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# SOCIAL INFLUENCES ON CONSTITUTIONAL LAW

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Constitutions do not govern by text alone, even as interpreted by a supreme body of judges. Constitutions draw their life from forces outside the law: from ideas, customs, society, and the constant dialogue among political institutions. In *South Carolina* v. *United States* (1905), the Supreme Court stated that the Constitution "is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now." Having announced the conventional formula, the Court immediately noted: "Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred."

Just as the Supreme Court leaves its mark on American society, so do social forces determine constitutional law. The Court, regarded as a nonpolitical and independent branch of government is very much a product of its times. Justice Cardozo remarked that the"great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." [1] Courts are obviously buffeted by social pressures. To what extent is difficult to say. We see the final result in a decision but must speculate how the court got there. The link betweek social cause and judicial effect cannot be measured with scientific accuracy, or anything approaching it, but we can make reasonable and informed judgments about social influences on constitutional law.

This essay begins by discussing the social environment in which cases are decided. For their own institutional protection, courts must take account of social movements and public opinion. In this brief essay I explore the historical interactions between society and the judiciary in four areas: economic regulation, eugenics, racial discrimination, and women's rights. The essay concludes with some general observations about the relationship between judicial doctrines and contemporary social standards.

## THE SOCIAL ENVIRONMENT

It is tempting to concentrate on decisional law and ignore the political, historical, and social framework in which decisions are handed down. Textbooks in constitutional law usually separate the courts from the rest of government and make unrealistic claims of judicial isolation. Morris Raphael Cohen, one of the early students of legal realism, denied that the law is a "closed, independent system having nothing to do with economic, political, social, or philosophical science." [2] It was Lord Ratcliffe who counseled that "we cannot learn law by learning law." Through this tantalizing phrase he meant that law must be "a part of history, a part of economics and sociology, a part of ethics and a philosophy of life. It is not strong enough in itself to be a philosophy of itself." [3]

It is too flippant to accept Mr. Dooley's pronouncement that the Supreme Court follows the election returns, but careful studies by Robert Dahl, David Adamany, and Richard Funston show that the Court generally stays within the political boundaries of its times. When it strays outside and opposes the policy of elected leaders, it does so at substantial risk to its legitimacy. The Court maintains its effectiveness by steering a course that fits within the permissible limits of public opinion. This reality does not make it a political body in the same sense as Congress and the President, but pragmatism and statesmanship must temper abstract legal analysis. Tocqueville noted in the 1840s that the power of the Supreme Court "is enormous, but it is the power of public opinion. They are all-powerful as long as the people respect the law; but they would be impotent against popular neglect or contempt of the law." Federal judges "must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles that can be subdued, nor slow to turn away from the current when it threatens to sweep them off . . . ." [4]

The responsiveness of courts to the social community is even more immediate at the local level. District courts regularly reflect public opinion on such matters as civil rights, labor relations, and sentencing of Vietnam resisters. A conference of federal judges in 1961 agreed that public opinion "should not materially affect sentences" and that the judiciary "must stand firm against undue public opinion." Nevertheless, the judges cautioned that "this should not mean that the community's attitude must be completely ignored in sentencing: although judges should be leaders of public opinion, they must never get so far out in front that the public loses sight of them" [5]

Social and political forces affect the process by which a multi-member Court gropes incrementally toward a consensus and a decision. In such areas as civil rights, sex discrimination, church and state, and criminal procedure, the Court moves with a series of half steps, disposing of the particular issue at hand while preparing for the next case. Through installments it lays the groundwork for a more comprehensive solution, always sensitive to the response of society and the institutions of government that must enforce judicial rulings. This social and political framework sets the boundaries for judicial activity and influences the substance of specific decisions, if not immediately then within a few years. A purely technical approach to the law misses the constant, creative interplay that takes place between the judiciary and society at large.

