

8-1-1978

## The Costs of Motive-Centered Inquiry

Kenneth L. Karst

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### Recommended Citation

Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978).

Available at: <https://digital.sandiego.edu/sdlr/vol15/iss5/9>

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# If "The Devil Himself Knows Not the Mind of Man," How Possibly Can Judges Know the Motivation of Legislators?

ARTHUR S. MILLER\*

Well over a century ago, Chief Justice Chase in a well-known opinion flatly stated: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution . . . ."<sup>1</sup> A half-century later, another Chief Justice, William Howard Taft, maintained in the *Child Labor Tax Case* that the federal child labor tax had a "palpable," "prohibitory and regulatory effect."<sup>2</sup> Chief Justice Taft continued, somewhat plaintively: "All others can see and understand this. How can we properly shut our minds to it?"<sup>3</sup> Numerous other examples exist in United States Supreme Court reports, but these two statements pose as well as any the polar opposites in the question whether it is appropriate for the Court to inquire into the legislature's motives.

In my brief commentary on the two major papers in this Colloquium,<sup>4</sup> I should like to take as my text neither something either author has written nor, indeed, anything written by the other

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\* Professor of Law, The George Washington University. B.A., Willamette University, 1938; LL.B., Stanford University, 1949; J.S.D., Yale Law School, 1959.

1. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

2. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922).

3. *Id.* This might be called the "Little Abner" rule: As Al Capp's character often said, "[A]ny fool kin plainly see . . . ." I take it Chief Justice Taft was saying that judges should be able to see what any fool can see; but judges see only if they wish to see, and only then, as this commentary suggests.

4. Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978); Simon, *Racially Prejudiced Governmental*

principal contributors to the literature on legislative motivation in constitutional adjudication.<sup>5</sup> Rather, I should like to base my comments on a statement published a few years ago by Judge J. Braxton Craven, Jr., of the Court of Appeals for the Fourth Circuit. Said he in a little noted but important essay: "I believe that there are only two kinds of judges at all levels of courts: those who are admittedly (maybe not to the public) result-oriented, and those who are also result-oriented but either do not know it or decline for various purposes to admit it."<sup>6</sup> Both major papers here, as well as the contributions of others who have weighed in on the question, are substantial contributions—but of a certain genre. With the greatest deference to each of the authors, whose industry and attention to detail one must surely applaud, I find the studies to be too long and too detailed, and with far too many footnotes. In making this statement, I realize of course that I am running against the tide of scholarship in the law journals. Professor Clark's article, for example, runs some eighty-seven pages, the reading of which surely must qualify as cruel and unusual punishment for the professoriate. A judge might cite, but certainly will not read, such extensive disquisitions on what essentially is a fairly simple matter. Perhaps his law clerk will read it, particularly if it comes from an educator or lawyer with whom he is acquainted.

An old saying in the legal profession suggests that if one has enough time, he can write a brief or any other document concisely. When a writer is hurried, under pressure of deadlines, he tends to wax prolix. Judges do not care for long briefs, by the way, if one can infer a general rule from the Supreme Court's refusal to accept a more than one hundred-page brief a few years ago.

What, then, is the problem regarding motivation? At the risk of being called simplistic, let me suggest that Professor Robert Cushman put his finger on the essence of the question when in 1934 he said:

The criterion of 'objective constitutionality,' which may not inaccurately be called the doctrine of 'judicial obtuseness,' permits the Court to uphold any carefully drawn taxing statute designed to promote the social and eco-

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*Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

5. The principal commentators on legislative motivation are Professors Brest, Eisenberg, and Ely. See Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

6. Craven, *Paeon to Pragmatism*, 50 N.C. L. REV. 977, 977 (1972).

conomic well-being of the country through regulation or repression by the simple process of keeping the judicial eye discreetly on the portions of the act which spell 'tax' and discreetly off those which spell 'regulation and destruction.'<sup>7</sup>

Professor Cushman was speaking of Congress using the power to tax as a basis for a "national police power," but his views surely have a wider relevance. What follows are a few of his considerations that seem pertinent to this Colloquium.

