indictment of Brutus against Caesar mounts with each successive Term of Court, Antony's apologies could actually push Caesar over the precipice into the pit of destruction. For if Caesar is to survive his enemies as well as his friends he might well be advised to look into his own soul and in a spirit of self-abnegation purge himself of whatever villainy he sees there.

If I may continue the Shakespearean analogy, Professor Kurland seems to suggest that Caesar will go the route of Coriolanus, who destroyed himself from ambition, conceit, and self-righteousness, rather than be destroyed, like Romeo, by external forces over which he has little control. And so Professor Kurland joined in this instance with neither Brutus nor Antony, but remained in the wings to await, sorrowfully, Caesar's self-destruction or, hopefully, his renaissance. Professor Kurland's oration ended on this note: "I find then that I have come neither to praise nor to bury Caesar. I should only remind those who would destroy Caesar of the self-destruction

* I wish to thank Walter F. Murphy of Princeton University, Herbert Jacob of the University of Wisconsin, and my colleague, Anton-Hermann Chroust, for their helpful comments and criticism on an earlier draft of this paper.

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¹ These amendments, proposed by the Council of State Governments, would (1) vest the amendatory power in state legislatures to the exclusion of Congress, (2) establish a "Court of the Union" with power to review judgments of the Supreme Court relative to the rights of the states, and (3) deprive federal courts of jurisdiction over the field of legislative apportionment.

² Kurland, *The Court of the Union or "Julius Caesar" Revised*, 39 NOTRE DAME LAW. 636 (1964).

to which the noble Brutus was brought; nor can the Antonys among us—who would use Caesar for their own ends—rejoice at his ultimate fate. For Caesar himself, I should borrow the advice given Cromwell by Wolsey: 'I charge thee, fling away ambition: By that sin fell the angels.'"³

But if at that moment Professor Kurland gave any appearance of neutrality as between Brutus and Antony, Caesar could only exclaim, "*et tu Philippe*," following his sharp attack on Caesar in the "Foreword" to the *Harvard Law Review* survey of the 1963 Term of the Supreme Court, where he charged him with the commission of four deadly sins.⁴ On the basis of his evaluation of the 1963 Term he concludes that the Supreme Court is: (1) directing an "egalitarian revolution in judicial doctrine" where equality has become the chief guide to constitutional decision; (2) effectively subordinating, if not destroying, the federal system; (3) enlarging the scope of judicial power beyond anything known before; and (4) ignoring the proper standards of craftsmanship in the drafting of written opinions. Support for these generalizations is derived not only from certain 1963 Term decisions,⁵ but also from what Professor Kurland regards as the major jurisprudential thrust of the Warren Court since 1954 when it decided the epochal *Brown v. Board of Education*.⁶

These decisions and the values they define constitute, according to Professor Kurland, unfortunate and illegitimate exertions of judicial power. The reason is that the Court has somehow invaded the political realm, inculcating social and political values, whose allocation ought to be left to Congress, state legislatures, executive officials, social processes, public opinion, and intergroup dynamics. In short, the Supreme Court has been acting like a bevy of impetuous politicians hellbent on transforming the warp and woof of American society into a tapestry of new and bold designs.

In mounting his assault on Caesar, however, Professor Kurland was much more cunning than Brutus. He knows that he cannot knife Caesar with cold steel and get away with it; after all, as a brilliant student of the Court he is committed to defending its *institutional integrity*, whatever the nature of its particular output at any particular time. Rather, his weapon is

³ *Id.* at 643.

⁴ Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964).

⁵ See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Jackson v. Denno*, 378 U.S. 368 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Lucas v. Forty-fourth Gen. Assembly*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁶ 347 U.S. 483 (1954).

that of biting wit. Woodrow Wilson is reputed to have said that "it is just as hard to do your duty when men are sneering at you as when they are shooting at you." In the *Harvard Law Review* essay Professor Kurland "sneers" at the Court.

But he also casts a distrusting glance at political scientists. The following remark, partly the inspiration behind this article, is a summation of his indictment:

The time has probably not yet come for an avowal that in the field of public law, "judicial power" does not describe a different function but only a different forum and that the subject of constitutional law should be turned back to the political scientists. These students of political affairs realized, before lawyers did, that the true measure of the Court's work is quantitative and not qualitative. The Court will continue to play the role of the omniscient and strive toward omnipotence. And the law reviews will continue to play the game of evaluating the Court's work in light of the fictions of the law, legal reasoning, and legal history rather than deal with the realities of politics and statesmanship.⁷

Presumably, political scientists are more interested in the quantitative than in the qualitative aspects of the Supreme Court's work, though it is difficult to determine from this brief passage where irony leaves off and genuine dismay or anger begins. Professor Kurland is obviously perturbed by the absence on the Supreme Court of what he regards as the disciplined lawyer's skill and temperament. Pervading his essay is the belief that good socio-political theory does not always make good constitutional law. Or, to put it another way, constitutional law is not the pathway to the good society any more than the Supreme Court is its fountainhead. The impression is conveyed that this august tabernacle of law has somehow fallen into unconsecrated hands. At best, the Justices have momentarily forsaken their priestly duties to assume the roles of political activist and social philosopher.

It is, of course, true that the legal scholar and the political scientist are interested in different aspects of the Supreme Court—the former with logic and doctrine, the latter with the process of decision. The political scientist perceives the Court as an instrument for the resolution of political conflict, while the lawyer perceives the Court as an enunciator of legal doctrine. Both perceptions are probably needed for a full understanding of the Supreme Court as a corporate institution in the society. But the legal scholar who seeks to range beyond logic and doctrine, as Professor Kurland does, to define the broad limits of the Court's role in our society needs also to be guided by the insights and capabilities of political science.

