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To a political scientist interested in understanding the operation of the American political system, the Constitution of the United States means what a majority of the nine Justices on the United States Supreme Court says it means.

Law in any society is a product of its political system. Politics embraces two elements: power and values. To have political power is to have influence over the making of laws adopted by a society. The values of the power holders are in turn reflected in the substance of such laws.

The Justices of the United States Supreme Court are among those in the American political system who have influence in the making of laws. The Justices, through the exercise of judicial review, have a recognized power position. They interpret constitutional provisions, statutes, and administrative regulations. This task of interpretation is not an automatic, mechanical process requiring some kind of special legal craftsmanship. If it were, computers could resolve legal disputes. The vagueness and generality of most constitutional provisions, statutes, and administrative regulations allows for considerable discretion on the part of the Justices in the performance of the interpretative function.

The Justices are forced to choose between conflicting views over the meaning of words, between conflicting interpretations over the original intention behind those words, and between conflicting judicial precedent. In short, the task of interpretation allows for the values of the Justices to influence the way they define the meaning of the Constitution and also statutes and regulations. This reality about judicial behavior exposes Supreme Court opinions for what they are: revealing testaments of political philosophy and not just legal opinions.

The late Justice William O. Douglas in his memoirs quotes Chief Justice Charles Evans Hughes to this effect: "At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections."[1]

This is not a new view. Centuries ago in a sermon preached before

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1. W. DOUGLAS, THE COURT YEARS 8 (1980).

the King of England, Bishop Hoadly noted that "whoever hath an absolute authority to interpret any written or spoken laws, *it is he* who is truly the law-giver to all intent and purposes, and not the person who first wrote or spoke them."[2] Almost two hundred years ago, Chancellor James Kent, Chief Justice of the highest court in New York State and a person who had a profound impact upon the early development of American law, stated: "I almost always found principles suited to my view of the case."[3] Famous legal scholar John H. Wigmore has stated: "A judge may decide almost any question any way and still be supported by an array of cases."[4] In his much quoted statement, the famous Oliver Wendell Holmes stated:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, *even the prejudices which judges share with their fellow men have had a good deal more to do than the syllogism* in determining the rules by which men should be governed.[5]

To understand the meaning and the evolution of the American Constitution then is to understand the thinking and the *values* of those men, and now woman, on the Supreme Court who have read meaning into its words.

The *institution of judicial review* itself is a testament to the impact of the Justices' political values upon the early development of our constitutional system. One cannot appreciate the origin of judicial review or understand how it gained acceptability without noting its importance to men of considerable property in the first 150 years of our existence under the Constitution.

John Marshall, well known for his Hamiltonian-Federalist views, shared the Federalist fear of supposed Jeffersonian radicalism. After the loss of both the Congress and the White House in the election of 1800, the only bastion left to the Federalists was the federal courts, with its membership at that time stacked with Federalist sympathizers. How crucial it was then, from a Federalist political point of view, to claim a power that would enable the judiciary to guard against the

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2. C. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789–1835, at 35 (1973) (emphasis added) (address by Benjamin Hoadley, Bishop of Bangor, from sermon preached before the King of England (1717)).

3. C. HAINES, *supra* note 2, at 37 (quoting Kent, *Autobiographical Sketch of Chancellor Kent*, 1 S.L. REV. ___, 389 (1872)).

4. *Id.* at 35 (quoting 1 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW xv (2d ed. 1923)).

5. O. HOLMES, THE COMMON LAW 1 (1938) (emphasis added).

possibility of Jeffersonian populist legislation.[6] Thus, *Marbury v. Madison*[7] was decided to give the Federalist party a check on the Jeffersonians.

Marshall's holding in *Marbury*, however, was not accepted immediately,[8] but later became concretely accepted after the Civil War when the Supreme Court began to exercise the power more frequently and primarily for business interests opposed to legislative regulation of business activity. This philosophy of laissez-faire capitalism, read into the Constitution and subsequently sustained by a Court majority for fifty years—a philosophy espoused by the American business community—supported the acceptability of judicial review as an established feature of our constitutional system.[9]

This laissez-faire capitalism validation theory held until the Great Depression;[10] at that time, the twenty-five million Americans out of work regarded such a defense as hollow. President Franklin Roosevelt's hit-and-miss pragmatic attempt to pull the nation out of the Depression received overwhelming endorsement in the election of 1936. This strong popular support and FDR's plan to increase the membership of the Supreme Court from nine to fifteen brought about a change in thinking on the part of the same majority that had been striking down New Deal legislation as unconstitutional.[11] In 1937, a reconstituted majority began to accept the FDR legislative program and, in so doing, sounded a retreat when it came to judicial opposition to the regulation of economic activity on constitutional grounds.

