AP American Government: Unit IX

The Judicial Branch

(Wilson, Chapter 16)

Tuesday	2/3	**Finish Frost/Nixon? I hope☺**
Wednesday	2/4	Begin class notes of Judicial Activism and Judicial Restraint. **/List/Prioritize significant issue debate topics. Assignment will be explained later.**
Thursday	2/5	Half-page summary due on ***Federalist #78*** in Ciglar-Loomis, p. 447. Class discussion of Hamilton's ***Federalist #78.*** *Video*: **The Supreme Court**
Friday	2/6	**NO SCHOOL! District Waiver/Professional Day**
Monday	2/9	**Quiz** over Ch16, pp. 438-445. **Announce Landmark Supreme Court Cases Decision: Due at End of MOCK TRIAL!**
Tuesday	2/10	Begin reading "***For Loose Construction***," by Brennan, in Woll, p. 516. ***Video: Frost/Nixon?***
Wednesday	2/11	**Critical review due on,** "***The Tempting of America***," by Robert Bork in Woll, p. 464./***Compare/contrast with "For Loose Construction"*** Class discussion comparing and contrasting Brennan and Bork articles. ***Video: Frost/Nixon***
Thursday	2/12	(To The Power of Federal Courts). Answers to questions due from the last page of "***Classic Statement: Griswold v. Connecticut***" (in packet). **Introduction to Mock Trial Case; assignment of Mock Trial roles.**
Friday	2/13	**Quiz Ch16 pp. 445-456.** Answers to "***How the Supreme Court Arrives at Decisions***," by Brennan, in Woll, p. 499 (questions in packet). ***Video: Frost/Nixon***
Monday	2/16	**NO SCHOOL! PRESIDENT'S DAY☺**
Tuesday	2/17	Answers to questions due on "***The Framers and Original Intent***," by Levy in Ciglar/Loomis, p. 458 (questions on page 465). Be sure and answer both parts of questions 2 and 3!

Video: Frost/Nixon

Wednesday	2/18	Quiz Ch16 pp. 456-465. Answers due on "***What am I? A potted plant?***" by Posner, in Ciglar/Loomis, p. 466 (questions in packet) **Video: *Gideon's Trumpet***
Thursday	2/19	May It Please the Court: ***Miranda v. Arizona and/or Gideon vs. Wainwright*** **Video: *Gideon's Trumpet***
Friday	2/20	**NO SCHOOL!**
Monday	2/23	Answers to questions due on "***Judicial Self-Restraint***," by Roche, in Woll p. 493 (questions in packet). **Video: *Gideon's Trumpet***
Tuesday	2/24	Critical review on "***God's Justice and Ours***," by Antonin Scalia (in packet). **Video: *Gideon's Trumpet***
Wednesday	2/25	**Multiple Choice Test** - 70 Questions - 45 minutes
Thursday	2/26	**Essay Test** - Two Questions - 45 minutes
Friday	2/27	**Mock Trial** - (opening arguments, prosecution begins case)
Monday	3/2	**Mock Trial- (**Prosecution continues, Defense begins if Prosecution rests case)
Tuesday	3/3	**Mock Trial -** (Closing arguments, Case to jury).
Wednesday	3/4	**Landmark Supreme Court Cases Due.**

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THE FEDERAL COURTS

The judicial branch plays a large role in making public policy. The major power that the federal courts have is judicial review, the right to declare laws of Congress and acts of the president unconstitutional.

KEY TERMS

amicus curiae
briefs
class action suits
concurring opinion
courts of appeals
dissenting opinion
district courts
Dred Scott v. Sandford
in forma pauperis
judicial activism
judicial review
"litmus test"
Marbury v. Madison
McCulloch v. Maryland
opinion of the Court
senatorial courtesy
solicitor general
stare decisis
strict construction
writ of certiorari

KEY CONCEPTS

- The federal courts have evolved into an institution that has significant impact on public policy.
- The selection of federal judges is a very political process.
- A limited number of cases are heard in federal courts, and an even more limited number reach the Supreme Court.
- Judicial activism is a philosophy in which judges make bold policy decisions.
- The other branches of government and the public have checks on the powers of the federal courts.

