Maryland Law Review

Volume 47 | Issue 1 Article 20

The Role of the Supreme Court: Judicial Activism or Self-Restraint?

Archibald Cox

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Legal History, Theory and Process Commons

Recommended Citation

Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 Md. L. Rev. 118 (1987)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol47/iss1/20

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

THE ROLE OF THE SUPREME COURT: JUDICIAL ACTIVISM OR SELF-RESTRAINT?

ARCHIBALD COX*

It was on September 17, 1787, that stout, old Ben Franklin's sedan chair was carried up the steps of Independence Hall for the signing of a proposed new Constitution. Franklin wept as he signed. He had labored unsuccessfully for a lifetime to bring the North American Colonies together. Each movement towards union had been overwhelmed by difficulties in travel and communication; by fierce local pride and jealousy nurtured by differences in environment, custom, and religion; by clashes of economic interest; and, after throwing off British rule at least for a moment, by unwillingness to surrender even an iota of local independence to new central rule. For four hot and humid months the Convention had often teetered on the brink of dissolution. George Washington would write his friend Lafayette, calling the final agreement a miracle.

Today everything has changed except the Constitution. Where there were some 3,000,000 people scattered along the seaboard and piedmont with a few tentacles reaching out through the Appalachian passes, now there are 240,000,000 people spanning an area ten times broader. Communication is instantaneous. Markets are nationwide. No words can summarize the scientific discoveries, the technological and economic revolutions, and the rise in the standard of living. Compare the single blacksmith at his forge with the armies of skilled men in gigantic mills of the United States Steel Corporation. In other lands scores of written constitutions have been adopted and then thrown on the junk pile of history. Yet the Constitution of the United States, with few important changes, still provides not only a practical outline of the structure, powers, and limits of government, but also a spiritual lodestar to which Americans turn.

How are we to explain this second, greater miracle? The question is relevant to our topic because part of the explanation of the second miracle is the unique process of constitutional interpretation by an independent judiciary headed by the Supreme Court of the United States. The process—as I believe that I can show—usually

* Carl M. Loeb University Professor Emeritus, Harvard University; Visiting Professor of Law, Boston University. A.B., Harvard University, 1934; LL.B., 1937.

avoided the extremes of either judicial activism or judicial restraint, and thus kept the Constitution a living instrument relevant to a constantly changing society while also preserving the authority of the original document and constitutional traditions of the past.

I.

The framers had a remarkable capacity for saying enough but not too much. They devised a unique form of federation, blending unity and diversity. For the frame of the new federal government they looked to representative democracy and the separation of powers. Four years later they wrote down in the Bill of Rights our basic guarantees of individual liberty against government oppression.[1] The Civil War Amendments added a federal guarantee of "life, liberty, and property" against state interference in very general words and also proscribed state denials of "equal protection of the laws."[2] In all three areas the framers laid out essential principles, sometimes in very specific terms, but often in general, majestic phrases like "the freedom of speech,"[3] "due process of law,"[4] and "Commerce . . . among the several States"[5]—phrases that invoke historic ideals, fix limits, and give a sense of direction, yet leave important questions open for the future to decide. These phrases reflect principles to be particularized and questions upon which the framers could not agree and others which they could not foresee.

The questions left to the future by the framers fell to the courts, and ultimately to the Supreme Court, to decide whenever the questions arose in a justiciable case or controversy.[6] History leaves doubt as to how far this key disposition was the result of design, or of chance and the genius of John Marshall. At least some of the framers planned it that way. Alexander Hamilton in *The Federalist* No. 78 explained that constitutional limitations "can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."[7] Hamilton also foresaw that the courts, in exercising the power of judicial review, would be

1. U.S. CONST. amends. I-VIII.
2. *See* U.S. CONST. amend. XIV, § 1.
3. U.S. CONST. amend. I.
4. U.S. CONST. amends. V, XIV.
5. U.S. CONST. art. I, § 8, cl. 3.
6. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
7. THE FEDERALIST No. 78, at 228 (A. Hamilton) (R. Fairchild 2d ed. 1981).

"bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[8]

Here Hamilton, himself a lawyer, was undoubtedly referring to the traditional English common-law method of decision in which all early American lawyers and judges were trained. Courts, the theory ran, decide one case at a time. The decision becomes a binding precedent for every future case upon facts that are the same in all material respects as in the previous case. Future decisions should also be consistent with the reasoning supporting or logically necessary to support the first decision. Over time, therefore, the field once open to discretion was gradually narrowed, and the prospect of extrapolating a broader principle by the inductive method of science developed. The principle could then be applied by deductive reasoning to new particular instances.

Nevertheless, the rule that each case is to be decided upon its own facts and that precedents are binding only when the relevant facts are identical left room for change and growth. Later generations of judges could determine for themselves what had been critical among the facts in earlier cases. They could supply their own rationale for earlier decisions and take account of changes in societal conditions. The common law has thus experienced centuries of change and growth.