The Roosevelt appointees to the Court (most significantly Justices Black, Douglas, Frankfurter, Jackson, and Murphy) and some of their Warren Court successors (Justices Brennan, Fortas, Goldberg, Marshall, and Warren himself)—children of their time who had been profoundly influenced, by first, the Nazi destruction of democratic liberties and then the excesses of the Stalinist era—displayed a particular sensi-

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6. For reference to this point concerning the background to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), see 3 A. BEVERIDGE, LIFE OF JOHN MARSHALL 105 (1919). *See also* E. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 22 (1919); R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 53–54 (1971); J. GARRATY, QUARRELS THAT HAVE SHAPED THE CONSTITUTION 1–14 (1962); R. HOFSTADTER, THE IDEA OF A PARTY SYSTEM 162–65 (1970); D. MALONE, JEFFERSON THE PRESIDENT 114 (1970).

7. 5 U.S. (1 Cranch) 137 (1803).

8. R. ELLIS, *supra* note 6.

9. For a well-documented study affirming this contention, see B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT (1942). *See also* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 39–74 (1941); R. MCCLOSKEY, THE AMERICAN SUPREME COURT 101–35 (1960); A. PAUL, CONSERVATIVE CRISIS AND THE ROLE OF LAW: ATTITUDES OF BAR AND BENCH, 1892–1895 (1960).

10. *See* R. MCCLOSKEY, *supra* note 9.

11. *Id.*

tivity to libertarianism in defense of civil and political rights and a commitment to egalitarianism in the enjoyment of such rights.[12]

Probably, no United States Supreme Court opinion more staunchly espoused that libertarianism than that of Justice Jackson in *West Virginia State Board of Education v. Barnette*:[13]

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[14]

As to the emerging need to protect egalitarianism, no one demonstrated a stronger commitment than Chief Justice Warren; the thrust of his majority opinions in *Brown v. Board of Education*,[15] *Reynolds v. Sims*,[16] and *Miranda v. Arizona*[17] was unmistakable: Equality of civil rights, of political rights, and of procedural guarantees was now going to be protected with a much more watchful eye.[18]

In recent years, beginning with the urban riots and anti-Vietnam War demonstrations of the 1960's, a perception took hold in the minds of many Americans that the nation was coming unraveled—that criminals were running loose in the streets, and that judges, too mesmerized perhaps by the rhetoric of a Warren or a Brennan on procedural rights, were being too solicitous of the rights of the individual accused of crime and not solicitous at all of the welfare of society as a whole. This perception had been perpetuated or fueled by strong evidence of violent crime on the streets and in the neighborhoods of American cities since the 1960's.

In accepting the nomination of his party for President in 1968, Richard Nixon referred to judicial decisions that had "gone too far in

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12. For references in Supreme Court opinions linking objectionable police practices as a step in the direction of a police state and consequently leading to a libertarian defense of certain constitutional guarantees, see New York v. Class, 106A S. Ct. 960, 970 (interim ed. 1986) (Brennan, J., dissenting); United States v. Calandra, 414 U.S. 338, 355 (1974) (Brennan, J., dissenting); Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting); Johnson v. United States, 333 U.S. 10, 17 (1948); Harris v. United States, 331 U.S. 145, 161, 163, 171, 173 (1947) (Frankfurter, J., dissenting).

13. 319 U.S. 624 (1943).

14. *Id.* at 642.

15. 347 U.S. 483 (1954).

16. 377 U.S. 533 (1964).

17. 384 U.S. 436 (1966).

18. *See, e.g.*, *Miranda*, 384 U.S. at 467–73, 475–76; *Sims*, 377 U.S. at 561–68, 584–85; *Brown*, 347 U.S. at 493–96.

weakening the peace forces as against the criminal forces in this country."[19] He expressed the view that there was a need for Supreme Court Justices who would be more atuned to the value of law and order.[20] This notion became one of the more popular themes of his 1968 campaign. Once elected and given the unique opportunity of nominating four Justices to the Supreme Court in his five and one-half years as President, Nixon was influenced in his selection by these considerations.[21] This motive, which is shared in great part by Ronald Reagan, brought to the Court Justices Warren Burger, William Rehnquist, Lewis Powell, Harry Blackmun, Sandra Day O'Connor and most recently Antonin Scalia. These Nixon and Reagan appointees joined by Justice Byron White have for some time been chipping away at some of the procedural-rights decisions of the Warren Court—the modification of the exclusionary rule in *United States v. Leon*[22] and the limitations on a criminal suspect's "Miranda rights" in *New York v. Quarles*[23] are two cases in point.

