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# ON ECCENTRIC CONSTITUTIONAL JURISPRUDENCE†

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The performance of the United States Supreme Court in adjudicating matters of major concern has proven no less controversial today than it did in the days of John Marshall. The assignment of political jurisdiction among the branches of the federal government, so urgently debated in the *Federalist Papers*, was recently contested with equal vigor in connection with the Watergate exposés, impoundment of congressional appropriations, and covert operations in foreign affairs. In these areas, the Supreme Court and subordinate federal courts have managed to fashion decisions which are consistent with constitutional tradition and precedent. In cases under the fourteenth amendment challenging police power legislation by the states, however, both the Warren and Burger Courts have had more difficult sailing. The modern Court has devised novel approaches and potent doctrines of its own, resulting in wholesale facial nullification of state laws. This expansive constitutionalism espoused by the Court has drawn a fire of criticism.

The public controversies and discord within the legal profession renew fundamental arguments on the role of the Supreme Court in our legal system. The Court's responsibility has been placed in question by charges of excessive activism and a lack of consistency in its uses of new creative devices. The trend toward constitutionalizing sensitive areas of social and familial relationships, thereby cutting away traditional state legislative controls, has been deplored by several Justices and by substantial segments of the legal profession. Underlying these criticisms of the Court's function are the more basic and difficult issues regarding the decisional modes by which it rationalizes case results. The issue is not the power of the Court to find new constitutional immunities, with concurrent displacement or shrinkage of state legislative controls, but whether the Court has pressed that power to extremes that are neither necessitated nor warranted by the Constitution. We all recognize that every faction will, at one time

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or another, disapprove of particular decisions as antimajoritarian judicial legislation; however, the lathering over judicial revisions of entire classes of laws cannot be tossed off as the idle cranks of pedagogues, ideologues, or frustrated litigants. Chiding dissents within the Court are also a hallmark of its current work. When rendered by such able and diverse jurists as the late Justices Black and Harlan, and supplemented by formally voiced disapprobation of national associations of state jurists, it is clear that deeper jurisprudential issues underlie such protests.

There *is* reason to doubt that the Justices have given consistent study and reflection to root problems of judicial process in the constitutional sphere. Chief Justice Burger's generous criticism of the poor training and performance of court lawyers might well have conceded a similar lack of training and insight into the judicial process and into the long-range implications of isolated constitutional decisions. In *Lemon v. Kurtzman*[1] the Chief Justice certainly played loosely with constitutional reasoning when he converted his own dicta in *Walz v. Tax Commission*,[2] regarding the broad policy of nonentanglement of government with religion, into a new, independent test of establishment of religion to invalidate government assistance to nonpublic schools. What is more surprising is that he should register shock a few years later when, in *Meek v. Pittenger*,[3] his brethren should invoke his own entanglement dicta to nullify publicly administered therapeutic services to children attending parish schools. A decent caution in issuing constitutional pronouncements would certainly have avoided this implanting of broad dicta into constitutional concrete. Former Justices have long warned that a figure of speech is a poor foundation for constitutional principle.[4] The Chief Justice is in for another surprise since his belief in *Roe v. Wade*[5] that the Court was not sanctioning abortion on demand is fast being disproved by current developments.

Only history will tell whether the Warren and Burger Courts have been off the center of their own institutional heritage; whether they failed, with sufficient rigor, to maintain a fair balance between social stability and disruption in generating constitutional innovations; and, whether, especially on policy questions that ultimately rest more on sociopolitical preference than clear constitutional purpose, they have been too casual in

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[1] 403 U.S. 602 (1971).

[2] 397 U.S. 664 (1970).

[3] 421 U.S. 349 (1975).

[4] In Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting), Justice Reed noted that "[a] rule of law should not be drawn from a figure of speech." In Berkey v. Third Ave. Ry., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926), the then Judge Cardozo warned that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."