Since court opinions frequently turn on the "reasonableness" of government actions, legal briefs attempt to amass sociological data and scientific findings. The "Brandeis brief" of 1908 was the forerunner of what is now a common tactic for both sides in a lawsuit. Through the publication of articles, books, and commission reports, authors hope to see their products cited in briefs and footnoted in court decisions. The practice of citing professional journals goes back at least to Justice Brandeis in the 1920s. Other Justices, like Cardozo and Stone, adopted this technique as a way of keeping law current with changes in American society. Brandeis' opinions introduced a new meaning to the word "authority." He believed that an opinion "de-

rives its authority, just as law derives its existence, from all the facts of life. The judge is free to draw upon these facts wherever he can find them, if only they are helpful." [6]

## ECONOMIC REGULATION

From the late nineteenth century to the 1930s, the courts struck down a number of federal and state efforts to ameliorate industrial conditions. Laws that established maximum hours or minimum wages were declared an unconstitutional interference with the "liberty of contract." Lawyers from the corporate sector helped translate the philosophy of laissez faire into legal terms and constitutional doctrine. Some of the intellectual sources were Herbet Spencer's *Social Statics* (1851), Thomas M. Cooley's *Constitutional Limitations* (1868), and Christopher G. Tiedeman's *Treatise on the Limitations of the Police Powers* (1886).

The climate of the years following the Civil War promoted the pursuit of material goals. Elitism by corporate leaders could not be justified by tradition (feudalism) or the will of God (Calvinism). Neither belief system fitted an age devoted to materialist thinking, scientific discovery, and capitalism. Justification took the form of Social Darwinism and the belief in self-interest and ruthless individualism. Survival and success became the overriding values. The American Bar Association was organized in 1878 to prevent legislatures from interfering with property rights. The spectre of "socialism" and communism gave added force and urgency to these efforts. In the first Income Tax Case of 1895, Joseph H. Choate warned the Court during oral argument that the tax "is communistic in its purposes and tendencies." In that decision, Justice Field predicted that "the present assault upon capital is but the beginning." Political contests would soon become "a war of the poor against the rich; a war constantly growing in intensity and bitterness."

The courts of the nineteenth century had permitted legislatures and municipalities broad discretion under the "police power" to regulate public health and safety. The tone shifted slightly in *Allgeyer* v. *Louisiana* (1897) when a unanimous Supreme Court used the phrase "liberty to contract" and spoke in strong terms about a citizen's right to be free to earn his livelihood. This general philosophy did not prevent the Court the next year from upholding Utah's eight-hour day for workers in coal mines and smelters. In 1903 it sustained an eight-hour law in Kansas that covered all persons employed by the state or local governments, including work contracted by the state.

Judicial tolerance of the police power came to an abrupt halt in *Lochner* v. *New York* (1905), which invalidated a New York law limiting bakery workers to 60 hours a week or 10 hours a day. Justice Peckham, writing for a 5-4 majority, converted the general right to make a contract into laissez-faire rigidity. Such laws were "mere meddlesome interferences" with the rights of an individual to enter into contracts. In their dissent, Justices Harlan, White, and Day cited statistical support for remedial legislation. Peck-

ham's opinion was so spiced with conservative business doctrines that Holmes's dissent accused the majority of deciding "upon an economic theory which a large part of the country does not entertain." The Fourteenth Amendment, he said, "does not enact Mr. Herbert Spencer's Social Statics."

After *Lochner,* the Court equivocated on the principle of laissez-faire. In 1908 it struck down a congressional statute that made it unlawful for the railroads to fire workers because of their union membership. A 6-2 decision maintained the fiction of *Lochner* that the employer and employee had "equality of right" to enter into a contract.[7] In that same year, however, the Court in *Muller* v. *Oregon* sustained a 10-hour day for women. The statistical record referred to by the dissenters in *Lochner* supplied a good tactical clue for Louis D. Brandeis, who argued the case for Oregon. His brief of 113 pages consisted almost entirely of copious data extracted from sociological studies supporting the need to set maximum hours for women.