It is true that all the Justices justify their value decisions by legal doctrines and legal rationalizations or constitutional methodologies. Justice Black, for example, cited "original intent" as his methodological guidepost,[24] and Justice Frankfurter earned the reputation of champion of judicial restraint.[25] However, adherence to the concept of origi-

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19. *Address by Richard Nixon, Republican Presidential Nominee*, 34 VITAL SPEECHES DAY 674, 676 (1968).

20. *Id.*

21. *Id.*

22. 468 U.S. 897 (1984). The exclusionary rule, which bars the admission at trial of evidence obtained through an illegal search and seizure, was extended to the states by the Warren Court in Mapp v. Ohio, 367 U.S. 643 (1961).

23. 467 U.S. 649 (1984). "Miranda rights" guarantee that a criminal suspect's statements cannot be used against him unless he had been warned of his right to remain silent. Miranda v. Arizona, 384 U.S. 436 (1966).

24. The classic Black statement to that effect is contained in his dissent in Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966), in which he stated:

> The Court's justification for consulting its own notions rather than following the *original meaning* of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil. . . . It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written unless changed through the amendment process which the Framers wisely provided. Moreover, when a 'political theory' embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.

Id. at 677–78 (Black, J., dissenting) (emphasis added).

25. Two classic examples of Justice Frankfurter's position were his dissents in West Virginia v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting) and Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting). In *Barnette*, Frankfurter said:

nal intent, whatever that might mean, did not stop Justice Black from justifying his "one man, one vote" decision in *Wesberry v. Sanders*,[26] on the basis of the first few words of article I, section 2,[27] words which introduce the clause providing for *weighted representation* for the Southern States on the basis of their slave populations. Nor was Justice Frankfurter in *Sweezy v. New Hampshire*,[28] dissuaded by judicial restraint from willfully frustrating the New Hampshire legislature in defense of academic freedom[29]—something not explicitly found in the Constitution. Neither the original intent of those who drafted the fourteenth amendment nor the doctrine of judicial restraint (or adherence to precedent for that matter) can justify the votes of either Black or Frankfurter in the decision of *Brown v. Board of Education*.[30] Both joined a unanimous court in striking down legal segregation of public

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> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. *It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench.*

Barnette, 319 U.S. at 646–47 (Frankfurter, J., dissenting) (emphasis added).

In *Baker*, Frankfurter stated:

> Disregard of inherent limits in the effective exercise of the Court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

Baker, 369 U.S. at 267.

26. 376 U.S. 1 (1964).

27. U.S. CONST. art. I, § 2 (providing that members of the House of Representatives shall be chosen "by the people").

28. 354 U.S. 234 (1957).

29. *Id.* at 260–63 (overturning a contempt conviction for refusing to answer questions of the state attorney general on grounds that there was insufficient evidence that the legislature had requested the specific information which was the subject of the questions).

30. 347 U.S. 483 (1954).

schools on the basis of race.[31]

The reality that a Justice's values or political philosophies have much to do with the manner in which a Justice will interpret the Constitution is not abhorrent, for it is not necessarily bad—it is (probably) inevitable, given the task of judicial interpretation. The crucial focus is not that the values of the individual Justices matter, but rather the quality of those values.

All that aside, focus should also be directed at the person who selects the Justices who will apply those values. The key actor in the nomination of Supreme Court Justices is the President of the United States. The United States Senate is also vested with a constitutional role in the nomination process. Yet, in this century, the Senate has failed to confirm only four of fifty-four presidential nominations.[32] Thus, the quality and the kind of values represented by a Supreme Court nominee will often reflect the quality and the kind of values represented by the President.

Recent nominations to the Court by Presidents Nixon and Reagan suggest that possessing particular value preferences is the major criterion necessary for obtaining a Supreme Court appointment. Further, six of the last eight nominations have been judges who were presiding judges (on the bench of either a federal or state court) at the time of their nominations. Such judges possess established judicial records. These records can be carefully screened by the President to select the individual whose political philosophy is consistent with his own.

The selection of Supreme Court nominees from the ranks of presiding judges seems to be a definite preference of Republican Presidents. For example, of our last nine Presidents, beginning with Franklin Roosevelt, five have been Democratic and four have been Republican. And among the four Republican Presidents, nine of their thirteen appointments were presiding judges.[33] Yet, among the five Democratic Presidents, only four of seventeen appointments were presiding judges.[34] A key ethical question thus arises: Should the value preferences of the President control the process? Or is there also a major role for the United States Senate in appraising the qualification of Supreme Court nominees?

The most recent debate dealing with this question focused on the nomination of Justice Rehnquist as Chief Justice of the Supreme

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31. *Id.* at 500.

32. L. BAUM, AMERICAN COURTS: PROCESS AND POLICY 109 (1986).

33. H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 195–233 (1974) (background of Supreme Court nominees from Franklin Roosevelt through Ronald Reagan).