In constitutional adjudication the courts' initial guideposts were the words and purposes of the instrument. As decisions were rendered, they became precedents to be linked into a continuing body of law. As the country changed, more new questions arose concerning both individual rights and the distribution of power between the Nation and the states. The issues divided powerful interests. They aroused strong emotions. But with time and good fortune the Constitution had become the symbol of the traditions, the successes, and the ideals of the American people. By demonstrating that its judgments were indeed the authentic voice of a body of principles reaching back through the past to the sacred instrument, the Court, despite false starts and a few egregious blunders, was able down through the years to resolve the great, divisive constitutional issues in ways that commanded the assent of the country yet also met its current needs and aspirations. Continuity was preserved, but the continuity was creative.

I shall return to this theme and try to illustrate it further, but it

8. *Id.* at 233.

seems appropriate next to say a word about the storm of controversy that currently rages about the Court. Such storms have appeared throughout our history, but the current debate is as intense and raises as fundamental questions as any in history, excepting only the Jeffersonians' attack upon the entire power of judicial review and their effort to subject the Court to the Congress by impeachment.

II.

The varieties of current opinion concerning the proper role of the Supreme Court in constitutional interpretation can best be pictured by imagining two lines drawn horizontally from left to right across a piece of graph paper, each linking two magnetic poles, pulling Justices and observers in opposite directions.

One line marks the range of fundamental differences of temperament and philosophy that divide us all in greater or lesser degree throughout the whole realm of politics and government. The division is suggested by the loose terms "Conservative" at the right hand pole and "Liberal" at the left. The political liberals tend in varying degrees to see the proper role of all branches of government as the active promotion of human freedom and equality. Extending from the center towards the politically conservative pole are those who in varying degrees are attached to settled ways and institutions, who place great stress upon government authority to preserve security and order, but who insist that the proper role of government is confined to the preservation of public order, health, safety, and morality. The political conservatives leave opportunities for human development to individual initiative in the private sector, controlled only by the forces of a free market.

The second line on my graph paper runs between the two opposite poles of opinion concerning the proper institutional role of the Court and the process of constitutional interpretation.

One extreme views the Court as a political body actually and properly engaged in pursuing policy goals, even though somewhat limited by jurisdictional rules and by the tradition of cloaking judicial policymaking in the concepts of the legal profession. This is often described as an "activist" view of the judicial function. It can be said to "politicize" the process of constitutional interpretation. Especially noteworthy is that the judicial activists are not limited to political liberals. The strong political conservative may also be a strong judicial activist. The mark of the extreme judicial activist is the belief that law is only policy and that the judge should concen-

trate on building the good society according to the judge's own vision.

Extending toward the opposite pole on our institutional axis are those who are attracted in varying degrees to a limited view of the nature of the judicial process. Those compelled by this view, often called "judicial self-restraint," stress one or more of four considerations.

First, they highlight the values of representative self-government and majority rule—of government by consent of the governed—which require the Court, an oligarchical body, to proceed slowly in imposing its social, economic, or political views upon the country under vague constitutional phrases such as "due process" and "the equal protection of the laws."

Second, they point to the values of a federal system that provides for decentralized decisionmaking through state and local governments which require the Court, a national body, to proceed slowly in using vague constitutional phrases to set aside state laws or local ordinances in favor of national rules.

Third, proponents of judicial self-restraint assert that an accumulated body of wisdom expressed in the precedents and other sources of law, built up step by step by judges and constitutional custom, is a better guide to the wise resolution of constitutional questions than the individual views of one judge or even a majority of nine Justices.

Fourth, and most important, they assert the need to assure the effectiveness of the rulings of an institution charged with enforcing constitutional limitations against the popularly elected executive and legislative branches. Lacking power of the purse or the sword, the Court must rely upon the power of legitimacy—upon the capacity to evoke uncoerced assent and strong public support. How else could a President be forced to return the steel mills to their owners in response to a constitutional decision, as President Truman was required to do despite a Presidential seizure in time of war?[9] Only public support for the Court's decision forced President Nixon to abandon his defiance of a judicial subpoena for the Watergate tapes.[10]

The power of legitimacy has many springs. One source in the beginning was a link between law and divine command, or "natural law." Later, after experience under royal despots, came the practi-

---

9. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
10. *See* United States v. Nixon, 418 U.S. 683 (1974).

cal judgment that courts and law were the best safeguards against executive or legislative violations of liberty. Constitutional law has long drawn strength from traditional and evocative precepts that symbolize the historic struggles for freedom from government oppression: "Liberty under Law," for example, and "A government of laws, not of men." The link to the Constitution is important, perhaps because it suggests a delegated authority, but especially because it evokes an historic sense of the common and continuing ideals, the common success, and common purposes of the American people. But the essence of law is that it binds everyone. To command an uncoerced allegiance while lacking the sanction of majoritarianism, law must not only apply to all people equally—not just today but yesterday and tomorrow—but, above all, it must bind the judges as well as the judged.