Could the constitutional principle announced in *Lochner* be set aside by sociological data? The Court engaged in some judicial doubletalk. The information supplied by Brandeis "may not be, technically speaking, authorities," but the facts were "significant of a widespread belief that women's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil." The Court asserted that constitutional issues "are not settled by even a consensus of present public opinion," for the value of a written constitution is that it places limits on legislative action. Nevertheless, the Court said that "when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

In *Bunting* v. *Oregon* (1917), the Court upheld the constitutionality of Oregon's 10-hour day for men and women, including a provision for overtime pay. Felix Frankfurter argued the case for Oregon and prepared a "Brandeis brief" that contained an array of facts and statistics to demonstrate the effects of overtime on the physical and moral health of the worker. A 5-3 Court upheld the statute. Frankfurter was again lead counsel in defending a congressional statute that provided for minimum wages for women and children in the District of Columbia. Despite his lengthy sociological brief, the Court in *Adkins* v. *Children's Hospital* (1923) held the statute invalid. Writing for a 5-3 majority, Justice Sutherland found the mass of data compiled by Frankfurter "interesting but only mildly persuasive." Because of progress in contractual, political and civil rights of women since the *Muller* decision of 1908, Sutherland said that the continuation of protective legislation could not be justified. Although the Court had sustained statutes setting maximum hours, the minimum wage law seemed dangerous territory to the majority. What was next, Sutherland asked, maximum wages?

Between 1923 and 1934, the Court repeatedly struck down statutes on the ground that the activity regulated was not "affected with a public inter-

est." Inexorably, new areas of the economy became affected with a public interest. Subjects that had been intrastate, and thus within the jurisdiction of states, eventually fell across state lines and were brought within Congress' power over commerce. The onset of the Great Depression in 1929 punctured the belief in a self-adjusting, stable free economy.

The philosophy of *Adkins* survived as late as 1936, although a decision that year striking down New York's minimum wage law for women and children could muster only a 5-4 majority.[8] In one of the dissents, Justice Stone attacked the majority's reasoning: "It is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest."

***Adkins*** was finally overruled in 1937. Sutherland, Van Devanter, McReynolds, and Butler, who had provided four of the majority votes in the New York case, dissented. Roberts, the fifth member of that majority, now joined the other members of the Court to uphold a minimum wage law for women and minors in the state of Washington.[9] Justice Sutherland, speaking for the four dissenters in this case, assailed the idea that decisions should be reconsidered because of economic conditions: "the meaning of the Constitution does not change with the ebb and flow of economic events." The phrase "ebb and flow" implies a seasonal if not spasmodic quality, which seems offensive to a constitution grounded on fundamental principles. But the record of the Court on economic regulation was decidely one of ebb and flow. Over a period of four decades it tried to impose a Liberty of Contract theory at a time when changing economic institutions had shifted power dramatically from the employee to the employer. A countervailing force was needed and government intervened to redress the imbalance.

By 1941 the ideological composition of the Court had been radically altered, especially with the appointments of Reed, Murphy, and Black to replace the conservative Sutherland, Butler, and Van Devanter. A unanimous Court that year upheld in *United States* v. *Darby* a congressional statute setting minimum wages and maximum hours for men and women. A combination of social, economic, and political forces had finally reversed the constitutional doctrines of the Court. As the Court remarked in *Ferguson* v. *Skrupa* (1963): "Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." After retiring from the Court, Justice Roberts said this about the expansion of national power over economic conditions: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country — for what in effect was a unified economy." [10]

## THE EUGENICS MOVEMENT

Use of the police power to regulate economic conditions left a number of questions unanswered. How much could government, operating under the broad banner of "public health and safety," invade fundamental areas of indi-

vidual freedom and privacy? Did the police power justify the sterilization of certain persons if the majority decided that it was necessary for the welfare of the general society? Should courts defer to these legislative judgments?

Some of the early decisions by federal courts rejected efforts by states to sterilize prisoners for eugenic reasons. In 1914 a federal district court struck down a law in Iowa that required the vasectomy of criminals convicted twice of a felony. Part of the legal problem lay with the definition of felony, which has been broadened to cover offenses previously considered misdemeanors, such as breaking an electric globe or unfastening a strap in a harness.[11] The district court regarded vasectomy as a cruel and unusual punishment: "This belongs to the Dark Ages." In 1918 another federal district court struck down a Nevada law on sterilization as a cruel and unusual punishment. Vasectomy was optional, meaning that its use depended on the proclivities of a judge.[12]

The case that reached the Supreme Court came out of Virginia. In 1925 the Virginia Supreme Court of Appeals upheld the state's compulsory sterilization law. Carrie Buck had been committed to the State Colony for Epilectics and Feeble-Minded at the age of eighteen. Her mother had been committed to the same institution, and Carrie had just given birth to an illegitimate child which the state claimed was of "defective mentality." Under Virginia law, the superintendent of the institution could propose to a board that a mental defective be sterilized — by vasectomy for a man or salpingectomy (cutting the Fallopian tubes) for a woman. The statute claimed that "heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy and crime." [13] The Virginia court concluded that the right to enact sterilization laws "rests in the police power."