34. *Id.*

Court. The Republicans, particularly the Senate Republicans, claimed that the 1984 election returns gave the President the uncontested right to select Justices for the Court. They believed that the role of the Senate at that time was to be nothing more than that of a "rubber stamp."

Such deference to the President in selection matters does not seem to be consistent with what the Framers had in mind, if the writings of Alexander Hamilton in the *Federalist Papers* are to be taken as any guide.[35] Furthermore, such deference was not the norm in the nineteenth century—about twenty-five percent of all Supreme Court nominations failed in the Senate.[36]

It would be helpful to have a public dialogue on this selection matter. There seems to be a certain amount of confusion within the Senate, on the part of the press, and amongst the general public as to the role of the Senate in the nomination process. One has the impression that the public perceives that a President's choice of a Supreme Court Justice is no different from that of a President's choice for his Cabinet. The question remains whether that should be the case given the importance of the judicial role in the interpretation of the Constitution?

Two kinds of questions may be raised with respect to these concerns; the first has to do with principles, and the second has to do with methods of interpretation. These are questions which might serve to guide Senators in their appraisal of a Supreme Court nominee. First, with reference to principles, there are a number of principles both stated and implied contained within the Constitution:

(1) separation of powers/checks and balances—notions which permeate the first three articles in the Constitution, reflecting the Framers' belief that in fragmenting political power, there is insurance against abuses of political power;

(2) a free press—mandated by the first amendment—a free press is deemed essential to a free society in providing citizens with information needed to make prudent decisions about public affairs;

(3) separation of church and state—seemingly mandated by the first amendment and the provision in section three of article VI against a religious test for public office;

(4) procedural fairness—implicit in the notion of due process in both the fifth and fourteenth amendments and in the guarantees of the fourth, fifth, and sixth amendments; and

(5) equality before the law—reflective of the equal protection clause in the fourteenth amendment.

In viewing these principles as a whole, one is forced to ask the

35. *See, e.g.*, THE FEDERALIST No. 76, at 513–14 (A. Hamilton) (J. Cooke ed. 1961).

36. L. BAUM, *supra* note 32, at 109.

question: Is there something qualitatively different and indeed special about such principles that defense of them should not be subordinated to the passions and emotions and rationalizations of the moment? This is a question for Senators to consider with respect to potential Justices.

Another set of questions for Senators to consider involves the concept of judicial interpretation. Should the constitutional protections of due process and equal protection as well as the protections against unreasonable searches and seizures along with cruel and unusual punishment be read according to the thinking of people who lived in 1787? Should such principles be read according to the people who were thinking and living in 1868? Alternatively, should such principles be interpreted according to changes in attitudes and advances in knowledge that mark the lives of people living today?

Justice Frankfurter seemed to be in favor of the latter; in fact, he once stated that "it is of the very nature of a free society to advance in its standards of what is reasonable and what is right."[37] Justice Holmes also seemed to favor adjusting to the times in claiming that in interpreting the Constitution one must not be bound by the perspective of those who lived a century or two ago but that one should take into account the sum total of the nation's experience.[38]

These are the kinds of questions that Senators could pose to nominees for the United States Supreme Court; they are the kinds of questions that do not necessarily deal with specific cases, but rather questions that measure a person's political and constitutional philosophy. The answers to these questions are important because it is that political and constitutional philosophy that makes a difference and determines the contemporary meaning of the Constitution.

One final observation is necessary in this area. Given that political and constitutional philosophy are paramount in the interpretation of the instrument, it is not at all clear that lawyers, and only lawyers, should be vested with so important a responsibility as the interpretation of the Constitution. Furthermore, all empirical data today suggests that the best trained legal minds in the country are devoted to the service of business interests and the concerns of business activity. Many lawyers and law professors tell undergraduates that the best preparation for a legal career today is an undergraduate education in business and accounting.

There is nothing wrong with that, but how does that kind of focus, background, and perspective add up to a singular, preferred qualification to interpret the Constitution? There is no reason why former Con-

37. Wolf v. Colorado, 338 U.S. 27, 30 (1948).

38. Missouri v. Holland, 252 U.S. 416, 433 (1920).

gressmen, Senators, or Governors with distinguished records in public service, who by occupation are not lawyers, should not be considered for the Supreme Court. Furthermore, there is no reason why constitutional historians, political scientists, and legal philosophers should also not be considered.

This is not suggested facetiously, although it is not too likely to occur. Just as the old adage—war is too important to be left only to generals—is a provocative one, so perhaps is the adage that the American Constitution is far too important a document—far too important in the maintenance of a free society—to be left in its meaning exclusively to the political values of only lawyers.