On the extreme right along the second line on our graph paper fall those who see law as a static set of rules derived by logical deduction from the words and concepts found in precedents and secondary sources of law, paying scant attention to the underlying social and economic conditions.

To complete the picture one must imagine that the two axes on our graph paper lie close enough together for the fields of force to overlap. The judge or observer who is strongly attracted toward either the conservative or liberal pole on the political axis will be pulled back toward a more moderate net position if he also feels strongly attracted toward the pole of judicial restraint along the institutional axis. Conversely, the judge or observer who believes that law is chiefly policy that courts enforce and that the Supreme Court is, within its jurisdiction, essentially a political instrument, will feel relatively free to decide a case or to appraise a decision according to his or her place upon the political axis.

My own view of the proper role of the Supreme Court places me somewhat on the liberal side of the political axis, near the center of the institutional axis and, because of the importance I attribute to long-range institutional concerns, near the center on the whole. I can describe it best by quoting from my greater master, Judge Learned Hand. In speaking of Cardozo and the common-law judge's duty to find a decision in a continuing body of law, Judge Hand stressed the link between the judge's power to bind and the judge's adherence to law:

> His authority and immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal

> reputation and character can command, if it is . . . to stand against the passionate resentments arising out of the interests he must frustrate.[11]

Yet law cannot be static if it is to meet the needs of society. "[T]he customary law of English-speaking peoples stands," Judge Hand went on to say, "a structure indubitably made by the hands of generations of judges." A judge, he concluded, "must manage to escape both horns of this dilemma: he must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time."[12]

The final dilemma is much the same in constitutional adjudication even though the restraints upon the judge may be somewhat greater because the values of state autonomy and majority rule enter the balance. But I think that Judge Hand would agree that often—though not always—both branches of the antinomy can be served and the horns of the dilemma avoided by eschewing a woodenly logical reading of the written law, by looking behind the formal concepts to realities of the context and the underlying ideals and purposes, and by then applying the old ideals and purposes to new realities with a sensitive understanding of their human significance. The history of the Court and the Constitution illustrates the complex interplay of these forces.

III.

From 1789 until 1865, in dealing with the then critical questions concerning the nature of the new federal system, the Court saw its task as limited to interpretation of the words of a written document, but the style of interpretation, especially under Chief Justice Marshall, was active and creative. Both the text and the "intent" were interpreted broadly: "[W]e must never forget, that it is a *Constitution* we are expounding."[13] The honest search for the framers' purposes and their conscientious particularization in the case at hand limited the Justices, but, because the purposes were general and the framers were not wholly of one mind, the identification and particularization required the Justices to make conscious choices according to a vision of the country's needs and potential.[14] Yet the

11. Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 361 (1939).
12. *Id.*
13. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1816).
14. *See, e.g.*, Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (negative implications of the commerce clause); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)

vision was not the Court's alone. In expanding national power the Court was moving in step with the dominant trend in the political branches; therefore it rarely had need to face the institutional problem of majoritarianism. The single notable exception, the *Dred Scott* case,[15] has long been seen as a tragic judicial blunder into the political realm.

After 1870 America changed from a land of frontiersmen, farmers, small merchants, and artisans into an enormously complex, reticulated economy, largely industrialized, urbanized, and filled with aggregations of people and property carrying tremendous economic power. The regulatory and welfare state began to emerge in response to the pressure for government to redress imbalances of private power and thus protect the health, safety, and welfare, and so the liberty, of those unable to protect themselves in unremitting contests for economic power.

At first the Court asserted that the Constitution forbade the change, forbade not only federal regulation of the production and local distribution of goods[16] but also government interference, either state or federal, with the essentials of liberty of contract.[17] On the political line running from a strongly conservative political philosophy on the right to strong liberalism on the left, the decisions fell well on the conservative side.

The decisions are also often presented as examples of the dangers of judicial activism. In invalidating a federal income tax,[18] minimum wage laws,[19] price regulation,[20] and protection for union members,[21] the Court did indeed go far to impose uniform judge-made rules upon the country in place of determinations made by majorities of the people through representative government.

I am inclined to think, however, that the decisions of that era are better characterized as examples of the harm done by a highly verbal and conceptual, and therefore static, jurisprudence, pursued by Justices who did not understand the changes sweeping the country. The decisions denying Congress power under the commerce

(same); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1816) (implied powers of Congress).

15. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

16. *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895).

17. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905).

18. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

19. Adkins v. Children's Hosp., 261 U.S. 525 (1923).

20. Ribnick v. McBride, 277 U.S. 350 (1928).

21. Adair v. United States, 208 U.S. 161 (1908).

clause to regulate anything more than interstate transportation pursued a policy of "strict construction" by denying Congress power not plainly granted by the words of the Constitution and by adhering to the almost certain supposition of the framers that they had withheld from Congress the power to regulate "production" as they knew it and its effects upon the economy.[22] In fact, vast industrial changes had revolutionized both the meaning of production and its practical interstate consequences. Similarly, in protecting economic liberty and property the Court woodenly applied words and concepts that had long been parts of the American legal and political tradition without regard to the difference between their original context and the new economic realities. Liberty of contract in an artisan's negotiations with prospective employers in the cities and towns of 1800 had strikingly different practical, human significance than in an immigrant steelworker's negotiations with United States Steel Corporation a century later. The decisions failed to meet the country's needs because of unimaginative emphasis upon the verbal logic of the law stated in precedents at the expense of "some composition with the dominant trends of [the] time[s]."[23]

The reaction climaxed in 1937. The Court swung over to a period of judicial restraint marked by extreme deference to the political process and to the values of state and local autonomy. An act of Congress regulating local production or distribution would be held to exceed federal power only if it were demonstrated that the activities regulated could not rationally be found to affect interstate commerce even in their cumulative effect.[24] A state or federal law would be held to violate the due process clause only if the challengers demonstrated that the measure bore no rational relation to any reasonable view of the public interest.[25] In 1937 and for the next few years the pull of the liberal pole of the political axis reinforced the pull of forces counselling judicial conservatism in defining the role of the Court. The dominant political philosophy in the executive and legislative branches, and in the industrial states, was much more liberal than that of the judicial branch.

The years following World War II brought a realignment of forces. The multiplication and magnification of government activities increased sensitivity to threats to civil liberty. Humanitarianism,

---

22. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895).

23. Hand, *supra* note 11, at 361.

24. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

25. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 294 (1964).

aided by the prevailing teachings of the psychological and social sciences, cast doubt upon the sterner aspects of criminal law. A wave of egalitarianism flowed from the historic impulse of the American people, stirred by the war against Hitler's ideas of a "master race" and by the rise of the peoples of Asia and Africa. A wave of emancipation reflected wide dissatisfaction with social, moral, and legal constraints upon the individual. The Court became the branch of government in which the libertarian, egalitarian, and humanitarian impulses beat the strongest. In the new milieu the polar forces of liberal political philosophy and institutional restraint pulled in opposite directions, but the latter was weakening and the pull of judicial activism was growing stronger because more and more members of the legal profession, especially professors and law students, came to question the reality of the old ideal of law. The Justices began to assert with new vigor the Court's responsibility for protecting individual human liberties, including equality of opportunity and individual dignity.

Measured in institutional terms, the constitutional decisions of the Warren and early Burger Courts had five dominant characteristics.

First, often invoking the doctrine of "strict judicial scrutiny" instead of the permissive rationality test, the Court substituted judicial rules, resting upon judicially determined values, for the values determined and rules laid down by elected representatives of the people. The most dramatic examples are the reapportionment[26] and abortion cases,[27] but the same characteristic runs strongly in cases involving freedom of speech,[28] of association,[29] and of religion.[30]

Second, in protecting individual rights the Court repeatedly substituted national rules—said to be derived from the Constitution—in the place of state law and the decisions of local authorities such as school boards. The best examples are the cases enlarging the rights of the accused in state criminal prosecutions.[31]

Third, the decisions overruled precedents and made new law upon an extensive scale, and so were open to the charge that the

26. *See, e.g.*, Avery v. Midland County, 390 U.S. 474 (1968); Reynolds v. Sims, 377 U.S. 533 (1964).

27. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

28. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

29. *See, e.g.*, United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

30. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

31. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

Court was no longer deciding "according to law." The expansion of "freedom of speech,"[32] of "equal protection,"[33] and of the procedural rights of the accused in criminal cases[34] serve as examples.

Fourth, the Court encouraged constitutional litigation by easing access to the federal courts in constitutional cases[35] and also by loosening the rules determining whether, when, and upon whose complaint a court will decide a constitutional question.[36]

Fifth, and most important, the new decisions mandated major institutional changes not only in the administration of justice but in the larger society. In the past the Court had invoked the Constitution chiefly as an instrument of continuity. Decisions holding acts unconstitutional had done no more than uphold or block legislative or executive initiatives. From 1950 to 1974 the Court used the Constitution to mandate change, without legislative support. The desegregation cases reordered large regions of society.[37] The reapportionment cases upset ancient political arrangements.[38] The school prayer cases banished a practice familiar to generations of Americans.[39] The Constitution had been made into an affirmative instrument of massive reforms.

Effectuation of such reforms required the courts to enter decrees with many of the characteristics of legislation and which called for continuing administration. The school busing decrees are the best examples, but in many places federal judges have intervened to supervise large parts of the management of state prisons, mental health institutions, welfare programs, public housing, and even the cleaning up of environmental hazards.[40]

In the conservative political mood of the 1970s and 1980s, such active and expansive use of judicial power to mandate societal change was bound to arouse intense political and professional criti-

---

32. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

33. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

34. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

35. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965).