By an 8-1 majority, the Supreme Court in *Buck* v. *Bell* (1927) affirmed the decision of the Virginia court. Writing for the court, Justice Holmes dismissed Buck's appeal by noting that the public welfare

> may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbelicity, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . .Three generations of imbeciles are enough.

Holmes did more than merely defer to the Virginia legislature. He equated vaccination with vasectomy and salpingectomy, argued that compulsory military service somehow justified compulsory sterilization, and spoke of degenerate offspring committing crime when crime was never an issue with Carrie Buck. How could a self-styled skeptic enthusiastically endorse the theory supporting

the Virginia law? The statute claimed that heredity played an important role in transmitting not only insanity, idiocy, imbecility and epilepsy but also crime. Even Brandeis, with his passion for discovering facts, joined the Holmes decision.

The Court of 1927 was operating in a social environment that believed that crime could be controlled by sterilization. The 1877 study by Richard Louis Dugdale, *The Jukes,* popularized the notion that crime was largely heredity. Cesare Lombroso's *Criminal Man* (1896-97) identified anthropological features that marked the born criminal. A study published in 1893 claimed that "it is established beyond controversy that criminals and paupers, both, are degenerate; the imperfect, knotty, knurly, worm-eaten, half-rotten fruit of the race." [14] The eugenics movement supplied the answer: sterilization.

In the hands of reformers and progressives, eugenics became a respected argument for opposing miscegenation and excluding "lower stock" immigrants from the Mediterranean countries, Eastern Europe, and Russia. Sterilization was to have wide application. A model eugenical sterilization law encompassed those who were feeble-minded, insane, criminalistic (including the delinquent and "wayward"), epilectic, inebriates and drug users, diseased (including tuberculosis, syphilis, and leprosy), blind (including seriously impaired vision), deaf (including seriously impaired hearing), deformed (including the crippled), and dependents "including orphans, ne'er-do-wells, the homeless, tramps, and paupers." [15]

Carrie Buck's counsel had warned the Supreme Court that in place of "the constitutional government of the fathers we shall have set up Plato's Republic." His remarks preceded by a few years Nazi Germany's biological experiments and the extermination of millions of Jews, Poles, gypsies, and other groups to produce a "master race."

Although *Buck* v. *Bell* has neven been explicitly overruled, its tenets were challenged by the Supreme Court in 1942. Oklahoma law provided for the sterilization of "habitual criminals." A unanimous opinion held that the state statute violated the Equal Protection Clause of the Fourteenth Amendment by making an invidious distinction. Under the statute, someone who stole more than $20 three times would be sterilized, whereas someone who embezzled that amount three times was exempt from the operation, even though both crimes were a felony under state law. Justice Douglas' opinion for the Court did not comment on the scope of the police power to mandate sterilization. He did note that the case involved "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." [16] Chief Justice Stone, in a concurrence, said that a state could, after appropriate inquiry, sterilize someone "to prevent the transmission by inheritance of his socially injurious tendencies." Justice Jackson, also concurring, insisted that there are limits to the extent that legislatures "may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority — even those who have been guilty of what the majority defines as crimes." Jackson's reservations have been underscored by recent cases involving the rights of marriage, family, and privacy.

## RACIAL DISCRIMINATION

In *Dred Scott* v. *Sandford* (1857), Chief Justice Taney refused to allow contemporary social attitudes to alter the meaning of the Constitution. No one, he said, "supposes that any change in public opinion or feeling" toward blacks "should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted." Although the Fourteenth Amendment later provided for the equality of whites and blacks before the law, some states invoked the police power to maintain separate facilities.