[5] 410 U.S. 113, 208 (1973) (Burger, C.J., concurring).

overriding judgments that are primarily entrusted by our Constitution to elected legislatures. Why does the modern Court provoke such criticism? Certainly not for lack of technical knowledge. Rather, there is evidence, among both allegedly liberal and conservative Justices, of failing in the crunch, when personal feelings run strong, to confine the boundaries of their constitutional discretion. The Court must make value judgments in constitutional litigation, but the method by which these are made must be harnessed by a rational, institutional jurisprudence if the Court is not to slide into idiosyncratic rulings. Being nonelected and far removed from local circumstances, the Court needs more than idealistic libertarian or conservative urges to legitimize its raw power to disrupt official arrangements and to impose, as in *Miranda v. Arizona*[6] and *Doe v. Bolton*,[7] detailed series of rules that partake more of a legislative code than a judicial decision.

By this time, you will have assuredly inferred my disapproval of the constitutional jurisprudence, or lack thereof, in which the majority of Justices have indulged these past 20 years. I must now take up the burden of providing some specifics to justify my position, and these specifics center on three elements of process which distinguish the modern Court. First, the Court has been too ready to nullify statutes and ordinances *on their face* and too prone to forego the narrower alternative of curing particular evils by limiting decisions to the constitutionality of a law's *application*. The approach of limiting decisions to a particular application, while seeking a saving or narrowed construction of the statute in question, would avoid chopping away gaps in a connected system of laws, would support legislative efforts, and would furnish more positive constitutional guidance to the nation's officials. Narrowed decision is not always possible, but the Court's uneven choice from case to case between facial nullification and nullification of specific application supports the suspicion that personal judicial bias has not been as restrained as it should be. Since *Marbury v. Madison*[8] the Court has acknowledged the fundamental proposition that constitutional adjudication is warranted only when necessitated by an actual controversy, and then only to the extent required to resolve that concrete case. The modern Court has, in my view, devalued that concept even while paying it lip service.

My second point, related to the first, is that the constitutional tests fashioned by the modern Court are unstable and heighten, rather than minimize, subjective judgments. Examples lie in the doctrines of vagueness and overbreadth which, in the hands of the Court, have themselves become somewhat vague and overbroad. The limits of these due process

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[6] 384 U.S. 436 (1966).
[7] 410 U.S. 179 (1973).
[8] 5 U.S. (1 Cranch) 137 (1803).

tests can only be gauged by the individual Justices, for no Justice has ever ventured an objective standard of language clarity or of legislative classification. Perfect clarity or classification through an objective standard is not possible. Only the perceptions of individual Justices determine *how much* imperfection of clarity or scope of coverage is constitutionally tolerable from one class of case to the next. Such appraisals are further complicated and rendered even more crucial under the equal protection tests of rational classification and strict scrutiny. These tests are mutually exclusive; hence, to determine which one applies, the Court must first decide whether or not the alleged constitutional interest is "fundamental," and such a judicial finding well-nigh preordains the final outcome. Where the Court elevates an aggrieved interest to the fundamental category, its strict scrutiny test provides the constitutional sledge hammer to accomplish the wholesale destruction of similar laws in every state of the nation. Since liberals and conservatives have been equally disappointed by the Court's ranking of fundamental and nonfundamental interests, the divergent equal protection tests are bound to foment uncertainty and litigation in most major areas of social legislation. When to this is added the latest gambit, nullifying laws in the guise of a due process prohibition of irrebuttable presumptions, which itself is only another way of expressing judicial disapproval of a legislative classification,[9] you have a truly formidable arsenal of judicial weapons with which to attack legislative discretion.