The impressive body of knowledge that the public law fraternity in political science has accumulated as a result of modern methods of inquiry

⁷ Kurland, *supra* note 4, at 175.

unfortunately has not been communicated to many of our colleagues on law school faculties who write in the field of what Glendon Schubert has called "constitutional politics."⁸ Rarely is this literature cited in the law reviews, for as Professor Kurland notes, approvingly it would seem, they continue "to play the game of evaluating the Court's work in light of the fictions of the law, legal reasoning, and legal history rather than deal with the realities of politics and statesmanship."⁹ Yet few lawyers actually engage in the hardheaded assessment of legal history for the purpose of determining, quantitatively if possible, the particular functions and contributions of a given legal institution over a period of time as a basis for evaluating its present role in society. One reason for this failure is that studies of the Supreme Court by lawyers, and it must be added by some political scientists, are marked by too much polemics, of which Professor Kurland's essay is a prime example.

Currently, for example, a torrid debate rages among judicial activists, passivists, neutralists, objectivists, and value-oriented apologists and critics of the contemporary Court. We are, of course, entitled to our points of view, and there are probably times when students of the Court should stand up and be counted. In fact, I am not about to suggest here that some of Professor Kurland's criticisms are not well founded or that the Court might not have exercised greater political prudence in handling some of the troublesome problems it faced in the 1963 Term. My own particular bias is for an imaginatively liberal Court, steadfast in its defense of individual liberty and an open society. Unlike Professor Kurland, I therefore take my stand with the great liberal decisions of the Warren Court. But I have no intention, at least in this article, of defending the Warren Court against the particular indictments brought by Professor Kurland. For somewhere argument must end and resolve itself into a genuine search for understanding, and it would be desirable for legal scholars and political scientists to undertake such a task jointly within the framework of interdisciplinary research.

NEEDED: A CHANGE IN PERSPECTIVE

In the following pages I shall try to establish a basis for reorienting our thinking about the Supreme Court and go on to suggest a heuristic model that, it is hoped, would tend to deepen our appreciation of the role of the Supreme Court in American society and politics. I will use the Kurland article as my point of departure, since the intellectual and methodological problems embedded in that essay are not atypical of much current writing on the Supreme Court. But it is time now to strive for a level of analysis, other than that embedded in the tendentious literature mentioned above, by studying the Court in terms of its activity within a context that transcends the legal order as the lawyer might define it. It is time to look at the Supreme

⁸ SCHUBERT, *CONSTITUTIONAL POLITICS* (1960).

⁹ Kurland, *supra* note 4, at 175.

Court as an existential reality, to see it for what it is and has been in American political experience, rather than for what it ought to be, and to treat the values motivating Supreme Court behavior as objective data interacting with other forces, demands, and processes.

The legal scholar who would concern himself with the broad role of the Court in our society must realize that the vicissitudes of American politics impose unavoidable limits upon the coherence, unity, and predictability of constitutional doctrine. Indeed, it is safe to say that the Court's creativity, paradoxically, is to be found precisely in those political limitations which circumscribe the exercise of federal judicial power. For, within the context of Supreme Court litigation, doctrine (law) and politics collide with splintering impact, giving to the Court the leverage and freedom it needs to fashion solutions to complicated questions of public policy as they are brought in focus by particular cases.

But political science also needs much more research on the Supreme Court considered in *sociopolitical context*. For today the research is fairly well dominated by judicial behavioralists who, it must be said, have contributed enormously to our understanding of the judicial process. The judicial behavioralist's interest, however, has centered on the conduct of individual Justices. This research deserves to be supplemented by studies which give greater attention to the Court as a corporate institution, viewed both historically and contemporaneously with respect to its interplay with various social forces, interests, and units of government. After all of our work on the Supreme Court, we are still badly in need of accurate and systematic descriptions of the Court's relation to these factors. Above all, we must seek to avoid the subjectivism that is associated with our personal reactions to particular decisions.

For example, Professor Kurland's major criticism of the Court is that the Justices are guilty of a notorious lack of judicial self-restraint. But in making the charge he gives us little hint as to what are the limits of judicial power. He is at a loss to define these limits because it is impossible to do so with any degree of precision. Indeed, we are left in doubt as to the specific ground of his objections. Is Professor Kurland quarreling with the results of certain Supreme Court decisions, or with the grounds of those decisions, or both? Is he arguing on behalf of the application of neutral principles *à la* Professor Wechsler,¹⁰ or for the invocation of those passive virtues¹¹—or vices,¹² depending, of course, on your point of view—described by Profes-

¹⁰ See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

¹¹ See Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1960). For a more extended treatment of this theme, see BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

¹² See Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

sor Bickel? Or is he simply suggesting that certain areas of American public policy ought to be free of judicial oversight? Perhaps all these elements are embodied in his sally against the Court. The point is that we do not seem to get very far in accumulating systematic knowledge about the behavior of the Supreme Court by focusing on questions like these, which inevitably involve the application of highly subjective standards.

Then we are faced with the possibility of having constitutional law, in Kurland's words, "turned back to the political scientists."¹³ This statement is by no means clear. One wonders what is meant by the term "turned back." When did lawyers or legal scholars *recapture* the domain of constitutional law? When were the political scientists in charge? Under Marshall? Taney? Chase? Waite? Taft? Hughes? Stone? Vinson? Is the behavior of the Warren Court really any different from the behavior of these other regimes? Was any one regime any more political than any other? If so, by what criteria? Is the answer to be found in Professor Kurland's charge that the Warren Court has "wrought more fundamental changes in the political and legal structure of the United States than during any similar span of time since the Marshall Court had the unique opportunity to express itself on a *tabula rasa*"?¹⁴ But many of these political and legal, not to mention social, structures, such as racial segregation, were originally ratified and legitimated by the Supreme Court. Was the Court acting less politically then? Why should the process of ratification or legitimation be regarded as *intrinsically* less political than the process of nullification or reversal?