In *Plessy* v. *Ferguson* (1896), the Supreme Court upheld a Louisiana statute that required railroads to provide equal, but separate, accommodations for white and black passengers. At that time the tide of public opinion ran strongly against the idea of shared accommodations. In a ruling that relied heavily on social mores and customs, the Court said that "in the nature of things" it could not have been the intent of the Fourteenth Amendment to abolish distinctions based on color or to enforce a social commingling of the races. Segregation laws were within the competency of the states to exercise their police power. States were at liberty "to act with reference to the established usages, customs and traditions of the people." Separation between the races became widespread in transportation, schools, restaurants, theaters, and hotels.

The combination of racism in totalitarian countries and the emergence of America as world leader after World War II helped set the stage for the Desegregation Decision of 1954. America could not fight world communism and appeal to dark-skinned peoples in foreign lands if it maintained racial segregation in its own school system. The National Association for the Advancement of Colored People (NAACP) prepared an appendix to its brief entitled "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement." Justice Jackson viewed the NAACP's argument as sociology rather than law and was reluctant to rule segregation unconstitutional. He finally agreed to join the majority and form a unanimous Court, but acknowledged privately that he regarded the case as basically a question of politics: "I don't know how to justify the abolition of segregation as a judicial act. Our problem is to make a judicial decision out of a political conclusion . ." [17]

In the Desegregation Case of 1954, the Supreme Court acknowledged that in approaching the problem of school segregation "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written." Conditions had changed; public education was now compulsory, and education had become "perhaps the most important function of state and local governments." Segregation, said the Court, generated a feeling of inferiority among black children: "Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson,* this finding [that segregation was detrimental to education] is amply supported by modern authority." This sentence

was followed by the famous footnote eleven, the wisdom of which has been extensively debated, citing seven sociological studies on the effects of discrimination and segregation on children.

Foreign policy implications were also cited in NAACP's brief: "Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue." The Federal Government's amicus brief agreed that American segregation had harmful effects on the foreign policy of the executive branch. The problem of racial discrimination was "particularly acute in the District of Columbia, the nation's capital. This city is the window through which the world looks into our house." Foreign officials and visitors judged the country by their experiences and observations in the District. Not only were black citizens humiliated but dark-skinned foreign officials were mistaken for American blacks and refused food, lodging, and entertainment. The brief continued:

> It is in the context the of present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. . . .The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.

One year after the Court decided the Desegregation Case, it was faced with the constitutionality of a miscegenation statute from Virginia. The Court decided to sidestep temporarily a socially explosive issue. Immediately after the Court had issued its decision on desegregation, opponents predicted that integrated schools would lead to "mongrelization" of the white race. The lower court, in upholding the statute, said that it was necessary for the state to forbid interracial marriages "so that it shall not have a mongrel breed of citizens." [18]

The Supreme Court returned the case to the state courts, giving time for the Desegregation Decision to establish itself as the law of the land.[19] By 1967 the Court was prepared to strike down the miscegenation law and it did so with a unanimous ruling in *Loving* v. *Virginia.* The opinion pointed out that 14 states in the previous 15 years had repealed laws prohibiting interracial marriages. Contemporary public opinion obviously played a part, for the Court rejected the argument that the state law should be upheld because the framers of the Fourteenth Amendment did not intend to prohibit miscegenation laws. Under the Constitution, "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

## WOMEN'S RIGHTS

On the foundation of court cases that established rights for black Americans, the feminist movement pressed for fundamental changes in women's rights. It is extraordinary to read some of the early Supreme Court deci-

sions on women's rights to see how social attitudes were interwoven into the opinions of Justices. *Bradwell* v. *State* (1873) is a prime example. Myra Bradwell had obtained a law degree but needed the support of a panel of judges to practice law in Illinois. They turned her down solely because she was a woman. An 8-1 Supreme Court decided that her rejection did not violate the privileges and immunities of the Fourteenth Amendment.

A concurrence by Justice Bradley claimed that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." A woman's responsibility to domestic life and to the family institution made it "repugnant" for her to adopt an independent career from that of her husband. He recognized that his argument did not apply to unmarried women, but they were exceptions to the general rule: "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based on exceptional cases."