36. *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962).

37. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

38. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

39. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

40. This development is described in Cox, *The Effect of the Search for Equality upon Judicial Institutions*, 1979 WASH. L. REV. 795.

cism. Initially, *Brown v. Board of Education*[41] set off cries of "massive resistance."[42] Even today acceptance is not everywhere wholehearted. Busing to achieve school integration still faces strong opposition. Affirmative action is widely condemned. The school prayer cases[43] came as a shock, upsetting established ways. The emotional demand for returning an orthodox God to the classroom remains intense. *Roe v. Wade*[44] deeply offends religious and moral convictions. Expanded protection for persons accused of crime runs against a growing demand for law and order.

The ranks of the conservative policy-oriented critics have been greatly strengthened by institutional critics of excessive judicial activism. The conservatives on the political axis who might be judicial activists if they were in the saddle and the true advocates of strong judicial restraint can join hands in damning creative decisions of a liberal cast.

In my opinion, the decisions of the Warren and early Burger years, viewed as a whole, made ours a vastly more humane society, one freer, more equal, and more respectful of the human dignity of every individual—all very much in keeping with the main current of American history. I also think that, when taken by itself, each of the great decisions, except the abortion rulings, can be shown to have had adequate roots in our evolving constitutional tradition. Whether, taking the decisions as a whole, the Court endangered its legitimacy by swinging so far toward the activist pole of the institutional line on our graph paper so often seems to me to depend upon the success of the effort of the politically conservative right to control the future and undo a wide range of decisions by carefully tailoring appointments to the federal bench and then counting upon the new judges to reverse the course of constitutional law.

Before looking to the future, let me first explain why I think each of the great decisions, except the abortion cases, is, when viewed apart from the whole complex, consistent with a sound view of the nature of constitutional adjudication. The explanation may also throw some light upon the current debate over how far the Court is bound by the framers' "original intent."

---

41. 347 U.S. 483 (1954).

42. *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 496 n.2 (1979) (Rehnquist, J., dissenting) (discussing school desegregation).

43. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

44. 410 U.S. 113 (1973).

IV.

Loyalty to the "original intent" is obviously one of those links to the past that prevents a judge from roaming at large and gives authenticity to his decisions if the intent can be reliably ascertained. But before we can think intelligently about "original intent" or the "intent of the framers," we have to determine the meaning of these words.

Those who advocate interpreting the broad, open-ended phrases of the Constitution according to the "original intent" seem to me to be saying that the Court should confine the grants of federal power and the guarantees of individual rights to the particular instances that the framers specifically had in mind. A second meaning of "original intent" is at least possible. The very nature of the document and the use of general, majestic phrases requiring later particularization argue that the framers' intention embraced broader purposes, principles, or policies that a court may consciously search out and apply to particular questions which had been deliberately left open or were altogether unforeseen. The Court's pursuit of this second meaning of "original intent" through most of our history goes far to explain why the original document has served and still serves so well through two centuries of extraordinary change.

Consider a few examples. If we could ask the delegates to the Philadelphia Convention whether they had particularly intended to forbid electronic eavesdropping by government agents, their answer obviously would be, "No, we had never heard of electronic bugs." The framers were thinking only of physical trespasses. To give the fourth amendment only the literal scope of their conscious realization means that its guarantees against unreasonable searches and seizures give no protection against electronic bugging.[45] But if we look behind the specifics to the underlying purpose, surely the "original intent" was to guarantee the privacy of our papers and our conversations in our homes and offices against all warrantless governmental intrusions—not merely against government agents who break in and hide in the closet.[46]

---

45. *See* Olmstead v. United States, 277 U.S. 438, 459 (1928) (use of incriminating telephone conversation overheard by government officers using unauthorized wiretap as government evidence in criminal trial does not unconstitutionally compel the accused to produce private papers or to be a witness against himself).

46. *See* Katz v. United States, 389 U.S. 347, 353 (1967) (evidence obtained by use of an electronic recording device attached to the outside of a telephone booth from which criminal defendant was known to make calls violated privacy upon which defendant rea-

Desegregation furnishes a second example. No one has ever made a persuasive case for an affirmative answer to the question: "Did the Congress that recommended the fourteenth amendment and the state legislatures that ratified it consciously and specifically intend to abolish school segregation?" If this were the test, *Brown v. Board of Education*[47] is an instance of judicial usurpation. I submit, however, that one charged with applying the fourteenth amendment to a statute mandating school desegregation almost a century after its adoption should go on to ask what was the "intent" in the broad sense of purpose or policy, and he or she must then consider how that purpose applies to state-mandated racial segregation with the knowledge we have today and under the circumstances of the present time. The broad purpose was surely to secure for all individuals the same right to human dignity and equal standing before government regardless of race or color. And even if it were possible in earlier years to view state-mandated segregation upon common carriers as imposing no governmental stamp of inferiority upon black people,[48] that surely could not be said in 1954 of the system of official segregation then pervading the laws of many states. By those laws the states were denying equal treatment at the hands of government. In this proper sense the desegregation decisions were consistent with the original intent.

