

COMMENTARY

NEW STRUCTURES, NEW ATTITUDES, OR BOTH: A COMMENT ON PROFESSOR COX'S ARTICLE

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For some time I have profited greatly from views that Professor Cox has presented through his writing. The same holds true for this article. I find many areas of agreement. Nevertheless, I would like to state briefly some concerns that occurred to me as I read and thought about Professor Cox's article and related matters.

Might it not be that, in our focus on the increased role of courts in policymaking, we have given insufficient attention to the relative roles and functions of other political institutions such as Congress and the Presidency? Might it not be that, given their greater insulation from popular pressures, the courts may be in the best position to exert leadership on certain tough issues such as race and reapportionment? Might it not also be that the reason litigation appears to be more of a "normal part" of the policy process is the inability or unwillingness, or perhaps a lack of popular confidence in the capacity, of our elective political institutions to deal with these issues?

Certainly, Professor Cox noted some of these matters, especially in his references to the bold judicial strokes that courts might need to paint from time to time, but I think that we must continue to examine the relative roles and functions of our governmental institutions for their relative capacities and performance and their relation and interdependence in the governing process. In short, the judiciary's role must be continuously viewed in the context of our total political system. This context might reveal more clearly not only the dependence of the courts on political institutions, but also how courts might help these institutions by conferring legitimacy on their actions and, at times, by serving as a guide and leader on certain key issues.¹

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1. See generally Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

The real breakthrough in the new equality for minorities came in the 1954 *Brown*² decision. Thereafter, court decisions, congressional laws, and presidential initiatives all built on the principle thrusts of *Brown*. In the late 1960's, however, we began to see changes in the political climate, in the Presidency, in Supreme Court personnel, and in the tone and substance of Court decisions relative to equality. In recent times as well, we have seen voluminous materials critical of judicial forays into policy matters. All this activity has resulted in a slowdown—even a retreat—from the egalitarian thrusts of the 1950's and 1960's.

To what extent does this represent a retrenchment from the principles of *Brown* and an erosion of its very foundations? After all, *Brown* is relatively new to our constitutional-legal fabric—only twenty-five years old! To what extent does this activity portend an era of subtle but effective exclusion of racial or other minorities from various opportunities? I am especially struck by the gross inequities and disparities that women and minorities still suffer in various social indicators of equality such as employment, housing, income, and education. I am also struck by the continuing lack of representation that many of these groups have in professional schools, university faculties, and councils of government, including courts. In these contexts, cries of “reverse discrimination” project a very hollow ring, at least in my ears. At bottom, my real concern reduces to this question: if courts no longer exist as access points for these groups, or if they somehow attempt to withdraw from the battle, what effect will it have on our overall progress toward a meaningful equality as envisioned in *Brown*? I agree with Professor Cox that courts cannot do everything, but I do believe that courts can do some things, especially in promoting the value of equality. Perhaps they can create the kind of constitutional-legal climate that stirs other institutions and interests to take positive actions. In the meanwhile, I remain concerned that the current climate seriously jeopardizes further positive actions to effect equality in America.

Professor Cox indicated, and I very much agree, that the Supreme Court from time to time might have to make “new constitutional law by bold strokes resting upon little more than sensitive perception of the needs and enduring values of the nation.”³ The efficacy of bold strokes, I take it, might depend in part upon the Court's becoming too

2. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

3. Cox, *The Effect of The Search for Equality Upon Judicial Institutions*, 1979 WASH. U.L.Q. 795, 814.

embroiled on a continuing basis in policy management and policy implementation. I wonder, however, whether some of this management and implementation might be necessary for bold judicial strokes to become meaningful? Especially might the judiciary have to do so if other institutions fail to act in accordance with the bold strokes taken by the Court. In short, we might face some sort of a dilemma. On the one hand, too much involvement by the Court might well tarnish its legitimacy and hence effectiveness when the occasion arises for bold judicial ventures. On the other hand, if the Court fails to implement its bold ventures, then its standing might also be diminished. My belief is that if the equality in *Brown* represents one of the "enduring values of the nation"⁴ that demanded a bold judicial stroke, then the Court should use its authority to promote a meaningful equality for those who for so long have been deprived of that value.

Performance of this task, of course, can bring the courts into collision with significant political forces and place the judiciary under great stress. Judicial involvement in policy management and policy implementation matters also brings courts into closer proximity with direct policy conflict and obviously poses greater risks to judicial legitimacy. If the courts fail to perform a leadership role, however, who will or who can? Although I do not wish the judiciary to overplay its hand, neither do I wish it to refrain from the vital and special contributions it can make in the political system. Again, I agree with Professor Cox that the "question . . . is not whether a court can do everything, but whether it can do something to repair a serious failure of the normal processes of government."⁵

Because of the judiciary's special role in the political system, suggestions to relieve increasing pressures on courts are not only interesting, but inviting as well. For this reason also, Professor Cox's idea to create a legislative court, administrative agency, or some other tribunal stirs immediate interest. On the practical side, however, I am somewhat skeptical about whether Congress would approve of this sort of agency, especially given the current political mood, and if so, whether that agency would have sufficient authority and power to do an effective job. I also wonder whether a new tribunal would ultimately lead to more bureaucratic layers and build more delay into the realization of

4. *Id.*

5. *Id.* at 808.

constitutional rights. More importantly, although new organizational forms might prove useful, I wonder how much they will be able to insulate or relieve the pressure on the judiciary in dealing with these issues. I suspect that the really tough issues will end up in the courts.

Having said this, however, I certainly can appreciate the general thinking behind the idea and would like to know more, particularly on how the proposed new agency would mesh with existing institutions. What I really wonder, however, is whether we need new structures at all, or whether what we really need is to build new attitudes and enhance the political support necessary to implement Court decisions that promote the enduring values of the nation. Perhaps we need both.