cannot be jammed into my hypothesis without creating essentially spurious epicycles. However, I am not trying to establish a monistic theory of judicial action; group action, like that of individuals, is motivated by many factors, some often contradictory, and my objective is to elucidate what seems to be one tradition of judicial motivation. In short, judicial self-restraint and judicial power seem to be opposite sides of the same coin: it has been by judicious application of the former that the latter has been maintained. A tradition beginning with Marshall's *coup* in *Marbury* v. *Madison* and running through *Mississippi* v. *Johnson* and *Ex Parte Vallandigham* to *Dennis* v. *United States* suggests that the Court's power has been maintained by a wise refusal to employ it in unequal combat.

❖❖ Judicial Decision Making

Judicial decision making is not quasi-scientific, always based clearly upon legal principles and precedent, with the judges set apart from the political process. The interpretation of law, whether constitutional or statutory, involves a large amount of discretion. The majority of the Court can always read its opinion into law if it so chooses.

Justice William J. Brennan, Jr., a former member of the Supreme Court, discusses below the general role of the Court and the procedures it follows in decision making.

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William J. Brennan, Jr.
HOW THE SUPREME COURT ARRIVES AT DECISIONS

Throughout its history the Supreme Court has been called upon to face many of the dominant social, political, economic and even philosophical issues that confront the nation. But Solicitor General Cox only recently reminded us that this does not mean that the Court is charged with making social, political, economic or philosophical decisions.

Quite the contrary, the Court is not a council of Platonic guardians for deciding our most difficult and emotional questions according to the Justices' own

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notions of what is just or wise or politic. To the extent that this is a government function at all, it is the function of the people's elected representatives.

The Justices are charged with deciding according to law. Because the issues arise in the framework of concrete litigation they must be decided on facts embalmed in a record made by some lower court or administrative agency. And while the Justices may and do consult history and the other disciplines as aids to constitutional decisions, the text of the Constitution and relevant precedents dealing with that text are their primary tools.

It is indeed true, as Judge Learned Hand once said, that the judge's authority

> depends 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 do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate—he must preserve his authority by cloaking himself in the majesty of an over-shadowing past, but he must discover some composition with the dominant trends of his times.

ANSWERS UNCLEAR

However, we must keep in mind that, while the words of the Constitution are binding, their application to specific problems is not often easy. The Founding Fathers knew better than to pin down their descendants too closely.

Enduring principles rather than petty details were what they sought.

Thus the Constitution does not take the form of a litany of specifics. There are, therefore, very few cases where the constitutional answers are clear, all one way or all the other, and this is also true of the current cases raising conflicts between the individual and governmental power—an area increasingly requiring the Court's attention.

Ultimately, of course, the Court must resolve the conflicts of competing interests in these cases, but all Americans should keep in mind how intense and troubling these conflicts can be.

Where one man claims a right to speak and the other man claims the right to be protected from abusive or dangerously provocative remarks the conflict is inescapable.

Where the police have ample external evidence of a man's guilt, but to be sure of their case put into evidence a confession obtained through coercion, the conflict arises between his right to a fair prosecution and society's right to protection against his depravity.

Where the orthodox Jew wishes to open his shop and do business on the day which non-Jews have chosen, and the Legislature has sanctioned, as a day of rest, the Court cannot escape a difficult problem of reconciling opposed interests.

Finally, the claims of the Negro citizen, to borrow Solicitor General Cox's words, present a "conflict between the ideal of liberty and equality expressed in the Declaration of Independence, on the one hand, and, on the other hand, a way of life rooted in the customs of many of our people."

SOCIETY IS DISTURBED

If all segments of our society can be made to appreciate that there are such conflicts, and that cases which involve constitutional rights often require difficult choices, if this alone is accomplished, we will have immeasurably enriched our common understanding of the meaning and significance of our freedoms. And we will have a better appreciation of the Court's function and its difficulties.

How conflicts such as these ought to be resolved constantly troubles our whole society. There should be no surprise, then, that how properly to resolve them often produces sharp division within the Court itself. When problems are so fundamental, the claims of the competing interests are often nicely balanced, and close divisions are almost inevitable.

Supreme Court cases are usually one of three kinds: the "original" action brought directly in the Court by one state against another state or states, or between a state or states and the federal government. Only a handful of such cases arise each year, but they are an important handful.

A recent example was the contest between Arizona and California over the waters of the lower basin of the Colorado River. Another was the contest between the federal government and the newest state of Hawaii over the ownership of lands in Hawaii.

The second kind of case seeks review of the decisions of a federal Court of Appeals—there are eleven such courts—or of a decision of a federal District Court—there is a federal District Court in each of the fifty states.

The third kind of case comes from a state court—the Court may review a state court judgment by the highest court of any of the fifty states, if the judgment rests on the decision of a federal question.

When I came to the Court seven years ago the aggregate of the cases in the three classes was 1,600. In the term just completed there were 2,800, an increase of 75 percent in seven years. Obviously, the volume will have doubled before I complete ten years of service.

How is it possible to manage such a huge volume of cases? The answer is that we have the authority to screen them and select for argument and decision only those which, in our judgment, guided by pertinent criteria, raise the most important and far-reaching questions. By that device we select annually around 6 percent—between 150 and 170 cases—for decision.

PETITION AND RESPONSE

That screening process works like this: when nine Justices sit, it takes five to decide a case on the merits. But it takes only the votes of four of the nine to put a case on the argument calendar for argument and decision. Those four voters are hard to come by—only an exceptional case raising a significant federal question commands them.

Each application for review is usually in the form of a short petition, attached to which are any opinions of the lower courts in the case. The adversary may file

a response—also, in practice usually short. Both the petition and response identify the federal questions allegedly involved, argue their substantiality, and whether they were properly raised in the lower courts.

Each Justice receives copies of the petition and response and such parts of the record as the parties may submit. Each Justice then, without any consultation at this stage with the others, reaches his own tentative conclusion whether the application should be granted or denied.

The first consultation about the case comes at the Court conference at which the case is listed on the agenda for discussion. We sit in conference almost every Friday during the term. Conferences begin at ten in the morning and often continue until six, except for a half-hour recess for lunch.

Only the Justices are present. There are no law clerks, no stenographers, no secretaries, no pages—just the nine of us. The junior Justice acts as guardian of the door, receiving and delivering any messages that come in or go from the conference.

ORDER OF SEATING

The conference room is a beautifully oak-paneled chamber with one side lined with books from floor to ceiling. Over the mantel of the exquisite marble fireplace at one end hangs the only adornment in the chamber—a portrait of Chief Justice John Marshall. In the middle of the room stands a rectangular table, not too large but large enough for the nine of us comfortably to gather around it.

The Chief Justice sits at the south end and Mr. Justice Black, the senior Associate Justice, at the north end. Along the side to the left of the Chief Justice sit Justices Stewart, Goldberg, White and Harlan. On the right side sit Justice Clark, myself and Justice Douglas in that order.

We are summoned to conference by a buzzer which rings in our several chambers five minutes before the hour. Upon entering the conference room each of us shakes hands with his colleagues. The handshake tradition originated when Chief Justice Fuller presided many decades ago. It is a symbol that harmony of aims if not of views is the Court's guiding principle.

Each of us has his copy of the agenda of the day's cases before him. The agenda lists the cases applying for review. Each of us before coming to the conference has noted on his copy his tentative view whether or not review should be granted in each case.

The Chief Justice begins the discussion of each case. He then yields to the senior Associate Justice and discussion proceeds down the line in order of seniority until each Justice has spoken.

Voting goes the other way. The junior Justice votes first and voting then proceeds up the line to the Chief Justice, who votes last.

Each of us has a docket containing a sheet for each case with appropriate places for recording the votes. When any case receives four votes for review, that case is transferred to the oral argument list. Applications in which none of us sees merits may be passed over without discussion.

Now how do we process the decisions we agree to review?

There are rare occasions when the question is so clearly controlled by an earlier decision of the Court that a reversal of the lower court judgment is inevitable. In these rare instances we may summarily reverse without oral argument.

EACH SIDE GETS HOUR

The case must very clearly justify summary disposition, however, because our ordinary practice is not to reverse a decision without oral argument. Indeed, oral argument of cases taken for review, whether from the state or federal courts, is the usual practice. We rarely accept submissions of cases on briefs.

Oral argument ordinarily occurs about four months after the application for review is granted. Each party is usually allowed one hour, but in recent years we have limited oral argument to a half-hour in cases thought to involve issues not requiring longer arguments.