For a full discussion of the federal courts, see *American Government*, 9th ed., Chapter 14 / 10th ed., Chapter 16.

THE DEVELOPMENT OF THE FEDERAL COURTS

Most of the Founders probably expected judicial review to be an important judicial power, but it is unlikely that they thought the federal courts would play a large role in policy-making. The original view of the Founders was known as strict construction: judges would be bound by the wording of the Constitution and precedent, which was drawn mainly from the British legal system. Within a few decades, however, an activist approach emerged, and judges looked at the underlying *principles* of the Constitution.

The federal courts have evolved toward judicial activism, shaped by political, economic, and ideological forces of three historical eras:

- **National supremacy and slavery (1789-1861)** Two early court cases, *Marbury v. Madison* (1803) and *McCulloch v. Maryland* (1819), helped establish the supremacy of the national government. *Marbury* gave the Supreme Court the power to declare a congressional act unconstitutional. *McCulloch* established that federal law is supreme over state law. Both suggested that powers granted to the federal government should be construed broadly. The power of the federal government to regulate commerce among the states was also established, and state law that conflicted with federal law was declared void. A major case, *Dred Scott v. Sandford* (1857), made the Supreme Court a major player in setting the stage for the Civil War. The Supreme Court ruled that blacks were not citizens of the United States and that federal law prohibiting slavery in northern territories was unconstitutional.
- **Government and the economy (1865-1936)** The dominant issue during this period was deciding when the economy would be regulated by the states and when by the national government. Most court decisions protected private property. The Court upheld the use of injunctions to prevent labor strikes, struck down the federal income tax, sharply limited the reach of the antitrust laws, restricted the powers of the Interstate Commerce Commission, refused to eliminate child labor, and prevented states from setting maximum hours of work. These restricted the federal government's ability to regulate the economy. Yet the Court also authorized various kinds of regulation, such as requiring railroads to improve their safety, approving mine safety laws, and regulating fire-insurance rates. While the Court was supportive of private property, it could not develop a principle distinguishing between reasonable and unreasonable regulation.
- **Government and political liberty (1936-present)** During this period the Court has deferred to the legislature in regulating the economy. It has shifted its attention to personal liberties and is active in defining rights. The Warren Court, which began in 1953, redefined the relationship of citizens to the government and protected the rights and liberties of citizens.

During the past fifteen years, the Supreme Court has begun to rule that the states have the right to resist some federal action. It is possible that this is the beginning of a new era in which the Court will return certain powers to the states, a process known as devolution.

THE SELECTION OF JUDGES

All federal judges are nominated by the president and confirmed by the Senate. Presidents almost always nominate a member of their own political party, and party background does have some effect on how judges behave. However, rulings are also shaped by other factors, such as the facts of the case, precedent, and lawyers' arguments.

Confirmations are often contentious. Senate delays on confirmations often leave many seats open on the appellate courts. One tradition regarding nominations is senatorial courtesy: senators from the president's party review an appointee for a federal district court in their state; senators can "blue-slip"—that is, veto—a nominee, a practice that has been criticized because it gives senators virtual power in nominating judges.

Another concern is the use of the "litmus test," a test of ideological purity used by recent presidents, in nominating, and senators, in confirming, judges for federal courts. Presidents seek judicial appointees who share their political ideologies. Because various presidents appoint judges, different circuits issue different rulings over similar cases. While candidates cannot be asked how they would rule in a specific case, they can be asked about judicial philosophy. Litmus tests are most apparent in Supreme Court confirmations, for which there is no tradition of senatorial courtesy.

THE JURISDICTION OF THE FEDERAL COURTS

The United States has two court systems—one state, one federal—which can complicate the questions of which cases the federal courts may hear, and how cases beginning in the state courts may end up before the Supreme Court.