The vagueness doctrine has also been trotted out or avoided by the Court at will. When of a mind to save a statute, the Court has, by saving construction, supplied constitutionally fatal omissions. When disinclined to save other statutes, however, it has declined to engage in saving or narrowing construction. Thus, in *Screws v. United States*[10] the Court preserved a civil rights criminal statute by reading in the necessary scienter requirement, but declined to read in the necessary scienter requirement in the obscenity cases.[11] This past term the Court was asked, in *Wood v. Strickland*,[12] to construe a civil rights statute as providing immunity to school authorities from liability for good faith, nonmalicious disciplinary action which, on hindsight, courts find to violate a student's civil rights. After conceding that the scope of immunity issue was one of discretionary policy, the Court refused to recognize such immunity unless the disciplinarian reasonably believed that he was acting constitutionally. Common sense is ruffled by the Court's notion that defamation of public figures, no matter how gross, damaging, or negligent, is constitutionally immune if

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[9] *See* Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).
[10] 325 U.S. 91 (1945).
[11] *See, e.g.*, Smith v. California, 361 U.S. 147 (1959).
[12] 420 U.S. 308 (1975).

not proven to be actually intentional or wanton,[13] while the good faith imposition of school discipline, however well intended, is not within the scope of common law or statutory immunity. To the man in the street, the Court's heavenly remedial concepts are not of this world, but of a paradise lost.

The third systemic hazard of the Court's process arises from the selective employment of the strict scrutiny and rational basis tests. Their use is pegged not to any particular constitutional clause, but to the Court's valuations of different interests. The degree of sympathy which the Court brings to each particular interest is the bellwether for predicting how it will use these tests. Consider the penumbral right of privacy. It provides protection from official regulation of marital contraception,[14] home-consumed obscenity,[15] and, according to some Justices, distribution of contraceptives to unmarried minors.[16] The privacy of families and nearby nonpatrons of drive-in theatres, however, is not protected from nude movie scenes projected beyond the confines of unshielded drive-in movies.[17] In addition, per the Supreme Court, the penumbral right to travel ranks as fundamental,[18] but the claims of poverty groups against discrimination in educational expenditures do not.[19] I cite these instances not to appraise the soundness of each decision, but to question whether the Court's interpretive devices are truly rational and consistent with "the Blessings of Liberty."[20]

Concern with the Court's work is particularly acute in the areas of social regulation of sexuality and familial relations. In *Roe v. Wade*,[21] the Court decriminalized abortion by a substantive due process rationale which it had long condemned.[22] Far more egregious, however, was the Court's accompanying decision in *Doe v. Bolton*,[23] which declared that the Constitution prohibits, beyond the narrow limits set down by the Court, legislative oversight of abortions conducted by physicians and hospitals. Most state legislatures had determined that the dangers posed by quack or prostitute doctors or clinics was sufficiently serious to justify special regulation; yet, this essentially legislative policy judgment was held to be constitutionally impermissible. By specifying with particularity what a

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[13] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[14] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
[15] *See* Stanley v. Georgia, 394 U.S. 557 (1969).
[16] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).
[17] *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Rabe v. Washington, 405 U.S. 313 (1972) (per curiam).
[18] *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964).
[19] *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).
[20] U.S. CONST. preamble.
[21] 410 U.S. 113 (1973).
[22] *See* Ferguson v. Skrupa, 372 U.S. 726 (1963).
[23] 410 U.S. 179 (1973).

state legislature could and could not regulate in the field, the Court effectively preempted the field in the name of questionable constitutional readings. Little wonder that the Court was suspected of having an effusive, nonconstitutional faith that doctors, once licensed, can do no wrong. The lifelong association of Justices Burger and Black with medical clients, which more sensitive jurists would have found restraining, provides a psychological explanation of their performance, but no such conditioning could explain the temerity of the remaining Justices in foreclosing legislative alternatives at the very time that abortion laws had been or were being reconsidered by state legislators across the land.[24] Such activism undermines credibility and confidence in a purportedly dispassionate search for constitutional limits and raises the suspicion that particular interests are wired to the Court's gut rather than its intellect.