Consider also the hyperbolic assertion that the Court will continue to play the role of the "omniscient and strive toward omnipotence" so long as the "true measure of the Court's work is quantitative [that is, the concern of the statesman and political scientist] and not qualitative [that is, the concern of the judge and the legal scholar]."¹⁵ Again, it is hard to interpret the precise meaning of this reproach. Is the problem that of the Court being more concerned with results than with reasoning? Or does Professor Kurland simply disagree with the results of certain Supreme Court decisions, regardless of the reasons marshaled in support of them? Is his difficulty that of finding constitutional justification for certain Court decisions? Or, despite constitutional justification, *ought* the Court have refrained from deciding certain controversies as a matter of propriety, or out of deference to the political branches of government?

Perhaps it is Professor Kurland and not the political scientists or the Court who is putting too much stress on quantity. The *number* of new rulings, overrulings, and fundamental changes in the law would not seem to be as important as the ratio of such rulings to social change. The activity

¹³ Kurland, *supra* note 4, at 175.

¹⁴ Kurland, *supra* note 4, at 143.

¹⁵ Kurland, *supra* note 4, at 175.

of the modern Court may have much to do with the fact that social and technological change in the last two decades has gone forward at a very rapid pace, representing geometric rather than arithmetic progression, and is not to be compared with the proportionately slower rate of change between Marshall and Vinson. We are living in a period of great upheaval, requiring reassessment of our living habits, social relations, and political institutions. The revolutions we are witnessing today in science and technology are more than matched by the social revolutions occurring in the United States and in the world, the major thrust of which is toward greater personal and collective security, equality of opportunity, and freedom of individual choice and maneuver. One can take notice of the inexorability of this historical trend without necessarily being committed to value-oriented jurisprudence. But a question arises; is the Court a *prime* mover of events, as Professor Kurland believes, and obviously deplors, or is the Court being carried along in the current of events? Or, are we witnessing a creative interaction between law and social process? These are questions which Professor Kurland and his intellectual supporters have not even begun to investigate, yet these questions must be probed if Felix S. Cohen was correct in his judgment:

A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences. A judicial decision is a social event. Like the enactment of a Federal statute, or the equipping of police cars with radios, a judicial decision is an intersection of social forces: Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it. The decision is without significant social dimensions when it is reviewed simply at the moment in which it is rendered. Only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself.¹⁶

It is this dimension of Supreme Court decision-making that Professor Kurland and many other critics of the Court's conduct singularly ignore.

LAW AND SOCIAL SCIENCE

A legalistic view of constitutional law simply cannot account for the powerful sociopolitical forces buffeting our society today. Professor Kurland's own special fondness for neutral principles of constitutional law,

¹⁶ COHEN, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935), in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 33 (L. Cohen ed. 1960).

which would not take sides between clashing ideologies, raises the ugly head of slot-machine jurisprudence. Apparently, Professor Kurland cannot bear the thought of uncertainty in law. One has to marvel at the stubborn tenacity and persistence of a mechanistic theory of law which holds that the Justices are not involved in politics, but are above politics as they labor to resolve controversy through the dispassionate application of neutral and deductive principles. The real danger of the neutral principles thesis is that it tends to carry judges into the unreal and heady realm of logomachy, with the result that human feeling, emotions, and values are taken out of law, divorcing it from intimate contact with reality, or the hopes and aspirations of ordinary men. Part of this unrealistic quest for certainty in constitutional law stems not only from formal training in Anglo-American jurisprudence, but also from American law's relative estrangement from political and social science. Professor Kurland's approach is that of the constitutional legalist, where, at the best, the Supreme Court is viewed as functioning at the fringe of the political system, not as an essential component of it. And what could be more uncertain than politics, of which the legal process is an essential ingredient. Apparently the wisdom of Holmes, Frank, and others has not yet seeped in: that uncertainty is fundamental to the legal process, and that the quest for certainty in law is to take flight from adulthood in pursuit of a childish phantasy.¹⁷

The problem derives in part from the unfortunate fact that law, as a field of learning, has grown and been taught in relative isolation from the social sciences. The legal scholar, for example, has turned his attention inward to a self-sustaining structure of legal rules, norms, and values. He orbits around a world of books containing concepts, rules, precedents, and definitions, the empirical referents of which are often impossible to locate.¹⁸ Despite the impact of legal realism upon American jurisprudence, it is still possible for the law student to graduate at the top of his class without ever having read a sociological monograph, a treatise in psychology, or an essay in political dynamics. As Harold Lasswell suggests, it has been the lawyer's perennial duty to state arguments, to draft briefs, and to put forth a "persuasive interpretation of how a given prescription applies to concrete circumstances."¹⁹ But legal training which focuses on these objectives seems

¹⁷ See FRANK, *LAW AND THE MODERN MIND* 243-60 (1930).

¹⁸ Political science has only recently, under the impact of the behavioral revolution in the social sciences, liberated itself from similar intellectual strictures. There was a time when political scientists roamed about in an abstract world analogous to Von Jhering's heaven of legal concepts. Only there the fictions or disembodied spirits in terms of which the real world was all too frequently described were concepts like sovereignty, public interest, majority rule, justice, public opinion, democracy, and the state. Attention was focused on governmental and constitutional forms, rather than on the human activity which gave meaning and significance to these forms. Political scientists ignored life processes, just as legal scholars failed to heed Erlich's insight that law was the product of social forces and not logic.

¹⁹ LASSWELL, *THE FUTURE OF POLITICAL SCIENCE* 199 (1963). Lasswell also

to militate against (1) the development and refinement of causal analysis, (2) inquiry into "postulated goals of the legal system" considered against "projections of probable future events," and (3) analysis of courts from a broad functional perspective,²⁰ shortcomings which could be overcome by greater interdisciplinary cooperation between legal scholars and social scientists.