My view, in short, is that when the words are inconclusive, sound constitutional interpretation requires searching out the broad, underlying, and enduring purposes of the instrument and its framers, and then applying them to the modern particular with full understanding of the conditions of our times. Precedents should be applied or distinguished in like fashion. Decisions thus linked to the sacred instrument will carry the authority of the overshadowing past and usually will also meet the needs of our present times.

Of course, this is not the end of the problem. Ascertaining and defining the underlying purpose or policy with enough precision to decide concrete cases may require a kind of judicial choice illustrated by the decision two years ago holding Alabama's school prayer and moment of silence statute to be an unconstitutional law "respecting an establishment of religion" because it encouraged

---

sonably relied and constituted "search and seizure" within meaning of fourth amendment).

47. 347 U.S. 483 (1954).

48. *See* Plessy v. Ferguson, 163 U.S. 537, 543 (1896) (state statute requiring railway companies to provide, *inter alia*, separate, but equal, accommodations for blacks and whites not in conflict with thirteenth or fourteenth amendments).

prayer.[49] Chief Justice Rehnquist, then an Associate Justice, dissented upon the ground that the original intent of the establishment clause was not to require government neutrality between religion and irreligion. He took as authoritative evidence of that original intent Justice Story's assertion that "the real object of the Amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity by prostrating Christianity; but to exclude all rivalry among Christian sects."[50]

The key question seems to me to lie much deeper, although I accept Justice Story's statement as an accurate description of the framers' conscious thinking. In the America of the late eighteenth and early nineteenth centuries there was scant reason to choose between neutrality among Christian sects and total neutrality in the realm of spirit as between all beliefs, unbelief, and disbelief. Almost everyone was a Christian. Now the choice has become important. The world has broadened and the diversities of belief and nonbelief among the American people are many times greater than in the Western World of the eighteenth and nineteenth centuries. Today, we include many Jews, Buddhists, deists, members of the Ethical Culture Society and other humanistic groups, unbelievers, and disbelievers. All are members of the community. The key question concerning school prayer becomes whether the original framers, if brought before us today, would tell us to be guided in today's America by the verbal limits of Justice Story's exposition or would say that underlying their particular manifestations, and perhaps not fully appreciated by them because of the limits of their experience, lay the broader principle that government should not promote *any* religious orthodoxy, belief, or unbelief.

Recorded history will answer this question only for the literal-minded. The wise judge in keeping the Constitution a viable instrument suited to the needs of an ever-changing society will not often break away from the original purposes. In coming to understand the current application of their original meaning, however, he must bring to the process a sense of the circumstances and needs of both earlier and contemporary times. In the instance of the establishment clause the implications of the framers' theme seem to me, and have seemed to the Court, to be far broader than they do to Chief Justice Rehnquist. But I must admit—indeed emphasize—that my understanding, like the Court's decision, includes an element of

49. *See* Wallace v. Jaffree, 472 U.S. 38 (1985).

50. *Id.* at 2515 (quoting J. STORY, 2 COMMENTARIES ON THE CONSTITUTION 630-32 (5th ed. 1891)).

choice.[51]

From time to time the Warren and early Burger Courts pressed beyond the limits of the "original intent," even when that phrase is understood as I have defined it and the framers' expressions are interpreted in accordance with the circumstances of our times. Sometimes, but rarely, such decisions are commendable. The cases holding that sex discrimination violates the equal protection clause furnish an example.[52] Discrimination against women had been woven into the fabric of our laws and attitudes from the beginning. No matter how "original intent" is defined, no one can honestly say that the men who wrote the equal protection clause in 1869 "intended" to require the government and the law to treat men and women alike. The limits the framers put upon "equality" are as much a part of the "intent" as their affirmations. Nor can one argue with much conviction that laws discriminating against women had different effects in the 1960s and 1970s than they did in the prior century. Our ideas had changed, but the very most that one can do in order to relate the modern sex discrimination cases to history is to say that, despite contrary practices, the seed of equality of treatment for women had always been implicit in our historic ideals of human equality and dignity. This seed was waiting to flower, much like the seed of equality regardless of race or color, and the Court struck a responsive chord in the American people by pursuing the analogy even though it went contrary to precedent and the "original intent."