Counsel submit their briefs and record in sufficient time for the distribution of one set to each Justice two or three weeks before the oral argument. Most of the members of the present Court follow the practice of reading the briefs before the argument. Some of us often have a bench memorandum prepared before the argument. This memorandum digests the facts and the arguments of both sides, highlighting the matters about which we may want to question counsel at the argument.

Often I have independent research done in advance of argument and incorporate the results in the bench memorandum.

We follow a schedule of two weeks of argument from Monday through Thursday, followed by two weeks of recess for opinion writing and the study of petitions for review. The argued cases are listed on the conference agenda on the Friday following argument. Conference discussions follow the same procedure I have described for the discussions of certiorari petitions.

OPINION ASSIGNED

Of course, it is much more extended. Not infrequently discussion of particular cases may be spread over two or more conferences.

Not until the discussion is completed and a vote taken is the opinion assigned. The assignment is not made at the conference but formally in writing some few days after the conference.

The Chief Justice assigns the opinions in those cases in which he has voted with the majority. The senior Associate Justice voting with the majority assigns the opinion in the other cases. The dissenters agree among themselves who shall write the dissenting opinion. Of course, each Justice is free to write his own opinion, concurring or dissenting.

The writing of an opinion always takes weeks and sometimes months. The most painstaking research and care are involved.

Research, of course, concentrates on relevant legal materials—precedents particularly. But Supreme Court cases often require some familiarity with history, economics, the social and other sciences, and authorities in these areas, too, are consulted when necessary.

When the author of an opinion feels he has an unanswerable document he sends it to a print shop, which we maintain in our building. The printed draft may be revised several times before his proposed opinion is circulated among the other Justices. Copies are sent to each member of the Court, those in the dissent as well as those in the majority.

SOME CHANGE MINDS

Now the author often discovers that his work has only begun. He receives a return, ordinarily in writing, from each Justice who voted with him and sometimes also from the Justices who voted the other way. He learns who will write the dissent if one is to be written. But his particular concern is whether those who voted with him are still of his view and what they have to say about his proposed opinion.

Often some who voted with him at conference will advise that they reserve final judgment pending the circulation of the dissent. It is a common experience that dissents change votes, even enough votes to become the majority.

I have had to convert more than one of my proposed majority opinions into a dissent before the final decision was announced. I have also, however, had the more satisfying experience of rewriting a dissent as a majority opinion for the Court.

Before everyone has finally made up his mind a constant interchange by memoranda, by telephone, at the lunch table continues while we hammer out the final form of the opinion. I had one case during the past term in which I circulated ten printed drafts before one was approved as the Court opinion.

UNIFORM RULE

The point of this procedure is that each Justice, unless he disqualifies himself in a particular case, passes on every piece of business coming to the Court. The Court does not function by means of committees or panels. Each Justice passes on each petition, each time, no matter how drawn, in long hand, by typewriter, or on a press. Our Constitution vests the judicial power in only one Supreme Court. This does not permit Supreme Court action by committees, panels, or sections.

The method that the Justices use in meeting an enormous caseload varies. There is one uniform rule: Judging is not delegated. Each Justice studies each case in sufficient detail to resolve the question for himself. In a very real sense, each decision is an individual decision of every Justice.

The process can be a lonely, troubling experience for fallible human beings conscious that their best may not be adequate to the challenge.

"We are not unaware," the late Justice Jackson said, "that we are not final because we are infallible; we know that we are infallible only because we are final."

One does not forget how much may depend on his decision. He knows that usually more than the litigants may be affected, that the course of vital social, economic and political currents may be directed.

This then is the decisional process in the Supreme Court. It is not without its tensions, of course—indeed, quite agonizing tensions at times.

I would particularly emphasize that, unlike the case of a Congressional or White House decision, Americans demand of their Supreme Court judges that they produce a written opinion, the collective expression of the judges subscribing to it, setting forth the reason which led them to the decision.

These opinions are the exposition, not just to lawyers, legal scholars and other judges, but to our whole society, of the bases upon which a particular result rests—why a problem, looked at as disinterestedly and dispassionately as nine human beings trained in a tradition of the disinterested and dispassionate approach can look at it, is answered as it is.

It is inevitable, however, that Supreme Court decisions—and the Justices themselves—should be caught up in public debate and be the subjects of bitter controversy.

An editorial in *The Washington Post* did not miss the mark by much in saying that this was so because

> one of the primary functions of the Supreme Court is to keep the people of the country from doing what they would like to do—at times when what they would like to do runs counter to the Constitution. . . . The function of the Supreme Court is not to count constituents; it is to interpret a fundamental charter which imposes restraints on constituents. Independence and integrity, not popularity, must be its standards.

FREUND'S VIEW

Certainly controversy over its work has attended the Court throughout its history. As Professor Paul A. Freund of Harvard remarked, this has been true almost since the Court's first decision:

> When the Court held, in 1793, that the state of Georgia could be sued on a contract in the federal courts, the outraged Assembly of that state passed a bill declaring that any federal marshal who should try to collect the judgment would be guilty of a felony and would suffer death, without benefit of clergy, by being hanged. When the Court decided that state criminal convictions could be reviewed in the Supreme Court, Chief Justice Roane of Virginia exploded, calling it a "most monstrous and unexampled decision. It can only be accounted for by that love of power which history informs us infects and corrupts all who possess it, and from which even the eminent and upright judges are not exempt."

But public understanding has not always been lacking in the past. Perhaps it exists today. But surely a more informed knowledge of the decisional process should aid a better understanding.

It is not agreement with the court's decisions that I urge. Our law is the richer

and the wiser because academic and informed lay criticism is part of the stream of development.

CONSENSUS NEEDED

It is only a greater awareness of the nature and limits of the Supreme Court's function that I seek.

The ultimate resolution of questions fundamental to the whole community must be based on a common consensus of understanding of the unique responsibility assigned to the Supreme Court in our society.

The lack of that understanding led Mr. Justice Holmes to say fifty years ago:

> We are very quiet there, but it is the quiet of a storm center, as we all know. Science has taught the world skepticism and has made it legitimate to put everything to the test of proof. Many beautiful and noble reverences are impaired, but in these days no one can complain if any institution, system, or belief is called on to justify its continuance in life. Of course we are not excepted and have not escaped.

PAINFUL ACCUSATION

> Doubts are expressed that go to our very being. Not only are we told that when Marshall pronounced an Act of Congress unconstitutional he usurped a power that the Constitution did not give, but we are told that we are the representatives of a class—a tool of the money power.
>
> I get letters, not always anonymous, intimating that we are corrupt. Well, gentlemen, I admit that it makes my heart ache. It is very painful, when one spends all the energies of one's soul in trying to do good work, with no thought but that of solving a problem according to the rules by which one is bound, to know that many see sinister motives and would be glad of evidence that one was consciously bad.
>
> But we must take such things philosophically and try to see what we can learn from hatred and distrust and whether behind them there may not be a germ of inarticulate truth.
>
> The attacks upon the Court are merely an expression of the unrest that seems to wonder vaguely whether law and order pay. When the ignorant are taught to doubt they do not know what they safely may believe. And it seems to me that at this time we need education in the obvious more than investigation of the obscure.

❖❖ Interpreting the Constitution

Justice William J. Brennan, Jr., in his discussion of how the Supreme Court arrives at decisions in the preceding selection, points out that inevitably Supreme Court decisions and the justices are the subjects of public debate and often bitter controversy. It is not surprising that when Supreme Court

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The Framers and Original Intent

Leonard W. Levy

The Constitution is essentially silent regarding how and by whom it should be interpreted. This is no mere academic matter; such review is central to any useful understanding of the Constitution. The framers did develop a means for amending the Constitution, but this was an exceptional event; only sixteen amendments have been accepted since the original Bill of Rights of 1790. The 1803 case of *Marbury* v. *Madison* (Selection 13.2) decided the issue of whether the Supreme Court could declare a law unconstitutional, but the question of what criteria are appropriate in interpreting the Constitution remains unanswered.

Various scholars and judges, mostly judicial conservatives, have argued that the Court should not go past the "original intent" of the framers in its interpretation. To do otherwise would be to place the Court in a political role that the framers sought to avoid. Leonard Levy argues to the contrary: that the framers did not agree on intent and did not want their discussions to be used in subsequent interpretations. In addition, emerging issues and new solutions would make reliance on intent a relatively useless basis for rendering judicial decisions for a government that was destined to be still going strong two centuries after its inception.