In social cost, the fallout of *Wade* and *Bolton*, as they affect putative fathers or parents of unmarried minors,[25] and private medical institutions opposed to abortion-on-demand,[26] will be with us for years to come. It will agitate political divisions because the immunity from criminal prosecution is claimed to give rise to a "right" to taxpayer subsidy of elective abortions.[27] Would a wiser Court have left such complex matters to interstitial legislative correction, rather than attempt a wholesale political solution in the name of its own absolutes? Constitutional dogmatism does violence to the fundamental tenet of our pluralist democracy: that the law should maximize conflicting social wants through representative processes. Moreover, article III of the Constitution was not adopted to empower the Court to break every political deadlock on the anvil of the Constitution.[28]

The abortion cases are not an isolated frolic. By handcuffing legislative regulation of distribution of contraceptives to unmarried minors in *Eisenstadt v. Baird*,[29] the Court undercut police powers concerning youth.

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[24] *See* Roe v. Wade, 410 U.S. 113, 140 n.37 (1973).

[25] *See, e.g.*, Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973), *aff'd sub nom.* Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *appeal docketed sub nom.* Gerstein v. Coe, 44 U.S.L.W. 3319 (U.S. Nov. 14, 1975) (No. 75-713) (state requirement that spouse of married woman or parent of minor consent to abortion held unconstitutional). *But see* Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo.), *prob. juris. noted*, 44 U.S.L.W. 3200 (U.S. Oct. 6, 1975).

[26] Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973). *See* Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973).

[27] *See, e.g.*, Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa.), *vacated*, 505 F.2d 186 (2d Cir. 1974); Doe v. Rose, 380 F. Supp. 779 (D. Utah 1973), *aff'd*, 499 F.2d 1112 (10th Cir. 1974).

[28] Justice Frankfurter, and before him Justices Holmes and Brandeis, thought the Court most grievously abused its power in the first third of this century when it substituted its judgment for that of legislatures on social and economic matters—striking down a law against child labor, for example. They might have felt the same way in the recent abortion cases, for there again the justices dealt with an issue outside their own special competence and experience.

Lewis, *Most Priceless Asset*, N.Y. Times, July 8, 1974, at 29, col. 1, col. 2.

[29] 405 U.S. 438 (1972).

The results speak far more eloquently than apologetic dicta, especially when opinions have the flavor of a law school exercise where the professor (the Court) keeps telling the struggling students (the legislatures) that he or she did it wrong, but seldom supplies any guidance other than a poor grade.

The Court's ad hoc imposition of fluid procedural due process standards is also beginning to confound local administration of public schools. This past term, in *Goss v. Lopez*,[30] the Court ruled that a public school student could not be suspended—even for one day—without a disciplinary hearing. The formality of such hearings was left for the schoolmen to judge, the Court indicating only that the process which is due depends on the degree of discipline to be imposed. Schoolmen, as well as lawyers, must now be charged with knowledge of the fine points of constitutional law in carrying out their official responsibilities, and they run the risk of civil damages, under *Wood v. Strickland*,[31] for unintentional mistakes which a court deems unreasonable. Constitutionalizing even minor aspects of public regulation is, I submit, an unrealistic ritual and not very productive for either liberty or order.

The wreckage of the Court's obscenity decisions requires no comment, but the latest decision in *Erznoznik v. City of Jacksonville*[32] confirms the poverty of reasoning in this area. There, the Court struck down an ordinance prohibiting projection of nude movie scenes from massive, unshielded, drive-in theatre screens out to the neighborhood and view of the nonpatron public. The legislative interest in promoting traffic safety by suppressing distractions to motorists was acknowledged, but averted on the ground that only nude scenes were proscribed. The Court apparently rejected the legislative judgment that nude scenes were significantly more likely to distract, or distract for a longer duration, than other movie scenes. With respect to the protection of neighboring families and children from offensive displays, the Court decided that the burden fell upon the viewers to avert their eyes. Such gratuitous prescriptions descend to the absurd in view of the fact that there was no censoring of the patrons or of the movie itself—only the requirement that the exhibitor bear the economic cost of doing business by confining the show to his theater, either by relocating the screen or erecting appropriate visual barriers. The Court may as well have told the residents not to look north or south and to put blinders on their children. This subordination of traffic safety and home-dwellers' privacy to economic interests in the name of an insubstantial, almost theoretical interest in expression smacks of dogmatism and illustrates how the

[30] 419 U.S. 565 (1975).
[31] 420 U.S. 308 (1975).
[32] 422 U.S. 205 (1975).