Similarly, even though I applaud the one person, one vote decisions,[53] it strikes me as intellectually dishonest to argue that they give effect to the authors' and the supporters' understanding of the equal protection clause, or even to their broad "purpose" however defined. But the Court did draw upon the past even as it reshaped the present. Beneath the familiar practices of unequal apportionment that the framers regarded as consistent with equal protection,

---

51. Judge Hand observed:

> Life overflows its moulds and the will outstrips its own universals. Men cannot know their own meaning until the variety of its manifestations is disclosed in its final impacts, and the full content of no design is grasped till it has got beyond its general formulation and become differentiated in its last incidence. It should be, and it may be, the function of the profession to manifest such purposes in their completeness if it can achieve the genuine loyalty which comes not from obedience, but from the according will, for interpretation is a mode of the will and understanding is a choice.

L. HAND, *The Speech of Justice*, in THE SPIRIT OF LIBERTY 18 (3d ed. 1974).

52. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

53. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

there had always run a deep current of essential political egalitarianism to which the Court gave further impulse by removing an old limitation. Justice Douglas made the point succinctly: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments, can mean only one thing—one person, one vote."[54]

In these most creative instances wise constitutional adjudication seems to me to draw its legitimacy from, and be limited by, a delicate symbiotic relation. The opinions shape the Nation's understanding of itself. They tell us what we are by reminding us of what we might be. But the aspirations voiced by the Court must be those that we the people are willing not only to avow, but in the end to live by. The legitimacy of the decision depends upon the accuracy of the Justices' perception of this kind of common will, a will outside themselves, and upon the Court's ability by expressing the perception to strike a responsive chord equivalent to the consent of the governed. To go further, to impose the Court's own wiser choice, is illegitimate.

V.

It is illegitimate too, I think, to break the limits of continuing constitutional traditions in this fashion very often, because breaks with continuity strain the very idea of law. For this reason, we have to ask in the end whether the Warren and early Burger Courts went too far, too fast, too often in shaping constitutional law to what a majority of the Justices supposed to be the needs of a just and humane society and, therefore, undermined the sources of their own legitimacy. I fear that they created grave risk, but in my judgment the outcome will depend upon whether the result of the counter-reform movement led by President Reagan and Attorney General Meese is that the people come to see the Court as just another political body or that they rightly continue to honor its decisions as made "according to law."

The threat of politicization comes from several directions, but perhaps most notably from the executive branch under President Reagan. In making judicial appointments the President, Attorney General Meese, and their aides present courts to the public as just another set of political bodies whose decisions depend wholly upon the political ideology of the judge. The rhetoric is even more dam-

54. Gray v. Sanders, 372 U.S. 368, 381 (1962).

aging. The Attorney General's lecture at Tulane University last October asserted: "The Court's decisions do not establish a 'supreme law of the land' but are binding only upon the parties."[55] The statement contains elements of technical accuracy, but the implication that all others, including tens of thousands of state and federal officials, are free to disregard the Court's decisions would, if followed, destroy our constitutionalism.

Presidents may take appointees' political and judicial philosophy into account in selecting judges, and many have done so, but none before seem to have gone as far in that direction as the present administration. Making or appearing to make appointments simply with an eye to obtaining a predictable vote on policy grounds tends to weaken public belief in "law," and also to make the actual style of decisionmaking still more political. Heightened public perception of the political quality of decisions would fuel demands for political appointments. The cycle would inevitably lead to pressure for the election of Justices and judges. After all, if key court decisions really are little different from the determinations of policy by other branches of government, why should not the voters elect the Justices and judges for terms of years?

The view of the Court presented to the people by the media also tends to politicize. Unfortunately, very few reporters understand or have the time or space to describe the complexity of the judicial process. The issues are almost always oversimplified. Outcomes are given political labels—liberal or conservative.

Whether constitutional adjudication is further politicized and the Court loses the power to act as James Madison's bulwark against legislative or executive oppression may ultimately depend upon the way the next set of Justices performs its function. The Warren and early Burger Courts, as I have said, swung pretty far toward the policymaking side. Chief Justice Rehnquist, Justices O'Connor and Scalia, and any other new Justices of a strongly conservative political bent, if they become a majority, will have to choose between institutional restraint and a form of judicial activism not very different from the activism of their immediate predecessors, albeit in pursuit of conservative rather than liberal policy goals. The affirmative action, campaign finance, and other scattered cases suggest that the Chief Justice, for one, can be a strong activist when his political con-

55. E. Meese, The Law of the Constitution 12-13 (Oct. 21, 1986) (lecture delivered at The Tulane University Citizen's Forum on the Bicentennial of the Constitution) (available at the *Maryland Law Review*).

victions are at stake.[56]