The Constitution lists the kinds of cases over which federal courts have jurisdiction; all others are left to state courts. Federal courts can hear all cases involving the U.S. Constitution, federal law, and treaties; these are known as federal-question cases. Federal courts may also hear cases involving different states or involving citizens of different states; these are known as diversity cases. Some cases, such as those where both state and federal laws have been broken, can be tried in either state or federal courts.

The Constitution specifies a very limited original jurisdiction for the Supreme Court. Nearly every case the Supreme Court hears is on appeal and chosen by the court. It does this by issuing a writ of certiorari. If four justices agree to hear a case, a "writ of cert" is issued, and the case is scheduled for a hearing. The Court tends to take cases that pose a significant federal or constitutional question, involve conflicting decisions by circuit courts, or contain a constitutional interpretation by one of the highest state courts regarding state or

federal law. Only about one hundred appeals are granted certiorari in a given year.

Some Americans criticize the courts as undemocratic. The Supreme Court rejects all but a few of the applications for certiorari. In addition, the costs of appeals are high. Nevertheless, costs can sometimes be lowered or even covered in full in the case of indigents (called in forma pauperis), for which the government pays the costs. Those who are unable to afford counsel are provided a lawyer at no charge. Interest groups are also sources of funding for litigation. Court costs are also affected by the practice of fee shifting, which enables plaintiffs to collect their costs from a defendant if the defendant loses.

Getting to court requires legal standing. To have standing there must be a real controversy between adversaries, and the litigants must demonstrate personal harm. Under certain circumstances, a citizen can benefit from a court decision without ever going to court. In these cases, courts recognize class-action suits, in which an identifiable group of people has standing. If the case is won, all who have circumstances similar to the active plaintiffs receive a share of the judgment. Since 1974, the Supreme Court will not hear class-action suits unless every ascertainable member of the group is notified individually. This is often prohibitively expensive.

THE POWERS OF THE SUPREME COURT

Once a case gets to the Supreme Court, lawyers for each side submit briefs. A brief is a document that sets forth the facts of the case, summarizes the lower-court decision, gives the arguments for the side represented, and discusses precedents on the issue.

Oral arguments are presented later. Each side has one half-hour, but justices can interrupt with questions. Because the federal government is either the plaintiff or defendant in about half the cases that the Supreme Court hears, the solicitor general of the United States appears frequently before the Court. The solicitor general, the third ranking officer in the Justice Department, decides which cases the government will appeal from the lower courts and personally approves every case presented to the Supreme Court.

Written briefs and even oral arguments may be offered by a "friend of the court," or amicus curiae. An amicus brief is from an interested party not directly involved in the suit. The reasoning and research found in academic law journals are also sources of ideas used by the justices in reaching decisions and writing their opinions.

After briefs are submitted and oral arguments are heard, justices develop their opinions and decisions. Much of this work is performed by clerks, who are often recent graduates of the top law schools in the country. These drafted opinions are circulated among the justices and their clerks. Next, the justices meet in conference to allow for the exchange of ideas and arguments and to vote. The chief justice counts the votes, writes the decision of the court (or assigns someone to write the official decision if he is among the minority), and manages the process.

In deciding a case, a majority of justices must be in agreement. Sometimes the opinion is brief and unsigned; this is known as a per curiam opinion. There are three kinds of opinions:

- An opinion of the Court is the majority opinion.
- A concurring opinion is an opinion that agrees with the decision but uses different reasoning to reach that conclusion.
- A dissenting opinion is a minority opinion. Disagreeing with the decision, it has no value as precedent but may form the basis for later appeals or reversals of precedent.

The federal courts have the power to make public policy in three ways:

- by interpretation of the Constitution or law
- by extending the reach of existing law
- by designing remedies that involve judges acting in administrative or legal ways

These powers can be measured in several ways. Over 130 laws have been declared unconstitutional. Over 260 cases have been overturned—to let a prior decision stand is called stare decisis. Judges now handle cases once left to the legislature. Further, judges now often go beyond what is narrowly required by imposing remedies for issues and problems.