Court has trapped itself, and society, by hypertechnical exposition of constitutional tests of its own making. The *Erznoznik* case is more expressive of visceral reflex than of rational analysis.

If legislation continues to be tested on technical racks that can be arbitrarily tightened or loosened, with no cohesive rationale, the drafting of legislation becomes more an adventure than a political exercise and the adjustable calipers of vagueness, overbreadth, underinclusiveness, and compelling state interest tend to become not objective measures, but instruments of will for a five-man majority. Hard cases created by legislative default, as with racial segregation and legislative malapportionment, may require strong constitutional medicine where an extreme social necessity arises, but the bulk of the Court's rulings cannot be justified by a plea of necessity.

How, then, shall jurisprudential balance be reclaimed? Only the Court can do that, but the example of respected predecessors and the pressure of continuing professional criticism may influence a return to judicial discipline and self-mastery. Men like Holmes, Brandeis, Hughes, and Hand did not simplify complex social facts, embrace unverified assumptions, or loosely indulge in judicial notice to resolve competing interests. They were willing, but cautious, to contravene inadmissible legislative actions in the awareness that their own predilections were not always correct. They attempted strenuously to distinguish between creative elaboration of constitutional values and the influence of personal sociological bias. They eschewed facial nullification where less disruptive remedies could be found and disavowed technical doctrines which tend to make legislation suspect at the very threshold of judicial review. They limited constitutional adjudication to cases presenting only *substantial* constitutional interests and favored postponement of such adjudication when legislative correction was a reasonable alternative. They did not favor overwritten opinions in which a reader could not separate the "big" from the "little" dicta. And finally they strove for clarity, utility, and continuity in both the content and expression of their opinions and sought to tailor doctrinal pronouncements to clearly foreseeable circumstances.

The writings of Justice Frankfurter, Judge Traynor, and Professor Paul Freund provide some useful referents. Justice Frankfurter noted that "the only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so."[33] In commenting upon the performance of former Justices, Justice Frankfurter also pronounced guidelines for the present Court:

[33] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947).

> Their [Holmes, Brandeis, and Cardozo] opinions do not disclose a private attitude for or against extension of governmental authority by legislation . . . . [Holmes'] private feelings did not lead him to invoke the rule of indefiniteness to invalidate legislation of which he strongly disapproved . . . .[34]

Professor Freund has remarked that creative ambiguity can set the direction but not the limit for the growth of an area of the law and that the judge must face the question of how far he should go in articulating a new position.[35] "Intuitive leaps" are no substitute for the hard answers to this question. Only if these admonitions are followed can one conclude with Judge Traynor that:

> Although the judge's predilections may play a part in setting the initial direction he takes toward the creative solution, there is little danger of their determining the solution itself, however much it bears the stamp of his individual workmanship. Our great creative judges have been men of outstanding skill, adept at discounting their own predilections and careful to discount them with conscientious severity. . . . Thereafter the opinion must pass muster with scholars and practitioners . . . .[36]

The legal realist seeking the constitutional "quick-fix" tends to sacrifice all safeguards of constitutional structure and theory to the immediate desired goal in a particular case.

> It is usually easier to learn how to employ the weapon of powerful processes than it is to learn when and why to use, or not to use them. So in the fields of social organization and structure it is easier to learn how to use courts and constitutions to get quick results than it is to learn when to resort to them, and why they should not be used routinely.[37]

That temptation, ever present, must also be ever discountenanced by attorneys and judges, as well as by the Supreme Court, if we are to nourish a government of laws and not of men.

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[34] *Id.* at 531.

[35] Freund, *Rationality in Judicial Decisions*, in NOMOS VII: RATIONAL DECISION 109, 118 (C. Friedrich ed. 1964).

[36] Traynor, *Comment on Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 52 (M.G. Paulsen ed. 1959).

[37] Young, *"Interesting Times" for School Administrators*, 4 NOLPE SCHOOL L.J. 178, 180 (1974).