If Judge Craven is correct, as I think he is, then judges can and do attempt to evaluate the consequences of alternative decisions—the consequences, that is, on the social order of deciding one way or another. That judges are not very expert at this needs no present restatement; lawyers, too, have little or no expertise in the area. Indeed, the adversary system itself does not, in its present form (even with Brandeis briefs), provide data sufficiently relevant and accurate to permit judges to make such evaluations.<sup>8</sup> Justice Frankfurter admitted as much a few years ago when in the course of an off-bench speech he candidly acknowledged that he had no idea of the economic impact of Supreme Court anti-trust decisions.<sup>9</sup>

Nonetheless, as any student of the judiciary knows (or should know), judges routinely make assertions concerning the societal impact of given decisions. Usually these assertions are in dissenting opinions. Examples are legion and need not be multiplied. Consider, for example, Justice Harlan's assertion in *Wesberry v. Sanders* that the majority's decision "saps the political process,"<sup>10</sup> and Justice McReynolds' choleric attack in *Norman v. Baltimore & Ohio Railroad* (the gold clause case)—that "chaos" would surely ensue.<sup>11</sup>

What do these assertions mean? The answer is simple: Motivation must be married to impact analysis. Furthermore, motivation must be connected with an ability of judges and lawyers to predict with reasonable certainty what Justice Frankfurter called "the practical consequences" of judicial decisions: The "blind

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7. Cushman, *Social and Economic Control Through Federal Taxation*, 18 MINN. L. REV. 759, 782 (1934).

8. See Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

9. F. FRANKFURTER, SOME OBSERVATIONS ON SUPREME COURT LITIGATION AND LEGAL EDUCATION 17 (1954).

10. 376 U.S. 1, 48 (1964) (Harlan, J., dissenting).

11. 294 U.S. 240, 381 (1935) (McReynolds, J., dissenting).

guesses" of the judiciary are not sufficient to the need.<sup>12</sup>

An inquiry into motivation unavoidably means an expanded role for the judiciary. If one follows the views of Chief Justice Chase<sup>13</sup>—shared, by the way, by that best-known exponent of judicial self-restraint, Oliver Wendell Holmes<sup>14</sup>—then it is clear beyond doubt that the judges will have a limited role. Motivation, in other words, is an invitation, open-ended to be sure, for judges to act as "an imperial judiciary."<sup>15</sup>

Motivation inquiry is analogous to a search for legislative intention, or in constitutional terms, a search for the intentions of the Founding Fathers. As such, it is surely a bootless quest. Anyone with even a passing knowledge of how legislatures operate knows that on many statutes an individual member simply has no intent. At times, furthermore, he does not have more than the sketchiest knowledge about the details of a bill.

The same is true for the propensity of repairing to the Founding Fathers for guidance on present-day constitutional matters. Certainly the fifty-five men who sat in Philadelphia in 1787, the thirty-nine men who signed the document, or the members of the state legislatures that ratified it cannot be said to have had a specific intention on any modern question. Is it not time, then, that judges and lawyers recognize that the Founding Fathers have been buried and that they should not and cannot rule us from their graves? The answer can be only "yes." In making this statement, I am quite aware of such books as the remarkably silly disquisition by Raoul Berger, entitled *Government by Judiciary: The Transformation of the Fourteenth Amendment*.<sup>16</sup> Berger believes that the fourteenth amendment should be construed only in the light of what the members of the Thirty-ninth Congress, which first passed it, intended. Under no circumstances should such a view be followed by any thoughtful student of the judiciary or, indeed, of the Constitution.

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12. F. FRANKFURTER, SOME OBSERVATIONS ON SUPREME COURT LITIGATION AND LEGAL EDUCATION 17 (1954).

13. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

14. Said Justice Holmes: "About seventy-five years ago I learned that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'Goddammit, let 'em do it!'" C. CURTIS, *LIONS UNDER THE THRONE* 281 (1947).

15. The notion of "an imperial judiciary" has been proffered in Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INTEREST 104 (1975), criticized in Miller, *Judicial Activism and American Constitutionalism: Some Notes and Reflections*, in NOMOS XX: CONSTITUTIONALISM 333 (1978).