By contrast, the political scientist has usually turned his attention outward to the political process where human *activity*, denominated as *political*, has become the subject of study and analysis.²¹ This does not mean that legal rules, constitutional doctrines, or institutional framework are ignored by contemporary political science. This would be absurd. The tendency of modern research in political science is rather "to go beyond the data supplied by constitutions, statutes, administrative decrees, or judicial decisions—themselves evidence, directly or indirectly, of political behavior—to a more complete description of governmental structure in action. It seeks to disclose sets of recurring patterns in the way people behave, involving relationships of leadership and subordination, functional specialization, and the like, which are in varying degrees changeable even though relatively persistent."²² Under the impact of behavioral research, political science also has been pressed toward greater interdisciplinary cooperation with the other social sciences. The modern tendency toward the integration of the social sciences stems from the salutary realization that knowledge cannot be compartmentalized without grossly distorting reality. Indeed, the rele-

notes: "Political scientists who work with legal scholars will discover that the realistic point of view is by no means universal and that many lawyers who profess to go along with it are not willing to apply the realistic approach with vigor and constancy to every problem. Moreover, it cannot be taken for granted that the distinction between syntactics (logic) and semantics is generally understood." *Id.* at 195.

In this connection we are also reminded of Cardozo's observation: "There is in each of us a stream of tendency . . . which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which when reasons are nicely balanced, must determine where choice shall fall." CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12 (1921).

²⁰ LASSWELL, *op. cit. supra* note 19, at 193-206.

²¹ See generally DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* (1964); PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* (1955); PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* (1958); SCHMIDHAUSER, *THE SUPREME COURT, ITS POLITICS, PERSONALITIES, AND PROCEDURES* (1960); WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* (1958). For excellent collections of articles on this general subject, see MURPHY & PRITCHETT, *COURTS, JUDGES, AND POLITICS* (1961); SCHMIDHAUSER, *CONSTITUTIONAL LAW IN THE POLITICAL PROCESS* (1963); SCHUBERT, *JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH* (1964).

²² See Eldersveld, Heard, Huntington, Janowitz, Leiserson, McKean & Truman, *Research in Political Behavior*, 46 AM. POL. SCI. REV. 1003, 1004 (1952).

vance of the insights and discoveries of the economist, sociologist, psychologist, and anthropologist for a more proper understanding of political behavior, as well as the operation of political institutions, has been fairly well perceived by political scientists.

Yet law has been relatively untouched by the thrust toward interdisciplinary cooperation—to the hindrance of both social science and law—and legal scholars are not usually found in the company of social scientists, though there are fresh signs that this is beginning to change.²³ An exception to this generalization are certain legal historians who have tried to uncover law's explicit relation to extralegal phenomena and to describe systematically the mutually interacting influences of law, politics, economics, and social processes.²⁴ But the law-making process is the legitimate concern of both lawyers and political scientists. "In the most inclusive sense," Harold Lasswell notes, "jurisprudence is itself a component of political science," for it is "particularly concerned with authoritative patterns of decisions." He then admonishes: "Obviously, decisions may be both *authoritative* and *controlling*; specialists in neither jurisprudence nor political science are exclusively concerned with one or the other."²⁵ We would, therefore, simply re-emphasize that the fuller view of law as it relates to the political system would seem to require joint effort by legal scholars and political scientists.

THE NEW CONCEPTUALISM

Viewing the Court from a broad perspective and within the framework of larger political context avoids the new conceptualism implicit in much of the critical commentary on the modern Supreme Court. Unlike the old conceptualism which imported an excessive rigidity into the meaning of ambiguous constitutional language, the new conceptualism seeks to limit

²³ In recent years, for example, the Social Science Research Council has sponsored summer seminars on the legal process, bringing together legal scholars and social scientists, who devote several weeks of intensive study to various problems of law and society from an interdisciplinary point of view. See Kalven & Schwartz, *Administration of the Law of Torts: The 1961 Summer Research Training Institute on Interrelations of Law and Other Social Institutions*, 14 J. LEGAL ED. 513 (1962). Another co-operative enterprise between legal scholars and social scientists is the Center for the Study of Law and Society, established on the Berkeley Campus of the University of California in 1961. It is just now beginning to produce significant contributions to our understanding of law's relation to society. See CENTER FOR THE STUDY OF LAW AND SOCIETY ANN. REP. (1963-1964). Another hopeful beginning was the recent establishment of the Law and Society Association being supported by the Russell Sage Foundation. Perhaps one of the most forward-looking developments in recent years is the addition of social scientists to law school faculties. The Yale experiment is, of course, well known. Less dramatic moves in this direction have also been made at Wisconsin and Northwestern.

²⁴ See, e.g., HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* (1960). See also HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); HURST, *LAW AND ECONOMIC GROWTH* (1964).

²⁵ LASSWELL, *op. cit. supra* note 19, at 196.

the functions of the Court in accordance with narrow and fixed standards of judicial involvement. The Supreme Court exceeds its proper authority, according to this theory, if it transcends these fixed and proper limits of judicial power. This is another variant of legalism on the rampage. This is not to suggest that judicial power is no different from legislative or executive power, or that the judiciary is a political forum distinguishable from the legislature only in the number of its personnel. Judicial power is different because it is exercised within a certain framework of rules, values, and expectations, and because the remedies it provides are limited.²⁶ But the line which separates federal judicial power from executive or legislative power is far from straight; it is a wavering line whose curvatures depend upon the pressures, exigencies, and necessities of the moment.

