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Brubaker: Comment on Cox

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COMMENT

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It is our good fortune to celebrate the miracle of 200 years of political life under the Constitution, according to Professor Cox, because the framers had the wisdom of writing "enough, but not too much."[1] His emphasis tonight is on the "not too much," the majestic openness of the Constitution and the ability of the Supreme Court, following the common-law method of adjudication, to provide a creative continuity between the document's original meaning and America's evolving needs.

Our best hope to perpetuate that miracle is to honor the rule of law, preeminently on the Supreme Court. As Professor Cox notes, that hope has been attacked as illusory by the so-called Legal Realists, for whom the Constitution is what the Supreme Court says it is. And today it is attacked even more radically by the Critical Legal Studies movement for whom the "rule of law" is mere ideological glue attempting futilely to hold together liberal, capitalistic society against the force of its alleged contradictions and to mask that society's arbitrary use of power.

Against these attacks I join Professor Cox in defending the rule of law, and I share with him the belief that without this rule, and the character of the people to support it, the miracle of continuous political life under the Constitution will perish. I differ, however, with the framework that he provides for understanding the role of the Supreme Court, because it plays into the very hands of the proponents of Legal Realism and Critical Legal Studies.

That framework contains two axes. One represents differences of "temperament and philosophy" and ranges from liberalism to conservatism; the other represents the role of the Court and ranges from extreme activism to extreme restraint. Let us consider the meaning of these axes and their relation to each other.

First, activism and restraint. I began to suspect that what Professor Cox has in mind is not my understanding of activism and restraint when he considered the battle of what we shall call the Old

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1. Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 119 (1987).

Court with the nascent welfare state during the first third of the twentieth century, a period that almost all observers agree is a low point in Supreme Court history. During this time, the Old Court declared unconstitutional over 200 regulations of business activities, prices, and labor relations, in the name of "liberty of contract"—which it claimed to find in the Constitution through the oxymoronic concept of substantive due process. Another 200 such regulations it declared unconstitutional under other spurious doctrines such as dual federalism.[2] Child labor laws, income tax, minimum wage, maximum hour legislation—all spilled from its maw as the Old Court devoured the Progressive agenda. By Professor Cox's understanding of his own framework, however, this is *not* a case of judicial *activism*, but, he implies, a sort of judicial *restraint*.

My suspicion deepened when I compared his definition of restraint with the defense he cites as often given for it. He defines restraint in its extreme form as adhering to "a static set of rules derived by logical deduction from words and concepts . . . of law, paying scant attention to the underlying social and economic conditions."[3] This characterization is echoed in his criticism of the Old Court: "[I]t woodenly applied words and concepts . . . without regard to the [dramatically altered] economic realities." It placed "unimaginative emphasis upon the verbal logic of the law."[4] But the ideas Professor Cox describes as given to defend restraint are (1) self-government and majority rule, (2) federalism, (3) wisdom of tradition, and (4) prudence or caution in the use of limited power. Of these, only "tradition" even remotely suggests wooden adherence to verbal logic. Self-government cannot be served by "woodenly applied words and concepts" that void democracy's laws. Nor is prudence served by judicial decisions blind to "economic realities."

I have to conclude that what Professor Cox calls restraint is not in fact restraint, but the often confused concept of "strict construction." Strict construction has always enjoyed a rhetorical advantage over its opponent at the other end of the spectrum, "loose construction," for the latter suggests a casual attitude toward the lawmaker, a negligent view of the text, and a slovenly approach to the task of adjudication. For that reason any debate regarding the merits of

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2. Dual federalism postulated that if a matter could be regulated by the states, it could not for that reason be regulated by the federal government; if it could be regulated by the federal government, it could not be regulated by the states.

3. Cox, *supra* note 1, at 123.

4. *Id.* at 126.

strict or loose construction is too lopsided to be illuminating; to balance the rhetoric it is necessary to call strict construction something else, like wooden construction. But the reasons for rejecting that axis in a framework for evaluating the Court go deeper.

Strict construction, unfortunately, is so ambiguous a concept that it is virtually useless for evaluating the Court. On the one hand, it means firm adherence to the well-defined and hard rule of law. On the other hand, it means firm adherence to the will of the lawmaker. But the lawmaker may give the judge a rule that is ill-defined and soft. To decide cases strictly then in the first sense of the term would be to decide them loosely in its second sense. And, of course, there may not have been a single will of a lawmaker, but many different wills, each supporting the terms of the law for distinct and incompatible reasons. To claim strict adherence to the will of the lawmaker then is a fiction.