James Madison, Father of the Constitution and of the Bill of Rights, rejected the doctrine that the original intent of those who framed the Constitution should be accepted as an authoritative guide to its meaning. "As a guide in expounding and applying the provisions of the Constitution," he wrote in a well-considered and consistent judgment, "the debates and incidental decisions of the Convention can have no authoritative character." The fact that Madison, the quintessential Founder, discredited original intent is probably the main reason that he refused throughout his life to publish his "Notes of Debates in the Federal Convention," incomparably our foremost source for the secret discussions of that hot summer in Philadelphia in 1787.

We tend to forget the astounding fact that Madison's Notes were first published in 1840, fifty-three years after the Constitutional Convention had met. That

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period included the beginnings of the Supreme Court plus five years beyond the entire tenure of John Marshall as Chief Justice. Thus, throughout the formative period of our national history, the High Court, presidents, and Congress construed the Constitution without benefit of a record of the Convention's deliberations. Indeed, even the skeletal Journal of the Convention was not published until 1819. Congress could have authorized its publication anytime after President George Washington, who had presided at the 1787 Convention, deposited it at the State Department in 1796. Although the Journal merely revealed motions and votes, it would have assisted public understanding of the secret proceedings of the Convention, no records of which existed, other than the few spotty and jaundiced accounts by Convention members who opposed ratification. The Convention had, after all, been an assembly in which "America," as George Mason of Virginia said, had "drawn forth her first characters," and even Patrick Henry conceded that the Convention consisted of "the greatest, the best, and most enlightened of our citizens." Thomas Jefferson, in Paris, referred to the "assembly of demigods." The failure of the Framers to have officially preserved and published their proceedings seems inexplicable, especially in a nation that promptly turned matters of state into questions of constitutional law; but then, the Framers seem to have thought that "the original understanding at Philadelphia," which Chief Justice William H. Rehnquist has alleged to be of prime importance, did not greatly matter. What mattered to them was the text of the Constitution, construed in light of conventional rules of interpretation, the ratification debates, and other contemporary expositions.

If the Framers, who met in executive sessions every day of their nearly four months of work, had wanted their country and posterity to construe the Constitution in the light of their deliberations, they would have had a stenographer present to keep an official record, and they would have published it. They would not have left the task of preserving their debates to the initiative of one of their members who retained control of his work and a proprietary interest in it. "Nearly a half century" after the convention, Madison wrote a preface to his Notes in which he explained why he had made the record. He had determined to preserve to the best of his ability "an exact account of what might pass in the Convention," because the record would be of value "for the History of a Constitution on which would be staked the happiness of a young people great even in its infancy, and possibly the cause of Liberty throughout the world." That seems to have been a compelling reason for publication as soon as possible, not posthumously—and Madison outlived all the members of the Convention. . . .

A constitutional jurisprudence* of original intent is insupportable for reasons other than the fact that the records of the framing and ratification of both the Constitution and the Bill of Rights are inadequate because they are incomplete and inaccurate. Original intent also fails as a concept that can decide real cases.

* *Jurisprudence* is a system or body of law.

Original intent is an unreliable concept because it assumes the existence of one intent on a particular issue such as the meaning of executive powers or of the necessary and proper clause, the scope of the commerce clause, or the definition of the obligation of contracts. The entity we call "the Framers" did not have a collective mind, think in one groove, or possess the same convictions.

In fact, they disagreed on many crucial matters, such as the question whether they meant Congress to have the power to charter a bank. In 1789 Hamilton and Washington thought Congress had that power, but Madison and Randolph believed that it did not. Although the Journal of the Convention, except as read by Hamilton, supports Madison's view, all senators who had been at the Convention upheld the power, and Madison later changed his mind about the constitutionality of a bank. Clearly the Convention's "intent" on this matter lacks clarity; revelation is hard to come by when the Framers squabbled about what they meant. They often did, as political controversies during the first score of years under the Constitution revealed.

Sometimes Framers who voted the same way held contradictory opinions on the meaning of a particular clause. Each believed that his understanding constituted the truth of the matter. James Wilson, for example, believed that the ex post facto clause extended to civil matters, while John Dickinson held the view that it applied only to criminal cases, and both voted for the clause. George Mason opposed the same clause because he wanted the states to be free to enact ex post facto laws in civil cases, and he believed that the clause was not clearly confined to criminal cases; but Elbridge Gerry, who wanted to impose on the states a prohibition against retroactive civil legislation, opposed the clause because he thought it seemed limited to criminal cases. William Paterson changed his mind about the scope of the ex post facto clause. Seeking original intent in the opinions of the Framers is seeking a unanimity that did not exist on complex and divisive issues contested by strong-minded men. Madison was right when he spoke of the difficulty of verifying the intention of the Convention.

A serious problem even exists as to the identity of the Framers and as to the question whether the opinions of all are of equal importance in the determination of original intent. Who, indeed, were the Framers? Were they the fifty-five who were delegates at Philadelphia or only the thirty-nine who signed? If fathoming original intent is the objective, should we not also be concerned about the opinions of those who ratified the Constitution, giving it legitimacy? About 1,600 men attended the various state ratifying conventions, for which the surviving records are so inadequate. No way exists to determine their intent as a guide for judicial decisions; we surely cannot fathom the intent of the members of eight states for which no state convention records exist. The deficiencies of the records of the other five permit few confident conclusions and no basis for believing that a group mind can be located. Understanding ratifier intent is impossible except on the broadest kind of question: Did the people of the states favor scrapping the Articles of Confederation and favor, instead, the stronger Union proposed by the Constitution? Even as to that question, the evidence,

which does not exist for a majority of the states, is unsatisfactorily incomplete, and it allows only rough estimates of the answers to questions concerning popular understanding of the meaning of specific clauses of the Constitution. . . .

A Constitutional Jurisprudence of Original Intent?

A constitutional jurisprudence of original intent would be as viable and sound as Mr. Dooley's understanding of it. Mr. Dooley, Finley Peter Dunne's philosophical Irish bartender, believed that original intent was "what some dead Englishman thought Thomas Jefferson was goin' to mean whin he wrote th' Constitution." Acceptance of original intent as the foundation of constitutional interpretation is unrealistic beyond belief. It obligates us, even if we could grasp that intent, to interpret the Constitution in the way the Framers did in the context of conditions that existed in their time. Those conditions for the most part no longer exist and cannot be recalled with the historical arts and limited time available to the Supreme Court. Anyway, the Court resorts to history for a quick fix, a substantiation, a confirmation, an illustration, or a grace note; it does not really look for the historical conditions and meanings of a time long gone in order to determine the evidence that will persuade it to decide a case in one way rather than another. The Court, moreover, cannot engage in the sort of sustained historical analysis that takes professional historians some years to accomplish. In any case, for many reasons already described, concerning the inadequacies of the historical record and the fact that we cannot in most instances find a collective mind of the Framers, original intent analysis is not really possible, however desirable.

We must keep reminding ourselves that the most outspoken Framers disagreed with each other and did not necessarily reflect the opinions of the many who did not enter the debates. A point that Justice Rufus Peckham made for the Court in an 1897 case about legislative intent carries force with respect to the original intent of the Constitutional Convention. In reference to the difficulty of understanding an act by analyzing the speeches of the members of the body that passed it, Peckham remarked: "Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed." We must keep reminding ourselves, too, that the country was deeply divided during the ratification controversy. And we must keep reminding ourselves that the Framers who remained active in national politics divided intensely on one constitutional issue after another—the removal power, the power to charter a corporation, the power to declare neutrality, the executive power, the power to enact excise and use taxes without apportioning them on population, the power of a treaty to obligate the House of Representatives, the power of judicial review, the power to deport aliens, the power to pass an act against seditious libel, the power of the federal courts to decide on federal common law grounds, the power

to abolish judicial offices of life tenure, and the jurisdiction of the Supreme Court to decide suits against states without their consent or to issue writs of mandamus against executive officers. This list is not exhaustive; it is a point of departure. The Framers, who did not agree on their own constitutional issues, would not likely speak to us about ours with a single loud, clear voice. . . .