One reason for the blurring of these lines is that the founding fathers, whether they realized it or not, or whether they wanted to or not, placed the Supreme Court squarely at the center of the American political system. A major branch of government made coordinate with and independent of the legislature and the executive, entrusted simultaneously with power to settle controversies between the nation and the states, as well as to hear cases and controversies arising under the Constitution, federal laws, and treaties, could realistically occupy no other position in American politics, even barring the practice of judicial review. Chances are that the collection of practical politicians—or were they lawyers?—who gathered in Philadelphia in 1787 to draft a new constitution actually had little idea of what the Court would eventually become. As Professor John Roche said in his brilliant analysis of the constitutional convention:

Drawing on their vast collective political experience, utilizing every weapon in the politician's arsenal, looking constantly over their shoulders at their constituents, the delegates put together a Constitution. It was a makeshift affair; some sticky issues (for example, the qualification of voters) they ducked entirely; others they mastered with that ancient instrument of political sagacity, studied ambiguity (for example, citizenship), and some they just overlooked. In this last category, I suspect, fell the matter of the power of the federal courts to determine the constitutionality of acts of Congress. When the judicial article was formulated (Article III of the Constitution), deliberations were still in the stage where the legislature was endowed with broad power under the Randolph formulation, authority which by its own terms was scarcely amenable to judicial review. In essence, courts could hardly determine when ". . . the separate States are incompetent or . . . the harmony of the United States may be interrupted"; the National Legislature, as critics pointed out, was free to define its own jurisdiction. Later the definition of legislative authority was changed into the form we know, a series of stipulated powers,

²⁶ See MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 12-36 *passim* (1964).

*but the delegates never seriously reexamined the jurisdiction of the judiciary under this new limited formulation.*²⁷

In short, the Court would become what it would *in operation*. And what it became was an effective and sometimes aggressive instrument of policy-making, interacting with the legislative and executive branches under conditions of constructive or creative tension. Indeed, it is impractical to define a priori the role of any institution in a viable democracy and changing society. Just as words derive their import and meaning from usage, an institution derives its significance from its activity and usefulness.

Worth recalling here also is the fact that the law-making roles of judiciary, legislature, and executive have changed from era to era; the pattern of interplay between them alters, sometimes drastically, depending upon the intensity and course of social change, human inertia, and a multitude of other sociopolitical factors. And it would seem that whether the Court occasionally takes the lead in conflict resolution, or whether the behavior of the court conforms to some rigid standard of judicial propriety, is quite irrelevant so long as the integrity of the entire political system is maintained. As Alexander Bickel notes:

The functions [separation of powers] cannot and need not be rigidly compartmentalized. The Court often provokes consideration of the most intricate issues of principle by the other branches, engaging them in dialogues and "responsive readings"; and there are times also when the conversation starts at the other end and is perhaps less polite. Our government consists of discrete institutions, but the effectiveness of the whole depends on their involvement with one another, on their intimacy, even if it often is the sweaty intimacy of creatures locked in combat.²⁸

The new conceptualism which seeks to define rather precisely the perimeters of judicial power is really derived from too legalistic a view of separation of powers. Professor Kurland looks toward a constitutional legalism which views the Court solely as an expositor of legal doctrine, while forgetting that such expositions involve real and difficult choices among competing political values and interests. Indeed, the new conceptualism envisions a neutral, dispassionate, nonpolitical court, detached from the frustrations, emotions, and outbursts of our political life, when in actuality the cases which most frequently go to the Supreme Court reflect the deepest wounds, grievances, anxieties, and divisions of American society.

THE SUPREME COURT AND THE THEORY OF DEMOCRACY

Much of the criticism currently directed at the Supreme Court stems from the proposition that the Court is not a democratic institution. Adherents

²⁷ Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 812 (1960).

²⁸ BICKEL, *op. cit. supra* note 11, at 261.

of the new conceptualism in modern jurisprudence see the Court doing things that the legislature and other popularly elected organs of government should be doing. Even a realist like Professor Roche concludes that "the current policy power of the federal judiciary is an anomaly in our democratic system," for it is a "Platonic graft on the democratic process."²⁹ He perceives a distinct difference between the law-making and law-applying functions; "it is not the function of judges to determine social and economic policy: their task is to apply those policies decided upon by the responsible organs of government to cases at bar."³⁰

This is clearly not the place to describe the nature of democratic representation or the quality of political responsibility in America. But a few general observations are in order. Many thousands of hours of research and writing by modern political scientists should by now have established the fact that the American political process cannot be understood in terms of the classical theory of democracy. Though public opinion obviously sets limits to the exercise of political power, the complicated business of governing this nation on a day-to-day basis and the hammering out of solutions to hundreds of problems, large and small, are not matters simply of translating majority will into governmental policy.³¹ They are rather a complicated process of consultation, negotiation, and adjustment between politically active individuals, vested interests, and various agencies of government. Anyone who takes the trouble to grasp the reality of modern government will realize that it is not a neat tapestry woven with logic and embroidered in constitutional lace, but a tangled ball of thread. Operating beneath the veneer of formal government organization are multiple and competing systems and sub-systems of political power, sustained by the services they provide and the support they receive inside and outside government.³² Thus, government is a series of working relationships between manifold groups in the electorate and various departments, agencies, and levels of government, a process which must be taken into account by any viable theory of democratic representation. Democracy conceived populistically simply does not comport with political reality.³³

Obviously, the Supreme Court is not representative *in the same sense* as is Congress. But this does not mean that the Court is politically irresponsible

²⁹ ROCHE, COURTS AND RIGHTS 105 (1961).

³⁰ *Ibid.*

³¹ For the most sophisticated treatment of this complex problem of democracy, see KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 411-531 *passim* (1963).

³² For excellent descriptions of these interrelations, see MONSEN & CANNON, THE MAKERS OF PUBLIC POLICY: AMERICAN POWER GROUPS AND THEIR IDEOLOGIES (1965); TRUMAN, THE GOVERNMENTAL PROCESS 321-498 *passim* (1955); WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (1964); ZEIGLER, INTEREST GROUPS IN AMERICAN SOCIETY 93-232, 249-331 *passim* (1964). See also STEIN, PUBLIC ADMINISTRATION AND POLICY DEVELOPMENT 573-848 *passim* (1952).