Court doctrine had not advanced very far by the time of *Goesaert* v. *Cleary* (1948). A 6-3 majority of the Supreme Court upheld a Michigan statute that prohibited women from serving as bartenders unless they were the wife or daughter of the male owner. Frankfurter's decision for the majority is remarkable for its smug assurance: "Beguiling as the subject is, it need not detain us long. To ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classification the State has made . . . is one of those rare instances where to state the question is in effect to answer it." Three members of the Court dissented on the ground that the statute arbitrarily discriminated between men and women.

Judicial attitudes were not changed until well after the Desegregation Case of 1954. The correction came first from Congress, not the courts. The Civil Rights Act of 1964 prohibited discrimination based on sex. Congress established the Equal Employment Opportunity Commission to investigate cases of discrimination, and much of the caseload has been devoted to cases of sex discrimination. The Equal Pay Act of 1963 prohibited employers from discriminating on the basis of sex.

Changes in Supreme Court doctrine did not come until Warren Burger replaced Earl Warren as Chief Justice. In *Reed* v. *Reed* (1971), a unanimous Court struck down an Idaho law that preferred men over women in administering estates. The statute, the Court held, arbitrarily discriminated on the basis of sex and violated the Equal Protection Clause of the Fourteenth Amendment. Since that time there has been a flood of cases that are gradually eliminating sexual stereotypes of an earlier age. In *Frontiero* v. *Richardson* (1973), the Court said that sex discrimination had survived in America as "romantic paternalism," whereas the practical effect was to put women "not on a pedestal, but in a cage." In *Taylor* v. *Louisiana* (1975), the Court held that whatever the customs of earlier times "it is no longer tenable" to exclude women from juries. In that same year, in *Stanton* v. *Stanton,* the Court said that "old notions" of sex roles are in decline.

## CONTEMPORARY STANDARDS

New appointments allow the Supreme Court to incorporate contemporary social and political attitudes. Although Justices sometimes object that precedents are too easily abandoned and the principle of stare decisis ignored, new Justices bring fresh ideas and philosophies to the Court. In a dissent, Justice Black complained in *Rogers* v. *Bellei* (1971) that constitutional protections "should not be blown around by every passing political wind that changes the composition of this Court." No doubt he was frustrated by policy shifts from the Warren Court to the Burger Court, yet Black himself had been part of the Roosevelt appointees in the late 1930s and early 1940s who helped chart a new course in constitutional interpretation.

It was the view of Justice Jackson that changes in the Court's composition enable it to incorporate contemporary ideas and attitudes. He denied that this admission did violence to the notion of an independent, non-political judiciary: "let us not deceive ourselves; long-sustained public opinion does influence the process of constitutional interpretation. Each new member of the everchanging personnel of our courts brings to his task the assumptions and accustomed thought of a later period. The practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority." [20]

By recongizing the force of social movements and public opinion, do we reduce the judiciary to just another political body responding to majoritarian pressures? Not necessarily. If the Court succumbs to social needs in such areas as economic regulation, so are there examples — school prayer, school busing, abortion — where the Court remains steadfast in the teeth of intense opposition. In one of the most majestic paragraphs in Supreme Court history, Justice Jackson in 1943 struck down a mandatory flag salute and declared that the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

It is nonetheless a fact that constitutional rights depend to a substantial extent on contemporary standards and majority opinion. Jackson could write what he did in 1943 partly because Frankfurter's decision in 1940, upholding a mandatory flag salute, had aroused almost uniform opposition throughout the country. In such areas as obscenity, law enforcement, and the death penalty, the Supreme Courts attempts to determine "contemporary standards" and "evolving standards of decency." [21] Justice Frankfurter, in a death penalty case, felt obliged to follow "that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution." [22] When legislatures passed death sentences for certain crimes, ju-

rors often refused to return guilty verdicts and forced legislatures to permit discretionary jury sentencing.

It would be misleading to say that constitutional rights merely reflect contemporary values. If that were the case, we could dispense with the Constitution and simply legislate all constitutional questions. The Constitution is revered because it represents enduring values and a consensus of broad moral and political ideas. The fundamental principle that man cannot be governed without his consent created an inherent conflict between the Declaration of Independence and the Constitution, which sanctioned, at least for a time, the institution of slavery. This basic incompatibility between natural rights and the Constitution had to be redressed, if not by the courts and Congress then by civil war.