Conclusions

Fifty years ago, in his fine study of how the Supreme Court used original intent (not what the Framers and ratifiers believed), Jacobus tenBroek asserted, rightly, that "the intent theory," as he called it, "inverts the judicial process." It described decisions of the Court as having been reached as a result of a judicial search for Framers' intent, "whereas, in fact, the intent discovered by the Court is most likely to be determined by the conclusion that the Court wishes to reach." Original intent analysis involves what tenBroek called "fundamental misconceptions of the nature of the judicial process." It makes the judge "a mindless robot whose task is the utterly mechanical function" of using original intent as a measure of constitutionality. In the entire history of the Supreme Court, as tenBroek should have added, no Justice employing the intent theory has ever written a convincing and reliable study. Lawyers making a historical point will cite a Court opinion as proof, but no competent historian would do that. He knows that judges cannot do their own research or do the right kind of research and that they turn to history to prove some point they have in mind. To paraphrase tenBroek, Justices mistakenly use original intent theory to depict a nearly fixed Constitution, to give the misleading impression that they have decided an issue of constitutionality by finding original intent, and to make a constitutional issue merely a historical question. The entire theory, tenBroek asserted, "falsely describes what the Court actually does," and it "hypothesizes a mathematically exact technique of discovery and a practically inescapable conclusion." That all added up, said tenBroek, to "judicial hokum."

If we could ascertain original intent, one may add, cases would not arise concerning that intent. They arise because the intent is and likely will remain uncertain; they arise because the Framers either had no discernible intent to govern the issue or their intent cannot control it because the problem before the Court would have been so alien to the Framers that only the spirit of some principle implied by them can be of assistance. The Framers were certainly vaguer on powers than on structure and vaguer still on rights.

If, as Robert H. Bork* noticed, people rarely raise questions about original intent on issues involving powers or structure, the reason is likely that the

* Robert H. Bork was a U.S. Court of Appeals judge who was nominated by President Reagan for a Supreme Court appointment in 1987. After a bruising struggle, the Senate refused to confirm his nomination.

Constitution provides the answer, or it has been settled conclusively by the Court, making inquiry futile or unnecessary. For example, the question of constitutional powers to regulate the economy has overwhelmingly been put beyond question by the 1937 "constitutional revolution, limited," in Edward S. Corwin's phrase. Not even the most conservative Justices on today's Court question the constitutionality of government controls. Congress has the constitutional authority under Court decisions to initiate a socialist economy; political restraints, not constitutional ones, prevent that. There are no longer any serious limits on the commerce powers of Congress. The government can take apart the greatest corporations, like Ma Bell; if it does not proceed against them, the reason is to be found in national defense needs and in politics, not in the Constitution.

The states are supplicants before the United States government, beneficiaries of its largesse like so many welfare recipients, unable to control their own policies, serving instead as administrative agencies of federal policies. Those federal policies extend to realms not remotely within the federal power to govern under the Constitution, except for the fact that the spending power, so called, the power to spend for national defense and general welfare can be exercised through programs of grants-in-aid to states and to over 75,000 substate governmental entities; they take federal tax money and obediently enforce the conditions laid down by Congress and by federal agencies for control of the expenditures. Federalism as we knew it has been replaced by a new federalism that even conservative Republican administrations enforce. The government today makes the New Deal look like a backer of Adam Smith's legendary free enterprise and a respecter of John C. Calhoun's state sovereignty.

Even conservative Justices on the Supreme Court accept the new order of things. William H. Rehnquist spoke for the Court in *PruneYard*, Sandra Day O'Connor in *Hawaii Housing Authority*, and the Court was unanimous in both. In the first of these cases, decided in 1980, the Court held that a state does not violate the property rights of a shopping center owner by authorizing the solicitation of petitions in places of business open to the public. Rehnquist, finding a reasonable police power regulation of private property, asserted that the public right to regulate the use of property is as fundamental as the right to property itself. One might have thought that as a matter of constitutional theory and of original intent, the property right was fundamental and the regulatory power was an exception to it that had to be justified. Rehnquist did not explain why the regulation was justifiable or reasonable; under its rational basis test the Court has no obligation to explain anything. It need merely believe that the legislature had some rational basis for its regulation. . . .

The Constitution of the United States is our national covenant, and the Supreme Court is its special keeper. The Constitution's power of survival derives in part from the fact that it incorporates and symbolizes the political values of a free people. It creates a representative, responsible government empowered to serve the great objectives specified in the Preamble, while at the same time it keeps government bitted and bridled. Through the Bill of Rights and the great

Reconstruction amendments, the Constitution requires that the government respect the freedom of its citizens, whom it must treat fairly. Courts supervise the process, and the Supreme Court is the final tribunal. "The great ideals of liberty and equality," wrote Justice Benjamin N. Cardozo, "are preserved against the assaults of opportunism, the expediency of the passing hour, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders." Similarly, Justice Hugo L. Black once wrote for the Court, "Under our constitutional system, courts stand against any winds that blow, as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement."

The Court should have no choice but to err on the side of the constitutional liberty and equality of the individual, whenever doubt exists as to which side requires endorsement. Ours is so secure a system, precisely because it is free and dedicated to principles of justice, that it can afford to prefer the individual over the state. To interpose original intent against an individual's claim defeats the purpose of having systematic and regularized restraints on power; limitations exist for the minority against the majority, as Madison said. Original intent analysis becomes a treacherous pursuit when it turns the Constitution and the Court away from assisting the development of a still freer and more just society.

The history of Magna Carta throws dazzling light on a jurisprudence of original intent. Magna Carta approaches its 800th anniversary. It was originally "reactionary as hell," to quote the chief justice of West Virginia. But the feudal barons who framed it could not control its evolution. It eventually came to signify many things that are not in it and were not intended. Magna Carta is not remotely important for what it intended but for what it has become. It stands now for government by contract of the people, for fundamental law, for the rule of law, for no taxation without representation, for due process of law, for habeas corpus, for equality before the law, for representative government, and for a cluster of the rights of the criminally accused. No one cares, or should, that the original document signifies none of this. The Constitution is comparably dynamic.

The Court has the responsibility of helping regenerate and fulfill the noblest aspirations for which this nation stands. It must keep constitutional law constantly rooted in the great ideals of the past yet in a state of evolution in order to realize them. Something should happen to a person who dons the black robe of a Justice of the Supreme Court of the United States. He or she comes under an obligation to strive for as much objectivity as is humanly attainable by putting aside personal opinions and preferences. Yet even the best and most impartial of Justices, those in whom the judicial temperament is most finely cultivated, cannot escape the influences that have tugged at them all their lives and inescapably color their judgment. Personality, the beliefs that make the person, has always made a difference in the Court's constitutional adjudication. There

never has been a constitutional case before the Court in which there was no room for personal discretion to express itself.

We may not want judges who start with the answer rather than the problem, but so long as mere mortals sit on the Court and construe its majestic but murky words, we will not likely get any other kind. Not that the Justices knowingly or deliberately read their presuppositions into law. There probably has never been a member of the Court who consciously decided against the Constitution or was unable in his own mind to square his opinions with it. Most judges convince themselves that they respond to the words on parchment, illuminated, of course, by historical and social imperatives. The illusion may be good for their psyches or the public's need to know that the nine who sit on the nation's highest tribunal really become Olympians, untainted by considerations that move lesser beings into political office.

Even those Justices who start with the problem rather than the result cannot transcend themselves or transmogrify the obscure or inexact into impersonal truth. At bottom, constitutional law reflects great public policies enshrined in the form of supreme and fundamental commands. It is truer of constitutional law than of any other branch that "what the courts declare to have always been the law," as Holmes put it, "is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, consideration of what is expedient for the community concerned." Result-oriented jurisprudence or, at the least, judicial activism is nearly inevitable—not praiseworthy, or desirable, but inescapable when the Constitution must be construed. Robert H. Bork correctly said that the best way to cope with the problem "is the selection of intellectually honest judges." One dimension of such honesty is capacity to recognize at the propitious moment a need for constitutional evolution, rather than keep the Constitution in a deepfreeze.

Summary Questions

1. Why did the framers not keep a more complete and definitive record of their proceedings of the 1787 Constitutional Convention?
2. Levy notes several different kinds of evidence that demonstrate the problems with ascertaining "original intent." Find as many of these as you can.
3. Levy concludes that constitutional interpretation is always a "legislative" activity. What does he mean by this?

Supreme Court vs. Congress.

13.4

What Am I? A Potted Plant?

Richard A. Posner

During the Reagan administration, there was a great deal of debate over the appropriate amount of discretion that appeals court judges and Supreme Court justices should exercise in interpreting the Constitution (see Levy, Selection 13.3). Liberals have generally argued for substantial leeway, noting that the framers could not have anticipated many key contemporary policy debates, such as those about abortion or the regulation of nuclear plants. By and large, conservatives have made a case for less discretion and a more literal interpretation of the Constitution. Nevertheless, some liberals, such as the late Supreme Court Justice Hugo Black, have adopted a literalist position, while some conservatives, such as Court of Appeals Judge Richard Posner, have taken a more discretionary approach.