³³ See DAHL, A PREFACE TO DEMOCRATIC THEORY 34-62 (1956).

or not representative. The Supreme Court is no more unrepresentative than the federal bureaucracy, which has also suffered the slings and arrows of criticism overly influenced by classical democratic theory. The failure to incorporate *all* American political institutions into a viable theory of representative democracy derives from the failure to view these institutions in a wider context of interplay with social forces outside government and with other government institutions. According to the constitutional legalist, for example, government agencies do not make policies; they merely carry out the will of the original policy maker. On the other hand, Norton Long has argued that the federal bureaucracy is actually more representative of the people than Congress is. In taking a larger and more functional view than the constitutional legalist, he states:

The democratic character of the civil service stems from its origin, income level, and associations. The process of selection of the civil service, its contacts, milieu, and income level after induction make the civil service as a body a better sample of the mass of the people than Congress. Lacking a caste system to wall them off from their fellows, the members of this sample are likely to be more responsive to the desires and needs of the broad public than a highly selected slice whose responsiveness is enforced by a mechanism of elections that frequently places more power in the hands of campaign-backers than voters. Furthermore, it is unlikely that any overhauling of our system of representation in Congress will remove the need for supplementary representation through the bureaucracy. The working interaction of President, Congress, courts, and the administrative branch makes the constitutional system a going concern—not the legal supremacy of any one of them.³⁴

And out of this complex web of interrelationships comes something as closely approximating government for, by, and of the people as can be expected in a complicated political system operated by selfish and fallible men. This is one reason why the judicial activist-passivist controversy comes close to being a rather sterile debate, for it is highly unlikely that an activist court will seriously affect the balance that obtains among American political institutions, since the court functions within a complex web of government whose character is determined far more by the multifarious pressures brought against it than by any pronouncement of a single organ of law.

Part of our problem is that we have tended to identify representation with elections. To be sure, elections are absolutely necessary to democracy, but may not be *entirely* sufficient for effective representation. In our political culture the democratic process is to be identified with the whole complicated paraphernalia of structures and institutions—economic, social, political, and legal—which collectively embody the hopes and aspirations of our people, and by means of which men hope to realize their most ardent desires.

³⁴ LONG, *THE POLITY* 70-71 (1962).

Democracy has been defined as "a system in which, through compromise, the competing demands of interests may be satisfied while the decision-making mechanisms of government continue to operate."³⁵ Perhaps a better definition is that of Anton-Hermann Chroust who has described a working democracy as "that sum total of social, political, economic, and legal structures—that sum total of the practices of creating, distributing, and balancing all socially significant values—through which true human worth and true human individuality may effectively be realized."³⁶

For these and many other reasons, the intrusion of democratic theory into the debate over the role of the Supreme Court in American society can only becloud the issue. Professor Martin Shapiro suggests that it is better "to begin with the simple non-ideological proposition that the Supreme Court is here and is making policy in intimate connection with other parts of government."³⁷ The fact is that any organ of government at any particular point in time is more or less democratic. Whether more or less depends on the circumstances. In the words of Professor Shapiro:

But so long as the Supreme Court functions within a governmental matrix of mixed democratic and nondemocratic elements, whether or not to assign certain tasks to the Justices is no more and no less a question of democracy than whether or not to assign those tasks to any other government agency. In attempting to decide the desirability of allocating decision-making power over labor matters to the Court or to N.L.R.B., for instance, the relative degree of direct popular control over each may be significant, but it is simply one factor among many. Certainly nothing can be solved by calling down a plague on both their houses because neither is selected by annual elections. It seems preferable to determine in each separate policy area whether judicial policy-making contributes to well rounded representation of interests or to popular control more or less than policy-making by some rival agency. This approach is surely more useful than issuing blanket condemnations of judicial action on the basis of an abstract model of democratic policy-making that does not reflect the realities of American government.³⁸

It would, indeed, be unfortunate to get ourselves bogged down in a debate as to which political branch or agency is *the* representative unit of American government. Representation is a relative matter. It is so because only in utopia is there a perfect correspondence between popular will and governmental policy. All agencies and branches of government are representative only in degree, for each possesses some undemocratic qualities. Each branch, agency, or unit of government is defined by its own group life, its

³⁵ ZEIGLER, *op. cit. supra* note 32, at 40.

³⁶ Chroust, *Law: Reason, Legalism, and the Judicial Process*, 74 ETHICS 16 (1963).

³⁷ SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 45 (1964).

³⁸ *Id.* at 46.

own ritual, its own norms, and its own formal and informal power structures, all tending to limit or deny access or effective representation to some groups, while answering to the demands of others.

It is normal for groups to resort to the judicial process when they have been stymied at the hands of the legislature or some other agency of government. The American Negro is an excellent case in point. It is probably true that a majority of Americans are in favor of desegregating educational facilities. Yet, this majority sentiment has not been translated into a federal law by Congress because of an internal power structure which frequently blocks action. In some states the urban and suburban voters have suffered a similar fate, simply because the electoral system itself has institutionalized minority control. Congress is so encumbered by anti-majoritarian devices and its power so fragmented that voting majorities are frequently thwarted. But even with congressional reform and more responsible party government, certain segments of the American public would still be underrepresented in Congress. In that event, the response of the underrepresented group is frequently to the federal judicial process. As Professor Roche noted:

On the theoretical plane I do not consider Supreme Court review of policy matters to be democratic in character. As a participant in American society in 1963—somewhat removed from the abstract world of democratic political theory—I am delighted when the Supreme Court takes action against “bad” policy on whatever constitutional basis it can establish or invent. In short, I accept Aristotle’s dictum that the essence of political tragedy is for the good to be opposed in the name of the perfect. Thus, while I wish with Professors Wechsler and Kurland, *inter alios*, that Supreme Court Justices could proceed on the same principles as British judges, it does not unsettle or irritate me when they behave like Americans. Had I been a member of the Court in 1954, I would unhesitatingly have supported the constitutional death-sentence on racial segregation, even though it seems to me that in a properly ordered democratic society this should be a task for the legislature. To paraphrase St. Augustine, in this world one must take his breaks where he finds them.³⁹

The basis of American democracy is the fragmentation of political power. Indeed, the constitutional rights of property, contract, free speech, petition, and assembly legitimate the many independent and competitive centers of private power, whose interplay constitutes a flourishing social dynamism. The integrity of this system of power is preserved partially by the fact that the groups within it can go for protection to any number of *official* centers of political power, including the federal courts. Thus, constitutional framework and legal structure dovetail with the extralegal sociopolitical system to reinforce and vitalize American pluralism.