Loose construction, naturally, suffers a mirror image of this debilitating ambiguity. While it would seem to emphasize the need for following the spirit rather than the letter of the law, loose construction fails to acknowledge that some law is rock-hard and well defined. To pursue a spirit apart from the letter would be lawless.

The other axis of this framework, that of "temperament and philosophy" also presents problems. While there is no denying that such factors do influence some decisions, to cast the key issues coming before the Court as liberal or conservative contributes, as Professor Cox rightly charges the media with doing, to a simplified politicization of constitutional debates. More troubling, this dimension actually takes constitutional debate to a level below debate, for it reduces judicial decisions to factors that cannot be discussed in a judicial opinion. That is, no Justice says, nor properly can say: "The reason I voted the way I did in this case is that I am a liberal" or "I have a sweet and generous temperament."

And I think there is a problem with the relation of the two axes to each other, a relation that is more implied than avowed. The two axes, we are told, lie *parallel* to each other, both running horizontally. At the same time they're supposed to be distinct dimensions. It is possible, in other words, to believe strongly in certain political ends, but believe more strongly that it is wrong to achieve them through judicial means. If the two dimensions were truly distinct, however, they should be graphed as perpendicular to each other. One might dismiss this as a careless mistake, but instead, I think it suggests a relation between the axes best summed up in the word "progress."

The Court, this model seems to tell us, does its best work when it seeks to realize, through a moderate nudging of the body politic, an idea of progress immanent in the Constitution, an idea that aims somewhere vaguely toward the left in an indefinite future. The leftward tilt of this scheme is nicely illustrated by contrasting the treatment given the efforts of the Old Court to protect property rights and the efforts of the Warren and Burger Courts to protect personal rights. The Old Court adhered to "static" conceptions of the law—it didn't catch the beat—and it remained unresponsive to the dominant needs of the time.[5] The Warren and Burger Courts were more sensitive—in these Courts the "libertarian, egalitarian, and humanitarian impulses beat the strongest."[6]

Progress, it turns out, is a lobster trap: you can go into it, but you can't back out. Thus, the New Deal Court is applauded for overturning hundreds of precedents defending property rights. Such decisions liberated the polity from the static, wooden doctrines of the Old Court, doctrines that remained unresponsive to the dominant needs of the time. But try to employ similar terms to a parallel course that the Rehnquist Court could take. Certainly, you will hear nothing about that Court's liberating the polity from static conceptions of church-state relations, or from wooden conceptions of criminal procedure, or of its being responsive to the dominant needs of the time in allowing restrictions on abortions. Rather, we are told that if the Rehnquist Court reworks the precedents in a manner akin to that of the New Deal Court, it will imperil the rule of law.

More disturbing than each of these problems with this typology, however, is their confluence. For together they suggest a view of the Court and the Constitution that plays directly into the hands of today's opponents of the rule of law, the Critical Legal Studies movement. The notion of strict and loose construction renders the rule of law a tangle of contradictory sentiments. The notion of temperament guiding the decisions vindicates their realist heritage of viewing the law as the outcome of subterranean psychological forces. And the notion of progress encourages their belief that we should simply be done with the idea of rule of law and the constitutional text, and have the judge get on with the truly serious business of guiding the polity towards the promised land of socialism.

Briefly, let me suggest a different typology, keeping the two axes but changing their character and their relation to each other.

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5. *Id.*
6. *Id.* at 127.

First, I would keep the nominal activism-restraint dimension, but understand it to express the idea of judicial "deference" or lack thereof. Second, I would replace the temperament dimension with that of original or non-original meaning. And third, as I mentioned earlier, I would place the two dimensions perpendicular to one another.

A word of explanation is necessary for each dimension. First, activism-restraint. Some constitutional provisions are well defined and nearly rock-hard. No matter how much you may wish it to mean something else, when the Constitution says you need to "have attained to the Age of thirty Years" to be a Senator,[7] it means what it says. Other provisions are of such an "open texture" that the courts have held their meaning to represent political rather than judicial questions—in them, it is said, there is no judicially discoverable standard.[8] Most provisions, however, fall between these extremes. They have a core of clear, settled meaning, according to which some things are constitutional and some not, but as we move from that core the radiations of meaning grow thinner. As the questions move further from the core we become less and less confident about the answers. To shift the image, we might consider the range of uncertainty lying about most constitutional provisions as akin to the dusk that lies between day and night. In the midst of the dusk one might be genuinely puzzled whether it is day or night, whether a law is constitutional or not, without at the same time denying that, by and large, day and night are tolerably distinct.