In this article, Posner reacts to the strict constructionist or "legal formalist" view, labeling it virtually impossible to carry out. "Judges," he notes, "have been entrusted with making policy from the start." Posner endorses this notion in large part because of his tendency to approach legal reasoning from an economic perspective—one that has little, if any, grounding in the Constitution or the ideas of the framers. What is clear from his point of view is that all judges make policy and that both liberals and conservatives can benefit from expanded judicial discretion.

Many people, not all of conservative bent, believe that modern American courts are too aggressive, too "activist," too prone to substitute their own policy preferences for those of the elected branches of government. This may well be true. But some who complain of judicial activism espouse a view of law that is too narrow. And a good cause will not hallow a bad argument.

This point of view often is called "strict constructionism." A more precise term would be "legal formalism." A forceful polemic by Walter Berns in the June 1987 issue of *Commentary*—"Government by Lawyers and Judges"—summarizes the formalist view well. Issues of the "public good" can "be decided legitimately only

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with the consent of the governed." Judges have no legitimate say about these issues. Their business is to address issues of private rights, that is, "to decide whether the right exists—in the Constitution or in a statute—and, if so, what it is; but at that point inquiry ceases." The judge may not use "discretion and the weighing of consequences" to arrive at his decisions and he may not create new rights. The Constitution is a source of rights, but only to the extent that it embodies "fundamental and clearly articulated principles of government." There must be no judicial creativity or "policy-making."

In short, there is a political sphere, where the people rule, and there is a domain of fixed rights, administered but not created or altered by judges. The first is the sphere of discretion, the second of application. Legislators make the law; judges find and apply it.

There has never been a time when the courts of the United States, state or federal, behaved consistently in accordance with this idea. Nor could they, for reasons rooted in the nature of law and legal institutions, in the limitations of human knowledge, and in the character of a political system.

"Questions about the public good" and "questions about private rights" are inseparable. The private right is conferred in order to promote the public good. So in deciding how broadly the right shall be interpreted, the court must consider the implications of its interpretation for the public good. For example, should an heir who murders his benefactor have a right to inherit from his victim? The answer depends, in part anyway, on the public good that results from discouraging murders. Almost the whole of so-called private law, such as property, contract, and tort law, is instrumental to the public end of obtaining the social advantages of free markets. Furthermore, most private law is common law—that is, law made by judges rather than by legislators or by constitution-framers. Judges have been entrusted with making policy from the start.

Often when deciding difficult questions of private rights courts have to weigh policy considerations. If a locomotive spews sparks that set a farmer's crops afire, has the railroad invaded the farmer's property right or does the railroad's ownership of its right of way implicitly include the right to emit sparks? If the railroad has such a right, shall it be conditioned on the railroad's taking reasonable precautions to minimize the danger of fire? If, instead, the farmer has the right, shall it be conditioned on his taking reasonable precautions? Such questions cannot be answered sensibly without considering the social consequences of alternative answers.

A second problem is that when a constitutional convention, a legislature, or a court promulgates a rule of law, it necessarily does so without full knowledge of the circumstances in which the rule might be invoked in the future. When the unforeseen circumstance arises—it might be the advent of the motor vehicle or of electronic surveillance, or a change in attitudes toward religion, race, and sexual propriety—a court asked to apply the rule must decide, in light of information not available to the promulgators of the rule, what the rule should mean in its new setting. That is a creative decision, involving discretion, the weighing

of consequences, and, in short, a kind of legislative judgment—though, properly, one more confined than if the decision were being made by a real legislature. A court that decides, say, that copyright protection extends to the coloring of old black-and-white movies is making a creative decision, because the copyright laws do not mention colorization. It is not being lawless or usurpative merely because it is weighing consequences and exercising discretion.

Or if a court decides (as the Supreme Court has done in one of its less controversial modern rulings) that the Fourth Amendment's prohibition against unreasonable searches and seizures shall apply to wiretapping, even though no trespass is committed by wiretapping and hence no property right is invaded, the court is creating a new right and making policy. But in a situation not foreseen and expressly provided for by the Framers of the Constitution, a simple reading out of a policy judgment made by the Framers is impossible.

Even the most carefully drafted legislation has gaps. The Constitution, for example, does not say that the federal government has sovereign immunity—the right, traditionally enjoyed by all sovereign governments, not to be sued without its consent. Nevertheless the Supreme Court held that the federal government has sovereign immunity. Is this interpolation usurpative? The Federal Tort Claims Act, a law waiving sovereign immunity so citizens can sue the government, makes no exception for suits by members of the armed services who are injured through the negligence of their superiors. Nevertheless the Supreme Court has held that the act was not intended to provide soldiers with a remedy. The decision may be right or wrong, but it is not wrong just because it is creative. The 11th Amendment to the Constitution forbids a citizen of one state to sue "another" state in federal court without the consent of the defendant state. Does this mean that you can sue your own state in federal court without the state's consent? That's what the words seem to imply, but the Supreme Court has held that the 11th Amendment was intended to preserve the sovereign immunity of the states more broadly. The Court thought this was implied by the federalist system that the Constitution created. Again the Court may have been right or wrong, but it was not wrong just because it was creative.

Opposite the unrealistic picture of judges who apply law but never make it, Walter Berns hangs an unrealistic picture of a populist legislature that acts only "with the consent of the governed." Speaking for myself, I find that many of the political candidates whom I have voted for have failed to be elected and that those who have been elected have then proceeded to enact much legislation that did not have my consent. Given the effectiveness of interest groups in the political process, much of this legislation probably didn't have the consent of a majority of citizens. Politically, I feel more governed than self-governing. In considering whether to reduce constitutional safeguards to slight dimensions, we should be sure to have a realistic, not an idealized, picture of the legislative and executive branches of government, which would thereby be made more powerful than they are today.

To banish all discretion from the judicial process would indeed reduce the scope of constitutional rights. The framers of a constitution who want to make it a charter of liberties and not just a set of constitutive rules face a difficult choice. They can write specific provisions, and thereby doom their work to rapid obsolescence or irrelevance; or they can write general provisions, thereby delegating substantial discretion to the authoritative interpreters, who in our system are the judges. The U.S. Constitution is a mixture of specific and general provisions. Many of the specific provisions have stood the test of time amazingly well or have been amended without any great fuss. This is especially true of the rules establishing the structure and procedures of Congress. Most of the specific provisions creating rights, however, have fared poorly. Some have proved irksomely anachronistic—for example, the right to a jury trial in federal court in all cases at law if the stakes exceed $20. Others have become dangerously anachronistic, such as the right to bear arms. Some have even turned topsy-turvy, such as the provision for indictment by grand jury. The grand jury has become an instrument of prosecutorial investigation rather than a protection for the criminal suspect. If the Bill of Rights had consisted entirely of specific provisions, it would have aged very rapidly and would no longer be a significant constraint on the behavior of government officials.

Many provisions of the Constitution, however, are drafted in general terms. This creates flexibility in the face of unforeseen changes, but it also creates the possibility of multiple interpretations, and this possibility is an embarrassment for a theory of judicial legitimacy that denies that judges have any right to exercise discretion. A choice among semantically plausible interpretations of a text, in circumstances remote from those contemplated by its drafters, requires the exercise of discretion and the weighing of consequences. Reading is not a form of deduction; understanding requires a consideration of consequences. If I say, "I'll eat my hat," one reason that my listeners will "decode" this in non-literal fashion is that I couldn't eat a hat if I tried. The broader principle, which applies to the Constitution as much as to a spoken utterance, is that if one possible interpretation of an ambiguous statement would entail absurd or terrible results, that is a good reason to adopt an alternative interpretation.

Even the decision to read the Constitution narrowly, and thereby "restrain" judicial interpretation, is not a decision that can be read directly from the text. The Constitution does not say, "Read me broadly," or, "Read me narrowly." That decision must be made as a matter of political theory, and will depend on such things as one's view of the springs of judicial legitimacy and of the relative competence of courts and legislatures in dealing with particular types of issues.