The necessity for choice will arise because the constitutional rights to which political conservatives object are now so much a part of the fabric of existing law that changing them would be making new law to suit policy preferences. *Roe v. Wade*,[57] the first of the abortion rulings, was decided in 1973. For fourteen years the decision has been followed and reaffirmed.[58] The first school prayer decision of the Supreme Court was handed down twenty-five years ago;[59] its roots go back to the 1940s.[60] The counter-reformists' major goals also include reducing the present constitutional protection for persons accused of crime. The decisions to which they object go back twenty or thirty years.[61] School desegregation, by busing if necessary, became the standard judicial remedy for unconstitutional school segregation in the 1960s. The Reagan administration's position on affirmative action has been partly rejected.[62] One school of thought on the right seeks to sweep away all the New Deal and other regulatory agencies whose members serve for fixed terms beyond the President's discretionary power of removal, on the ground that the Constitution bars Congress from delegating power to any official other than the President or other "officer of the United States" whom the President has discretion both to choose and remove. The constitutionality of denying the President discretionary power to remove the members of independent agencies to which Congress had delegated mixtures of quasi-legislative and quasi-judicial power was upheld as long ago as 1935,[63] and a large part of the business of the federal government has been regularly conducted upon this foundation.

The overruling of even the shortest of the lines of settled law—the abortion cases—could doubtless be absorbed. Some overruling of precedent is part of the constitutional tradition. The message

56. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985); Fullilove v. Klutznick, 448 U.S. 448 (1980).

57. 410 U.S. 113 (1973).

58. *See, e.g.*, Thornburgh v. American College of Obstetricians, 476 U.S. 747 (1986); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

59. Engel v. Vitale, 370 U.S. 421 (1962).

60. *See* McCollum v. Board of Educ., 333 U.S. 203 (1948) (use of public school building for religious teaching violates first amendment).

61. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

62. *See* Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986).

63. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

would become dangerously loud and clear, however, if the reversals spread. The example would go far to encourage a swing back to the law as it stands today if a second new majority should result from a second wave of new appointments, next time by a more liberal President. Constitutionalism as practiced in the past could not survive if, as a result of a succession of carefully chosen Presidential appointments, the sentiment of a majority of the Justices shifted back and forth at five- or ten-year intervals so that the rights to freedom of choice, freedom from state-mandated prayer, and the use of unconstitutionally seized evidence were alternately recognized and denied.

In the long run, I suppose, the future of our constitutionalism depends upon whether we, the people of the United States, continue to believe that men and women in power, including judges, should govern themselves by "law." By "law" I mean a set of established governing principles. They are not neutral—call them "values," "policies," or "standards," if you prefer. They have a separate existence and command an allegiance greater than that due any individual merely by virtue of office or personal prestige, however strong or wise. Nor are they static. The law, even as it honors the past, must reach for justice of a kind not measured by force, by the pressures of interest groups, nor even by votes, but only by what reason and a sense of justice say is right. The judge must strive to understand, not to impose his preferences.

In academic circles today, and perhaps throughout the legal profession, there is a strong tendency to decry the ideal of law as an independent force and to view the judges simply as the makers and remakers of social policy. It is tempting to poke fun at the notion of law as a "brooding omnipresence in the sky."[64] It is easy to demonstrate that the law books that guide them have always left judges important opportunities for choice and that judges change the law from time to time, not only superficially as when new conditions require the formal restatement of an old rule, but fundamentally in keeping with changes as the ideals of the society develop.

Perhaps, the philosophy calling itself "realism" will prevail, but in my view the easy and convincing proof that the Court can, does, and should sometimes make law in constitutional adjudication falls short of demonstrating that the Justices are in nowise bound by law. Proof that resort to the words of the Constitution sometimes provides scant guidance fails to demonstrate that the Justices are free to

64. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J.).

interpolate whatever they will. Similarly, judges can feel, and therefore be, limited by an ever-constant, ever-changing body of law even though there is room for choice. The task calls for judgments of balance and degree mindful of both branches of the basic antinomy. That the basic antinomy, the tension between continuity and creativity, cannot be resolved nor the balance struck with certainty does not disprove the value of the effort. Dedicated pursuit of an ideal is a legitimating reality, even though the reach exceeds the grasp, provided that the people know that the effort is undertaken. And the value of the ideal is not diminished by acknowledging that its conscientious pursuit serves the utilitarian function of giving legitimacy to constitutional decisions.

VI.

The final answer to the question—"Why has the Constitution, written 200 years ago, served so long so well?"—lies in the character of the American people. Idealistic yet pragmatic, they had from the beginning what the Scottish-born philosopher Alfred North Whitehead described as a "spirit of toleration and cooperation" unique in human history. That spirit was surely a necessity of life on the frontier, but tolerance and the will to cooperate also flowed from a larger belief in the continuing value of the great American adventure—despite its faults, despite our selfishness, and despite our dim perception of the goal. For me, belief in the value of the enterprise is an article of faith. Whether enough of us still have enough belief in the worthwhileness of our common fate for the spirit of tolerance and cooperation to prevail and whether we share sufficient common ideals including belief in the rule of law with sufficient confidence will determine the survival of constitutionalism.