We should understand judicial restraint and activism to concern what the Court should do as it stands in the dusk. Advocates of judicial restraint urge the Court to defer to the political branches unless they have made a clear mistake as to the constitutionality of some issue. Advocates of judicial activism urge the Court not to defer, but to act on its own best judgment, uncertain though it necessarily will be, of the precise meaning of the constitutional provision in question.

In place of the temperament-philosophy dimension we should have theories of what the Constitution is. This second dimension is more involved and one can call it a dimension only with great distortion to the complex elements that it involves. But we trace the most pronounced element, I believe, if we regard it as the debate over original intent. At one end is the closest approximation to the

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7. *See* U.S. CONST. art. I, § 3, cl. 3.

8. *See, e.g.*, United States v. Channel, 423 F. Supp. 1017, 1025 (D. Md. 1976).

meaning of the constitutional provisions at the time they were adopted; in the middle, the text remains the focus, but it is supplemented by changing ideas of what is good and right; and at the other end original meaning becomes sufficiently irrelevant that one may not only supplement it but adjudicate contrary to it.

In attempting to place the proper role of the Court in this typology, we should start not with the silence of the framers, the fact that they didn't say too much, but with the "enough" that they did say. And of the things that they did say, one term stands out—republican government. "It is evident," Madison wrote in *The Federalist* No. 39, "that no other form would be reconcileable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government."[9] "If the plan of the convention," he continued, "be found to depart from the republican character, its advocates must abandon it as no longer defensible."[10]

On the original meaning dimension, republican government rejects the extreme position of Legal Realism and Critical Legal Studies—a position totally liberated from the original meaning. If meaning is as difficult to contain in words as they maintain, and virtually impossible to pass from one person or one generation to another, then government itself is impossible. We are left simply with the clash of wills, and justice becomes simply the will of the stronger.

Perhaps less obviously, republican government also rejects the opposite extreme of pure original intent, for that position imagines that we should look at the text the same way we do a philosophic text, to understand it in the way its author did. It may be possible to understand the Constitution that way, but it is not proper. Government is not simply a question of authenticity of meaning, but a question of authority. What makes the Constitution our constitution is not simply the fact that it was written, but that it was ratified in the name of republican government. A sound understanding of what it means for a people to bind itself, a theory of republican government, and of taking oaths to that government as a public official, must undergird any sound interpretation of the text.

Regarding the activism-restraint dimension, our government is founded on the republican principle of consent. Its authority is per-

9. THE FEDERALIST No. 39, at 250 (J. Madison) (J. Cooke ed. 1961).
10. *Id.*

petuated through the republican principle of representative government. Each public official is bound by oath to support our Constitution, which embodies these republican principles. In considering every bill each legislator and the President has a duty to assess its constitutionality. From these points I think it follows that when a law is enacted by the lawful representatives of the people, their opinion as to its constitutionality is entitled to the respect of the judiciary. In a word, courts should *defer* to the reasonable opinions of the representative branches of government as to the constitutionality of the laws that they enact.

That is the most fundamental point to be said in favor of the doctrine of deference: it arises from the theory that authorizes the Constitution. Of the several other points to be made in its behalf, I would like to emphasize two.[11] First, it promises more continuity in Court decisions and more consensus among the Justices. We are more likely to agree if the question is the range of reasonable meaning rather than the precise meaning of a constitutional provision. And second, it reinforces what must be the ultimate foundation for the security of our rights and our best hope for perpetuating our institutions through our third century—not an active, watchful, and paternalistic judiciary, but the character of the people and their sense of responsibility for governing themselves. On this final point, I can do no better than to invoke the thought of Judge Learned Hand, Professor Cox's acknowledged master, when he said: "[T]hat a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."[12]

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11. A couple of other points are significant. First, unlike strict construction, it is an honest theory, for it recognizes that, while there is a core of certainty to most constitutional provisions, there is also a penumbra of doubt. Second, it allows the Court more closely to approximate the ideal of discovering the law rather than creating it, for as the focus of adjudication moves from the deep dusk of uncertainty concerning precise meanings to that of the outer boundaries of reasonable interpretation, matters become somewhat clearer and less controversial.

12. Hand, *The Contribution of an Independent Judiciary*, in THE SPIRIT OF LIBERTY 164 (I. Dillard 3d ed. 1960).