Consider the provision in the Sixth Amendment that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Read narrowly, this just means that the defendant can't be forbidden to retain counsel; if he can't afford counsel, or competent counsel, he is out of luck. Read broadly, it guarantees even the indigent the effective assistance of counsel; it becomes not just a negative right to be allowed to hire a lawyer but a

positive right to demand the help of the government in financing one's defense. Either reading is compatible with the semantics of the provision, but the first better captures the specific intent of the Framers. At the time the Sixth Amendment was written, English law forbade a criminal defendant to have the assistance of counsel unless abstruse questions of law arose in his case. The Framers wanted to do away with this prohibition. But, more broadly, they wanted to give criminal defendants protection against being railroaded. When they wrote, government could not afford, or at least did not think it could afford, to hire lawyers for indigent criminal defendants. Moreover, criminal trials were short and simple, so it was not ridiculous to expect a person to defend himself without a lawyer if he couldn't afford to hire one. Today the situation is different. Not only can the society easily afford to supply lawyers to poor people charged with crimes, but modern criminal law and procedure are so complicated that an unrepresented defendant will usually be at a great disadvantage.

I do not know whether Professor Berns thinks the Supreme Court was usurping legislative power when it held in the *Gideon* case that a poor person has a right to the assistance of counsel at the state's expense. But his article does make clear his view that the Supreme Court should not have invalidated racial segregation in public schools. Reading the words of the 14th Amendment in the narrowest possible manner in order to minimize judicial discretion, and noting the absence of evidence that the Framers wanted to eliminate segregation, Berns argues that "equal protection of the laws" just means non-discriminatory enforcement of whatever laws are enacted, even if the laws themselves are discriminatory. He calls the plausible empirical proposition that "separate educational facilities are inherently unequal" "a logical absurdity."

On Berns's reading, the promulgation of the equal protection clause was a trivial gesture at giving the recently freed slaves (and other blacks, whose status at the time was little better than that of serfs) political equality with whites, since the clause in his view forbids the denial of that equality only by executive officers. The state may not withdraw police protection from blacks (unless by legislation?) but it may forbid them to sit next to whites on buses. This is a possible reading of the 14th Amendment but not an inevitable one, unless judges must always interpret the Constitution as denying them the power to exercise judgment.

No one really believes this. Everyone professionally connected with law knows that, in Oliver Wendell Holmes's famous expression, judges legislate "interstitially," which is to say they make law, only more cautiously, more slowly, and in more principled, less partisan, fashion than legislators.* The attempt to deny this truism entangles "strict constructionists" in contradictions. Berns says both that judges can enforce only "clearly articulated principles" and that they may invali-

* Oliver Wendell Holmes (1841–1935) served first on the Massachusetts Supreme Court and then on the U.S. Supreme Court between 1882 and 1932. He was labeled "the Great Dissenter," and many of Holmes's minority opinions became the fodder for subsequent Court majority reasoning.

date unconstitutional laws. But the power to do this is not "articulated" in the Constitution; it is merely implicit in it. He believes that the courts have been wrong to interpret the First Amendment as protecting the publication of foul language in school newspapers, yet the words "freedom of speech, or of the press" do not appear to exclude foul language in school newspapers. Berns says he deduces his conclusion from the principle that expression, to be within the scope of the First Amendment, must be related to representative government. Where did he get that principle from? He didn't read it in the Constitution.

The First Amendment also forbids Congress to make laws "respecting an establishment of religion." Berns says this doesn't mean that Congress "must be neutral between religion and irreligion." But the words will bear that meaning, so how does he decide they should be given a different meaning? By appealing to Tocqueville's opinion of the importance of religion in a democratic society. In short, the correct basis for decision is the consequence of the decision for democracy. Yet consequences are not—in the strict constructionist view—a fit thing for courts to consider. Berns even expresses regret that the modern Supreme Court is oblivious to Tocqueville's opinion "of the importance of the woman . . . whose chastity as a young girl is protected not only by religion but by an education that limits her 'imagination.' " A court that took such opinions into account would be engaged in aggressively consequentialist thinking rather than in strict construction.

The liberal judicial activists may be imprudent and misguided in their efforts to enact the liberal political agenda into constitutional law, but it is no use pretending that what they are doing is not interpretation but "deconstruction," not law but politics, because it involves the exercise of discretion and a concern with consequences and because it reaches results not foreseen 200 years ago. It may be bad law because it lacks firm moorings in constitutional text, or structure, or history, or consensus, or other legitimate sources of constitutional law, or because it is reckless of consequences, or because it oversimplifies difficult moral and political questions. But it is not bad law, or no law, just because it violates the tenets of strict construction.

Summary Questions

1. Can the notion of "original intent" be defended as a serious legal doctrine according to Posner? Why not?
2. Do all judges make policy at least part of the time?
3. Posner has frequently been mentioned as a prospective Supreme Court nominee. Do you think the sentiments articulated in this article would make his nomination and confirmation more or less likely? Why?

lower courts are limited to the consideration of cases and controversies brought before them by outside parties. Courts cannot initiate law. Moreover, all courts, and the Supreme Court in particular, exercise judicial self-restraint in certain cases to avoid difficult and controversial issues and to avoid outside pressure to limit the powers of the judiciary. John P. Roche, in the next selection, deals with the background, the nature, and the implications of judicial doctrines of self-restraint.

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John P. Roche
JUDICIAL SELF-RESTRAINT

Every society, sociological research suggests, has its set of myths which incorporate and symbolize its political, economic, and social aspirations. Thus, as medieval society had the Quest for the Holy Grail and the cult of numerology, we, in our enlightened epoch, have as significant manifestations of our collective hopes the dream of impartial decision-making and the cult of "behavioral science." While in my view these latter two are but different facets of the same fundamental drive, namely, the age-old effort to exorcise human variables from human action, our concern here is with the first of them, the pervasive tendency in the American political and constitutional tradition directed toward taking the politics out of politics, and substituting some set of Platonic guardians for fallible politicians.

While this dream of objectivizing political Truth is in no sense a unique American phenomenon, it is surely true to say that in no other democratic nation has the effort been carried so far and with such persistence. Everywhere one turns in the United States, he finds institutionalized attempts to narrow the political sector and to substitute allegedly "independent" and "impartial" bodies for elected decision-makers. The so-called "independent regulatory commissions" are a classic example of this tendency in the area of administration, but unquestionably the greatest hopes for injecting pure Truth-serum into the body politic have been traditionally reserved for the federal judiciary, and particularly for the Supreme Court. The rationale for this viewpoint is simple: "The people must be protected from themselves, and no institution is better fitted for the role of chaperone than the federal judiciary, dedicated as it is to the supremacy of the rule of law."

From John P. Roche, "Judicial Self-Restraint," *The American Political Science Review* 49 (September 1955). Reprinted by permission.

Patently central to this function of social chaperonage is the right of the judiciary to review legislative and executive actions and nullify those measures which derogate from eternal principles of truth and justice as incarnated in the Constitution. Some authorities, enraged at what the Supreme Court has found the Constitution to mean, have essayed to demonstrate that the framers did not intend the Court to exercise this function, to have, as they put it, "the last word." I find no merit in this contention; indeed, it seems to me undeniable not only that the authors of the Constitution intended to create a federal government, but also that they assumed *sub silentio* that the Supreme Court would have the power to review both national and state legislation.

However, since the intention of the framers is essentially irrelevant except to antiquarians and polemicists, it is unnecessary to examine further the matter of origins. The fact is that the United States Supreme Court, and the inferior federal courts under the oversight of the high Court, have enormous policy-making functions. Unlike their British and French counterparts, federal judges are not merely technicians who live in the shadow of a supreme legislature, but are fully equipped to intervene in the process of political decision making. In theory, they are limited by the Constitution and the jurisdiction it confers, but, in practice, it would be a clumsy judge indeed who could not, by a little skillful exegesis, adapt the Constitution to a necessary end. This statement is in no sense intended as a condemnation; on the contrary, it has been this perpetual reinvigoration by reinterpretation, in which the legislature and the executive as well as the courts play a part, that has given the Constitution its survival power. Applying a Constitution which contains at key points inspired ambiguity, the courts have been able to pour the new wine in the old bottle. Note that the point at issue is not the legitimacy or wisdom of judicial legislation; it is simply the enormous scope that this prerogative gives to judges to substitute their views for those of past generations, or, more controversially, for those of a contemporary Congress and President.

Thus it is naive to assert that the Supreme Court is limited by the Constitution, and we must turn elsewhere for the sources of judicial restraint. The great power exercised by the Court has carried with it great risks, so it is not surprising that American political history has been sprinkled with demands that the judiciary be emasculated. The really startling thing is that, with the notable exception of the McCardle incident in 1869, the Supreme Court has emerged intact from each of these encounters. Despite the plenary power that Congress, under Article III of the Constitution, can exercise over the appellate jurisdiction of the high Court, the national legislature has never taken sustained and effective action against its House of Lords. It is beyond the purview of this analysis to examine the reasons for Congressional inaction; suffice it here to say that the most significant form of judicial limitation has remained self-limitation. This is not to suggest that such a development as statutory codification has not cut down the area of interpretive discretion, for it obviously has. It is rather to maintain that when the justices have held back from assaults on legislative or executive actions, they have done so on the basis of self-established rationalizations. . . .