³⁹ Roche, *The Expatriation Cases: “Breathes There the Man, With Soul So Dead . . . ?,”* 1963 SUPREME COURT REV. 326 n.4 (1963).

The avoidance of concentrated power, the grand purpose of the Constitution, implies that all groups will be effectively represented in the political system, and that the legitimate exceptions of all major segments of the public will be at least minimally fulfilled. Circumstances may dictate the feasibility of resorting to the Supreme Court for redress, but even the Supreme Court is limited by what it can do. For one thing, the Court, as any other agency of government, operates within a framework of public expectations, while at the same time it functions within a vast judicial bureaucracy which modulates its rulings, parries its thrusts, and sometimes even openly defies its mandates. Furthermore, any major social or political achievement needs the creative collaboration of all branches of government. This is the real measure of the Court's limitations.

A FUNCTIONAL APPROACH TO THE STUDY OF THE SUPREME COURT

All these generalizations about the Supreme Court's contribution to American democracy are speculative propositions, for they have not been the subject of empirical inquiry. What is needed, therefore, is a theoretical framework which might help to clarify the Court's role in the political system. It would seem that a functional approach would furnish an analytical scheme satisfactory for this purpose. But functionalism has not been used very extensively in political science. There are, of course, many variants of functionalism as developed in the social sciences.⁴⁰ Functionalism as used here, however, would fall somewhere between what Flanagan and Fogelman call "eclectic functionalism" and "structural functionalism."⁴¹ The former lacks significant theoretical content, while the latter is so abstract in its theoretical formulations that it fails to meet the test of empirical inquiry. In middle-range functional theory the emphasis would be upon observing the activity of the Supreme Court so as to identify the sources of its input and the effect, both latent and manifest, of its output. Such inquiry would be concerned particularly with the effects of this output upon the Court itself as a corporate institution, as well as upon the political system. It would study the conditions under which judicial power and authority *are* maximized,⁴² stabilized, or minimized, since it seeks to eschew normative questions that deal with the Court's *proper* role in the society.

⁴⁰ For example, see its uses in LEVY, *THE STRUCTURE OF SOCIETY* (1951); MITCHELL, *THE AMERICAN POLITY* (1962); PARSONS, *THE SOCIAL SYSTEM* (1951); PARSONS, *STRUCTURE AND PROCESS IN MODERN SOCIETY* pt. III *passim* (1960). Adler, *Functionalism Made Verifiable*, 4 *THE SOCIOLOGICAL Q.* 59 (1963). For a more limited use of functionalism see MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 19-84 (rev. ed. 1957). See also *FUNCTIONALISM IN THE SOCIAL SCIENCES* (Monograph 5 in a series sponsored by the American Academy of Political and Social Science, 1965).

⁴¹ Flanagan & Fogelman, *Functionalism in Political Science*, in *FUNCTIONALISM IN THE SOCIAL SCIENCES*, *supra* note 40, at 112-15.

⁴² See Murphy's treatment of this problem in MURPHY, *op. cit. supra* note 26, at 123-275 *passim*.

In the words of Felix S. Cohen, that great and illustrious enemy of "transcendental nonsense" in law, functionalism, "may be defined as the view that a thing does not have a 'nature' or 'essence' or 'reality' underlying its manifestations and effects and apart from its relation with other things; that the nature, essence, or reality of a thing *is* its manifestations, its effects, and its relations with other things."⁴³ It is necessary to understand the Court's functions in terms of all its vital contacts with the changing forces of society.

Functional analysis as used here embraces inquiry into the reasons why particular interests gain access to the Supreme Court. This requires a perspective which goes beyond the internal decisional process of the Court itself, that is, one which views the Court as a subsystem within a larger system of political action. The larger system is moved by friction resulting from the interplay among interests, events, and institutions, which are the moving parts of the system; the task of the functionalist is to determine how and why they relate to each other, and to describe further how each moving part relates to the operating efficiency of the entire mechanism.

The Supreme Court is, of course, an important political agency, not by any means the most important political organ in our government, but one of many units of government engaged, in the words of Lasswell and Kaplan, in the "shaping, distribution, and exercise of power."⁴⁴ Because of the Court's power of review, its unavoidable involvement in high controversy, and the fact that it is the final legitimizing authority in the nation where constitutional questions are concerned, it constitutes a political subsystem necessarily engaged in, to use Easton's phrase, the "authoritative allocation of values for a society,"⁴⁵ a sophisticated way of saying that the Court wields power.

But what exactly is this power, and what qualities or properties does it share with political power generally? The first observation we would make is that power is not a substance capable of being located in the manner of a gridpoint on a map, but rather a process which describes the relationship between two or more actors in the political system. A political actor may refer to an institution or a group, such as the Supreme Court, as well as to an individual. The momentary equilibrium which exists between actors in the power system is subject continually to tensions, strains, and disturbances, caused by other forces, which inevitably impinge upon the primary actors, introducing factors which alter the original relationship. This is what the political process is all about.

With respect to the Supreme Court, the political process is one of transactions between the Court and the forces with which it continually interacts.

⁴³ COHEN, *op. cit. supra* note 16, at 47.

⁴⁴ LASSWELL & KAPLAN, *POWER AND SOCIETY* 75 (1950).

⁴⁵ EASTON, *THE POLITICAL SYSTEM* 129 (1959).