16. Berger's book was published in 1977. It should be compared with L. BODIN, *GOVERNMENT BY JUDICIARY* (1932), a much more scholarly discussion of the perennial problem of the legitimacy of judicial review in a nation calling itself democratic.

The meaning of these considerations for motivation inquiry is quite clear: It is a futile quest. Motivation inquiry enables judges to read their ideas of good social policy into the law with the pretense that they are not really doing so. This point deserves greater exposition.

In many respects, the study of law and the discussion of law in legal texts and periodicals is a manifest failure. Perhaps that failure cannot be avoided, but surely it should be recognized. In essence, the failure is this: Unlike the natural sciences, lawyers and legal scholars do little building on the received learning of the past. For a profession having adherence to precedent as one of its main attributes, this situation is at least mildly amusing. The consequence is that each generation of lawyers—each generation of law students—must plow old ground and learn anew bits of ancient wisdom. These “new insights” are treated as something novel when the contrary more likely is true.

For example, four score and one year ago Justice Holmes said:

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . .<sup>17</sup>

Thus “impact analysis”—at least, the name for it—is nothing new, but it is not followed. Deans of prominent law schools have been known to deride “result-oriented” commentators on the judicial process.

Similarly, all know (or should know, even though I am not aware of any constitutional law casebook more than mildly so al-luding) that the decisions of judges on economic and on social questions depend, as Theodore Roosevelt said, on the judges’ “economic and social philosophy.”<sup>18</sup> Lawyers still pretend that judicial decisions are brought by legal storks; some would have it that such a posture is good for the *hoi polloi*, who presumably do not have the moral and mental fiber to be told that judges are human.<sup>19</sup>

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17. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

18. M. COHEN, *AMERICAN THOUGHT: A CRITICAL SKETCH* 164 (1954).

19. E.g., Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62-70 (1965), criticized in Miller & Schefflin, *The Power of the Supreme Court in the Age of the Positive State: A Preliminary Excursus*, 1967 DUKE L.J. 273, 522.

The meaning should be clear: Motivation inquiry, as Professor Cushman stated, is a sometime thing, pulled out when a judge wishes to justify a predetermined result. "Motivation" is a technique by which a judge can rationalize a decision—and little more, and only when he wishes to do so. If he does not so desire, and thus if he has reached a different conclusion, he will adhere to Chief Justice Chase's position in *Ex parte McCardle*.<sup>20</sup>

I do not mean to suggest that judicial decisions are capricious. However, there can be no doubt that often, if not always, they are the product of the preferences or predilections—the biases, if one will—of the judges. At the appellate level, and perhaps elsewhere, judges always have a choice between two competing principles of roughly equal persuasiveness. Were that not so, one could not justify paying lawyers to appeal lower court decisions. That choice is based, as Justice White has said, less on pre-existing rules of law than on a process of law creation.<sup>21</sup> Is it not time for the legal profession to confront that situation?

If it does, then members of the professoriate as well as law students generally no longer would indulge themselves in taking the written word of the Justices so seriously. Opinions, as Professors Bickel and Wellington said some time ago, are often "desperately negotiated documents";<sup>22</sup> they are the product of a system of bargaining routine in the Marble Palace. Of course, it is true that much of what is known about the Supreme Court results from what the Justices choose to declare in their opinions. I should like to think that the profession has come to the time when it goes beyond the opinions and tries, systematically and thoroughly, to understand the Court. If it does so, then long expositions about legislatures' motivations, licit or illicit, will be replaced by data more relevant and more helpful. I do not expect many who read this to agree with my views. Members of the bar are still prisoners of the past; the greatest barrier to progress is not the man in the street, but the person with a vested interest in some system of knowledge. Lawyers do not have much of a system of knowledge about the law, but those with a vested interest in it likely will be determined to continue the well-worn, albeit inadequate, ways. *Qué lástima!*

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20. 74 U.S. (7 Wall.) 506 (1869).

21. *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting). I agree with Professor Forrester about the law-making proclivities of judges. See Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212 (1977).

22. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957).