The remainder of this paper is therefore concerned with two aspects of this

auto-limitation: first, the techniques by which it is put into practice; and, second, the conditions under which it is exercised. . . .

TECHNIQUES OF JUDICIAL SELF-RESTRAINT

The major techniques of judicial self-restraint appear to fall under the two familiar rubrics: procedural and substantive. Under the former fall the various techniques by which the Court can avoid coming to grips with substantive issues, while under the latter would fall those methods by which the Court, in a substantive holding, finds that the matter at issue in the litigation is not properly one for judicial settlement. Let us examine these two categories in some detail.

Procedural Self-restraint

Since the passage of the Judiciary Act of 1925, the Supreme Court has had almost complete control over its business. United States Supreme Court *Rule 38*, which governs the certiorari policy, states, (§ 5) that discretionary review will be granted only "where there are special and important reasons therefor." Professor Fowler Harper has suggested in a series of detailed and persuasive articles on the application of this discretion [*University of Pennsylvania Law Review*, vols. 99–101; 103] that the Court has used it in such a fashion as to duck certain significant but controversial problems. While one must be extremely careful about generalizing in this area, since the reasons for denying certiorari are many and complex, Harper's evidence does suggest that the Court in the period since 1949 has refused to review cases involving important civil liberties problems which on their merits appeared to warrant adjudication. As he states at one point: "It is disconcerting when the Court will review a controversy over a patent on a pin ball machine while one man is deprived of his citizenship and another of his liberty without Supreme Court review of a plausible challenge to the validity of government action." . . .

Furthermore, the Supreme Court can issue certiorari on its own terms. Thus in *Dennis* v. *United States*, appealing the Smith Act convictions of the American communist leadership, the Court accepted the evidential findings of the Second Circuit as final and limited its review to two narrow constitutional issues. This, in effect, burked the basic problem: whether the evidence was sufficient to demonstrate that the Communist Party, U.S.A., was *in fact* clear and present danger to the security of the nation, or whether the communists were merely shouting "Fire!" in an empty theater.

Other related procedural techniques are applicable in some situations. Simple delay can be employed, perhaps in the spirit of the Croatian proverb that "delay is the handmaiden of justice." . . . However, the technique of procedural self-restraint is founded on the essentially simple gadget of refusing jurisdiction, or of procrastinating the acceptance of jurisdiction, and need not concern us further here.

Substantive Self-restraint

Once a case has come before the Court on its merits, the justices are forced to give some explanation for whatever action they may take. Here self-restraint can take many forms, notably, the doctrine of political questions, the operation of judicial parsimony, and—particularly with respect to the actions of administrative officers of agencies—the theory of judicial inexpertise.

The doctrine of political questions is too familiar to require much elaboration here. Suffice it to say that if the Court feels that a question before it, e.g., the legitimacy of a state government, the validity of a legislative apportionment, or the correctness of executive action in the field of foreign relations, is one that is not properly amenable to judicial settlement, it will refer the plaintiff to the "political" organs of government for any possible relief. The extent to which this doctrine is applied seems to be a direct coefficient of judicial egotism, for the definition of a political question can be expanded or contracted in accordian-like fashion to meet the exigencies of the times. A juridical definition of the term is impossible, for at root the logic that supports it is circular: political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions. As an early dictionary explained, violins are small cellos, and cellos are large violins.

Nor do examples help much in definition. While it is certainly true that the Court cannot mandamus a legislature to apportion a state in equitable fashion, it seems equally true that the Court is without the authority to force state legislators to implement unsegregated public education. Yet in the former instance the Court genuflected to the "political" organs and took no action, while in the latter it struck down segregation as violative of the Constitution.

Judicial parsimony is another major technique of substantive self-restraint. In what is essentially a legal application of Occam's razor, the court has held that it will not apply any more principles to the settlement of a case than are absolutely necessary, e.g., it will not discuss the constitutionality of a law if it can settle the instant case by statutory construction. Furthermore, if an action is found to rest on erroneous statutory construction, the review terminates at that point: the Court will not go on to discuss whether the statute, properly construed, would be constitutional. A variant form of this doctrine, and a most important one, employs the "case of controversy" approach, to wit, the Court, admitting the importance of the issue, inquires as to whether the litigant actually has standing to bring the matter up. . . .

A classic use of parsimony to escape from a dangerous situation occurred in connection with the evacuation of the Nisei from the West Coast in 1942. Gordon Hirabayashi, in an attempt to test the validity of the regulations clamped on the American-Japanese by the military, violated the curfew and refused to report to an evacuation center. He was convicted on both counts by the district court and sentenced to three months for each offense, the sentences to run *concurrently*. When the case came before the Supreme Court, the justices sustained his conviction for violating the *curfew*, but refused to examine the validity of the evacua-

tion order on the ground that it would not make any difference to Hirabayashi anyway; he was in for ninety days no matter what the Court did with evacuation.

A third method of utilizing substantive self-restraint is particularly useful in connection with the activities of executive departments or regulatory agencies, both state and federal. I have entitled it the doctrine of judicial *inexpertise*, for it is founded on the unwillingness of the Court to revise the findings of experts. The earmarks of this form of restraint are great deference to the holdings of the expert agency usually coupled with such a statement as "It is not for the federal courts to supplant the [Texas Railroad] Commission's judgment even in the face of convincing proof that a different result would have been better." In this tradition, the Court has refused to question *some* exercises of discretion by the National Labor Relations Board, the Federal Trade Commission, and other federal and state agencies. But the emphasis on *some* gives the point away; in other cases, apparently on all fours with those in which it pleads its technical *inexpertise*, the Court feels free to assess evidence de novo and reach independent judgment on the technical issues involved. . . .

In short, with respect to expert agencies, the Court is equipped with both offensive and defensive gambits. It if chooses to intervene, one set of precedents is brought out, while if it decides to hold back, another set of equal validity is invoked. Perhaps the best summary of this point was made by Justice Harlan in 1910, when he stated bluntly that "the Courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts . . . that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

This does not pretend to be an exhaustive analysis of the techniques of judicial self-restraint; on the contrary, others will probably find many which are not given adequate discussion here. The remainder of this paper, however, is devoted to the second area of concern: the conditions under which the Court refrains from acting.

THE CONDITIONS OF JUDICIAL SELF-RESTRAINT

The conditions which lead the Supreme Court to exercise auto-limitation are many and varied. In the great bulk of cases, this restraint is an outgrowth of sound and quasi-automatic legal maxims which defy teleological interpretation. It would take a master of the conspiracy theory of history to assign meaning, for example, to the great majority of certiorari denials; the simple fact is that these cases do not merit review. However, in a small proportion of cases, purpose does appear to enter the picture, sometimes with a vengeance. It is perhaps unjust to the Court to center our attention on this small proportion, but it should be said in extenuation that these cases often involve extremely significant political and social issues. In the broad picture, the refusal to grant certiorari in 1943 to the Minneapolis Trotskyites convicted under the Smith Act is far more meaningful than the similar refusal to

grant five hundred petitions to prison "lawyers" who have suddenly discovered the writ of habeas corpus. Likewise, the holding that the legality of Congressional apportionment is a "political question" vitally affects the operation of the whole democratic process.

What we must therefore seek are the conditions under which the Court holds back *in this designated category of cases*. Furthermore, it is important to realize that there are positive consequences of negative action; as Charles Warren has implied, the post–Civil War Court's emphasis on self-restraint was a judicial concomitant of the resurgence of states' rights. Thus self-restraint may, as in wartime, be an outgrowth of judicial caution, or it may be part of a purposeful pattern of abdicating national power to the states.

Ever since the first political scientist discovered Mr. Dooley, the changes have been run on the aphorism that the Supreme Court "follows the election returns," and I see no particular point in ringing my variation on this theme through again. Therefore, referring those who would like a more detailed explanation to earlier analyses, the discussion here will be confined to the bare bones of my hypothesis.