The nature of these transactions may be illustrated by an adaptation of Easton's model of the political system.⁴⁶ According to this model, the Court is inextricably caught up in a relationship of interdependence with Congress, the President, administrative agencies, federal courts, and the states—all of which constitute the official political system—as well as with unofficial participants in the political system, such as political parties, interest groups, opinion leaders, the mass media, and certain individuals. The interactions within and among these groups and units of government frequently take the form of inputs (court cases) which the Court then converts into outputs (decisions). Inputs are perceived, according to the model, as the products of political conflict submitted to the Court for resolution; in that forum inputs are converted into outputs or decisions, which generate further conflicts in the system. A Supreme Court decision, therefore, does not really end conflict or quell disturbance. It merely introduces a new component into the political system, generating new demands and altering the terms of old conflicts. The political system is likened to a conveyor belt which feeds conflict into the Court, whose actions are then fed back into the larger political system to yield additional conflicts ultimately conveyed back to the Court.

Arthur Bentley also sought to destroy the rarified world of the constitutional legalist when he said: "There is no political process that is not a balancing of quantity against quantity. There is not a law that is passed

⁴⁶ See EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS 108-17 (1965). But Easton is concerned with interactions. He conceptualizes the political system, for example, "as a set of interactions, abstracted from the totality of social behavior, through which values are authoritatively allocated for a society." *Id.* at 57. Though Easton might deny it, there seem to be certain elements of functionalism implicit in his concept of systems analysis. In stressing the secondary importance of structure, he says:

From the point of view of the analysis being developed, structure is definitely secondary, so much so that only incidentally and for illustrative purposes need discussion of structures be introduced. . . . The assumption will be that there are certain basic political activities and processes [functions?] characteristic of all political systems even though the structural forms through which they manifest themselves may and do vary considerably in each place and age. Logically and temporally prior to the examination of such structures, it is vital to explore the processual nature of these political interactions. This stress on the processes of political interactions lends a dynamic character to political analysis, as we shall see, that must be absent from any premature and undue emphasis on the forms or patterning of political behavior.

Id. at 49-50. The point, of course, which Easton makes, and which is implicit in this article, is that in any political regime certain functions and services must be performed if the system is to achieve that necessary equilibrium essential to social and political stability. The important thing is the vitality and survival of the system. In this connection it might be said that in the United States the vitality of the system depends upon an effective system of representation to which the Supreme Court is contributing. That the Supreme Court is so contributing is not as important as that the activities *be performed*.

that is not the expression of force and force in tension. There is not a court decision or an executive act that is not the result of the same process."⁴⁷ Hence, it is essentially *activity* which is studied whenever power—including judicial power—is subjected to analysis. Thus, when one undertakes to investigate the Court, the appropriate question is not, "What is *the* nature of judicial power?" whereupon one then proceeds to interpret the Court's behavior in terms of that particular Procrustean bed. From a functional point of view the relevant question is not, "What *ought* the court to do?" but rather, "What is it now doing and why?" The behavior of an institution is determined by political dynamics, not by definitions of the *nature* of its power. Only in Plato's *Republic* do men live by definitions, and the political system defined there is totally incompatible with the spirit of liberty. As Martin Shapiro puts it: "The Supreme Court, like other agencies, has different powers and different functions depending upon who wants it to do what, when, and in conjunction with or opposition to what other agencies or political forces. If a final answer can ever be offered to the question, What is the role of the Supreme Court? it will be achieved by correlating various power and functions in specific areas, rather than by a general examination of the nature of the Court."⁴⁸

Judicial power in the United States is a fact of political life. It can only be explained by reference to the very rocky, jagged, and circuitous route it has traversed since its inception in 1789, and to an incredibly flexible political tradition of mixed values, factional bargaining, and pragmatic decision-makers who simply did not fret over the particular institutional source of their power so long as they resorted to an agency of politically organized society which had the right and capacity to govern. Though our political theory is jammed with rhetoric about separation of powers, in practice Americans were no more worried about the niceties of that principle than about articulating the fine line which allegedly divides federal and state authority. American men of power—whether judges, legislators, administrators, or interest group leaders—were pragmatists first and constitutional legalists second. Not that they were uninterested in constitutional theory, nor did they really feel that the Constitution was not on their side. Indeed, the Constitution has served as a pivot around which much, if not most, of American political debate has revolved. The great value of the Constitution is that historically it has served as a powerful myth, available for mobilization in support of given political goals. The great symbolic significance of the Constitution was captured in de Tocqueville's astute observation that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."⁴⁹

⁴⁷ BENTLEY, *THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES* 202 (1949).

⁴⁸ SHAPIRO, *op. cit. supra* note 37, at 2.

⁴⁹ DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (1953).

American politics has always been a delightful combination of principle, expediency, and skulduggery. We gave and we took, we compromised here and made adjustments there, and if the literal language of the Constitution had to be reinterpreted to fit the occasion, we had ways of doing that also. Harold Lasswell was probably correct in defining politics as "who gets what, when, [and] how."⁵⁰ It is in this complicated and twisted process of decision-making that we locate perhaps the genius of the American political system, and even the basis of our freedom.

CONCLUSION

The Supreme Court today is an embattled institution. It is so because it has assumed an active role in a period of rapid political and social change. But if we are to understand the role of the Court in our society we must give more systematic attention to its actual operations in the political system before defining its place in our scheme of government. Professor Kurland's essay, which prompted this article, fails to do this. Yet, his article cannot be dismissed since it may well represent a new and perhaps rising genre of critical commentary originating, for the most part, in the nation's leading law schools. It represents the beginning of a new conceptualism which tends to inhibit our understanding of the dynamics of government.

The difficulty arises in part from the continued estrangement of law from political science, and partially from the failure of political scientists to fashion tools, techniques, and concepts designed to answer many of the problems raised in the present essay. The legal scholar needs to change his perspective, while the political scientist might commit himself more fully to a functional approach to the study of the Supreme Court. It is the major conclusion of this article that such modest alterations in perspective and emphasis would lead to increased understanding of the role and functions of the Supreme Court in the American system of government.

⁵⁰ LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1958).