Two cases in 1986 demonstrate the Court's sensitivity to social attitudes. *California* v. *Ciraolo* concerned flights by police officers over a backyard to discover marijuana plants. The Court claimed that the grower's "expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor." In *Bowers* v. *Hardwick,* the Court by a 5-4 margin upheld a state law that made consensual sodomy among homosexuals a criminal offense. The Court rejected the argument that the law should be struck down because it merely reflects the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." The Court noted that the law "is constantly based on notions of morality." Justice Stevens, dissenting, pointed out that the fact that a majority in Georgia views sodomy as immoral "is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."

Finally, constitutional law is not a monopoly of the courts. Constitutional law is also made by the people operating through the executive and legislative branches. Many constitutional issues are resolved without a lawsuit, though that is often difficult to imagine in our litigious society. Congress and executive officials are constantly involved in constitutional interpretation through the passage of bills, agency implementation, and executive-legislative conflicts. Even when a matter is brought before the courts there is no assurance it will be decided there. The judiciary can avoid the constitutional issue by disposing of a case on statutory grounds or by raising the threshold questions of jurisdiction, standing, mootness, ripeness, political questions, and prudential considerations. If the constitutional question is decided, more likely than not the courts will defer to the interpretation previously reached by the other branches. On those rare occasions where the courts invalidate a congressional action, usually it is only a matter of time before the statute is revised slightly to initiate another dialogue with the judiciary. It is through this rich and dynamic political process that the Constitution is constantly adapted to seek a harmony between legal principles and the needs of a changing society.

† The views expressed here are those solely of the author, but he would like to thank Peter Benda and Morton Rosenberg for their helpful critiques of the draft.

[1]Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p. 168.

[2]Morris R. Cohen, *Law and the Social Order* (New York: Harcourt, Brace & Co., 1933), pp. 380-381, note 86.

[3]Lord Ratcliffe, *The Law & Its Compass* (1960), pp. 92-93.

[4]Alexis de Tocqueville, *Democracy in America* (Phillip Bradley ed.), Vol. I, pp. 151-52.

[5]35 F.R.D. 398 (1964).

[6]Chester A. Newland, "The Supreme Court and Legal Writing: Learned Journals as Vehicles of an Anti-Antitrust Lobby?," 48 Geo. L. J. 105, 140 (1959).

[7]Adair v. United States, 208 U.S. 161, 175 (1908). See also Coppage v. Kansas, 236 U.S. 1 (1915).

[8]Morehead v. N.Y. ex rel. Tipaldo, 298 U.S. 587 (1936).

[9]West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[10]Owen J. Roberts, *The Court and the Constitution* (Cambridge, Mass.: Harvard University Press, 1951), p. 61

[11]Davis v. Berry, 216 Fed. 413, 417-18 (S.D. Iowa 1914).

[12]Mickle v. Henrichs, 262 Fed. 687 (D. Nev. 1918).

[13]Buck v. Bell, 143 Va. 310, 312 (Sup. Ct. App. Va. 1925).

[14]Henry M. Boies, *Prisoners and Paupers* (New York: G.P. Putnam's Sons, 1893), p. 266.

[15]Harry Hamilton Laughlin, *Eugenical Sterilization in the United States* (Psychopathic Laboratory of the Municipal Court of Chicago, 1922), pp. 446-447.

[16]Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[17]Bernard Schwartz, *Super Chief* (New York: New York University Press, 1983), p. 89.

[18]Naim v. Naim, 87 S.E.2d 749, 756 (Sup. Ct. App. Va. 1955).

[19]Naim v. Naim, 350 U.S. 891 (1955).

[20]Robert H. Jackson, "Maintaining Our Freedoms: The Role of the Judiciary," *Vital Speeches*, No. 24, Vol. XIX (Oct. 1, 1953), at 761.

[21]Woodson v. North Carolina, 428 U.S. 280, 288, 293 (1976) (death penalty). See also Miller v. California, 413 U.S. 15, 30 (1973) (obscenity); Rochin v. California, 342 U.S. 165, 169, 173 (1952) (law enforcement).

[22]Francis v. Resweber, 329 U.S. 459, 471 (1947).