The power of the Supreme Court to invade the decision-making arena, I submit, is a consequence of that fragmentation of political power which is normal in the United States. No cohesive majority, such as normally exists in Britain, would permit a politically irresponsible judiciary to usurp decision-making functions, but, for complex social and institutional reasons, there are few issues in the United States on which cohesive majorities exist. The guerrilla warfare which usually rages between Congress and the President, as well as the internal civil wars which are endemic in both the legislature and the administration, give the judiciary considerable room for maneuver. If, for example, the Court strikes down a controversial decision of the Federal Power Commission, it will be supported by a substantial bloc of congressmen; if it supports the FPC's decision, it will also receive considerable congressional support. But the important point is that *either* way it decides the case, there is no possibility that Congress will exact any vengeance on the Court for its action. A disciplined majority would be necessary to clip the judicial wings, and such a majority does not exist on this issue.

On the other hand, when monolithic majorities do exist on issues, the Court is likely to resort to judicial self-restraint. A good case here is the current tidal wave of anti-communist legislation and administrative action, the latter particularly with regard to aliens, which the Court has treated most gingerly. About the only issues on which there can be found cohesive majorities are those relating to national defense, and the Court has, as Clinton Rossiter demonstrated in an incisive analysis [*The Supreme Court and the Commander-in-Chief*, Ithaca, 1951], traditionally avoided problems arising in this area irrespective of their constitutional merits. Like the slave who accompanied a Roman consul on his triumph whispering "You too are mortal," the shade of Thad Stevens haunts the Supreme Court chamber to remind the justices what an angry Congress can do.

To state the proposition in this brief compass is to oversimplify it considerably. I have, for instance, ignored the crucial question of how the Court knows when a majority *does* exist, and I recognize that certain aspects of judicial behavior

cannot be jammed into my hypothesis without creating essentially spurious epicycles. However, I am not trying to establish a monistic theory of judicial action; group action, like that of individuals, is motivated by many factors, some often contradictory, and my objective is to elucidate what seems to be one tradition of judicial motivation. In short, judicial self-restraint and judicial power seem to be opposite sides of the same coin: it has been by judicious application of the former that the latter has been maintained. A tradition beginning with Marshall's *coup* in *Marbury* v. *Madison* and running through *Mississippi* v. *Johnson* and *Ex Parte Vallandigham* to *Dennis* v. *United States* suggests that the Court's power has been maintained by a wise refusal to employ it in unequal combat.

❖❖ Judicial Decision Making

Judicial decision making is not quasi-scientific, always based clearly upon legal principles and precedent, with the judges set apart from the political process. The interpretation of law, whether constitutional or statutory, involves a large amount of discretion. The majority of the Court can always read its opinion into law if it so chooses.

Justice William J. Brennan, Jr., a former member of the Supreme Court, discusses below the general role of the Court and the procedures it follows in decision making.

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William J. Brennan, Jr.
HOW THE SUPREME COURT ARRIVES AT DECISIONS

Throughout its history the Supreme Court has been called upon to face many of the dominant social, political, economic and even philosophical issues that confront the nation. But Solicitor General Cox only recently reminded us that this does not mean that the Court is charged with making social, political, economic or philosophical decisions.

Quite the contrary, the Court is not a council of Platonic guardians for deciding our most difficult and emotional questions according to the Justices' own

God's Justice and Ours

Antonin Scalia

Before proceeding to discuss the morality of capital punishment, I want to make clear that my views on the subject have nothing to do with how I vote in capital cases that come before the Supreme Court. That statement would not be true if I subscribed to the conventional fallacy that the Constitution is a "living document"—that is, a text that means from age to age whatever the society (or perhaps the Court) thinks it ought to mean.

In recent years, that philosophy has been particularly well enshrined in our Eighth Amendment jurisprudence, our case law dealing with the prohibition of "cruel and unusual punishments." Several of our opinions have said that what falls within this prohibition is not static, but changes from generation to generation, to comport with "the evolving standards of decency that mark the progress of a maturing society." Applying that principle, the Court came close, in 1972, to abolishing the death penalty entirely. It ultimately did not do so, but it has imposed, under color of the Constitution, procedural and substantive limitations that did not exist when the Eighth Amendment was adopted—and some of which had not even been adopted by a majority of the states at the time they were judicially decreed. For example, the Court has prohibited the death penalty for all crimes except murder, and indeed even for what might be called run–of–the–mill murders, as opposed to those that are somehow characterized by a high degree of brutality or depravity. It has prohibited the mandatory imposition of the death penalty for any crime, insisting that in all cases the jury be permitted to consider all mitigating factors and to impose, if it wishes, a lesser sentence. And it has imposed an age limit at the time of the offense (it is currently seventeen) that is well above what existed at common law.

If I subscribed to the proposition that I am authorized (indeed, I suppose compelled) to intuit and impose our "maturing" society's "evolving standards of decency," this essay would be a preview of my next vote in a death penalty case. As it is, however, the Constitution that I interpret and apply is not living but dead—or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted. For me, therefore, the constitutionality of the death penalty is not a difficult, soul–wrenching question. It was clearly permitted when the Eighth Amendment was adopted (not merely for murder, by the way, but for all felonies—including, for example, horse–thieving, as anyone can verify by watching a western movie). And so it is clearly permitted today. There is plenty of room within this system for "evolving standards of decency," but the instrument of evolution (or, if you are more tolerant of the Court's approach, the herald that evolution has occurred) is not the nine lawyers who sit on the Supreme Court of the United States, but the Congress of the United States and the legislatures of the fifty states, who may, within their own jurisdictions, restrict or abolish the death penalty as they wish.

But while my views on the morality of the death penalty have nothing to do with how I vote as a judge, they have a lot to do with whether I can or should be a judge at all. To put the point in the blunt terms employed by Justice Harold Blackmun towards the end of his career on the bench, when he announced that he would henceforth vote (as Justices William Brennan and Thurgood Marshall had previously

done) to overturn all death sentences, when I sit on a Court that reviews and affirms capital convictions, I am part of "the machinery of death." My vote, when joined with at least four others, is, in most cases, the last step that permits an execution to proceed. I could not take part in that process if I believed what was being done to be immoral.

Capital cases are much different from the other life–and–death issues that my Court sometimes faces: abortion, for example, or legalized suicide. There it is not the state (of which I am in a sense the last instrument) that is decreeing death, but rather private individuals whom the state has decided not to restrain. One may argue (as many do) that the society has a moral obligation to restrain. That moral obligation may weigh heavily upon the voter, and upon the legislator who enacts the laws; but a judge, I think, bears no moral guilt for the laws society has failed to enact. Thus, my difficulty with *Roe v. Wade* is a legal rather than a moral one: I do not believe (and, for two hundred years, no one believed) that the Constitution contains a right to abortion. And if a state were to permit abortion on demand, I would—and could in good conscience—vote against an attempt to invalidate that law for the same reason that I vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter.

With the death penalty, on the other hand, I am part of the criminal–law machinery that imposes death—which extends from the indictment, to the jury conviction, to rejection of the last appeal. I am aware of the ethical principle that one can give "material cooperation" to the immoral act of another when the evil that would attend failure to cooperate is even greater (for example, helping a burglar tie up a householder where the alternative is that the burglar would kill the householder). I doubt whether that doctrine is even applicable to the trial judges and jurors who must themselves determine that the death sentence will be imposed. It seems to me these individuals are not merely engaged in "material cooperation" with someone else's action, but are themselves decreeing death on behalf of the state.

The same is true of appellate judges in those states where they are charged with "reweighing" the mitigating and aggravating factors and determining de novo whether the death penalty should be imposed: they are themselves decreeing death. Where (as is the case in the federal system) the appellate judge merely determines that the sentence pronounced by the trial court is in accordance with law, perhaps the principle of material cooperation could be applied. But as I have said, that principle demands that the good deriving from the cooperation exceed the evil which is assisted. I find it hard to see how any appellate judge could find this condition to be met, unless he believes retaining his seat on the bench (rather than resigning) is somehow essential to preservation of the society—which is of course absurd. (As Charles de Gaulle is reputed to have remarked when his aides told him he could not resign as President of France because he was the indispensable man: "*Mon ami*, the cemeteries are full of indispensable men.")

I pause here to emphasize the point that in my view the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted, constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own. Of course if he feels strongly enough he can go beyond mere resignation and lead a political campaign to abolish the death penalty—and if that fails, lead a revolution. But rewrite the laws he cannot do. This dilemma, of course, need not be confronted by a proponent of the "living Constitution," who believes that it means what it ought to mean. If the death penalty is (in his view) immoral, then it is (hey, presto!) automatically unconstitutional, and he can continue to sit while nullifying a sanction that has been imposed, with no suggestion of its unconstitutionality, since the beginning of the Republic. (You can see why the "living Constitution" has such attraction for us judges.)

It is a matter of great consequence to me, therefore, whether the death penalty is morally acceptable. As