AP Tip

Judicial activism versus judicial restraint is a major issue when considering the federal courts. The issue will certainly appear on the AP exam in some form.

Judicial activism, the philosophy by which judges make bold policy decisions, has both supporters and critics. Supporters believe courts should correct injustices when other branches or state governments refuse to do so and when change creates new circumstances not foreseen by the Founders. They also argue that the courts are the last resort for those without the power or influence to provoke new laws. Promoting the philosophy known as judicial restraint, critics argue that judges cannot put themselves above the law and that they lack expertise in designing and managing complex institutions. These critics also note that the courts are not accountable because judges are not elected.

Judicial activism increased during the twentieth century because government has tended to do more and courts have interpreted a greater number of laws. Also, activist judges have become far more widely accepted in American political culture as our values, society, and technology have changed.

CHECKS ON JUDICIAL POWER

Like the other branches of the federal government, the judicial branch does not have unrestrained powers. There are several checks on the powers of the federal courts:

- Courts rely on others to implement their decisions. Congress can check the courts in several ways:
  - Confirmation proceedings gradually alter the composition of the courts.
  - Impeachment proceedings, though rare, can also change the composition of the courts.
  - Congress can change the number of judges, giving the president more or fewer appointment opportunities.
  - Revising legislation can undo Supreme Court decisions.
  - Amending the Constitution can alter the jurisdiction of the Court.
  - Defying public opinion may be dangerous for the legitimacy of the Supreme Court. Public confidence in the Supreme Court since the 1960s has varied as the Court has issued controversial rulings. Today there is often more popular support for the executive and legislative branches.

The courts have substantial power, and judicial review in particular makes the courts an important part of the complex process of establishing and revising American public policy.

Multiple-Choice Questions

1. Using the power of judicial review, the Supreme Court can do all of the following EXCEPT
   (A) declare a law passed by Congress unconstitutional
   (B) declare a law passed by a state unconstitutional
   (C) declare acts of the executive branch unconstitutional
   (D) determine the meaning and application of the Constitution
   (E) overturn a Constitutional amendment as a violation of civil rights

ANSWER: E. Judicial review allows the Supreme Court to determine the meaning and application of the Constitution and overturn a law or regulation that violates the Constitution. Because amendments are part of the Constitution, they are, by definition, constitutional, and the Supreme Court may not overturn them (*American Government*, 9th ed., pages 403-404 / 10th ed., pages 438-439).

2. Justice Clarence Thomas believes that the Constitution should be interpreted according to its clearly implied language. This judicial philosophy can best be described as
   (A) strict construction
   (B) judicial activism
   (C) conservatism
   (D) liberalism
   (E) constitutionalism

ANSWER: A. Justice Thomas is a strict constructionist who believes the Constitution should be interpreted directly by the language of the Constitution (*American Government*, 9th ed., page 404 / 10th ed., page 439).

13.1

The Federalist, No. 78

Alexander Hamilton

Of the three branches of government, the judiciary is the least fully outlined in the Constitution. To an extent this reflects the framers' greater concerns with the legislature and the executive, but it also indicates their perception that the judiciary simply did not pose the dangers the other branches did. For Alexander Hamilton, the key problem was to ensure that the judiciary remained independent of the legislature and the executive. One way to provide for this was to make court appointments lifetime positions, with removal impossible as long as the incumbents maintained "good behaviour"—a purposefully vague term.

Hamilton also laid out the case for judicial review of legislation. He observed that "no legislative act . . . contrary to the Constitution can be valid." And it is the Supreme Court that makes the final judgment on constitutionality. This seemingly great grant of authority is tempered, however, by the Court's inability to enforce its decisions without cooperation from the executive.

To the People of the State of New York: We proceed now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged; as the propriety of the institution in the abstract is not disputed: The only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points therefore our observations shall be confined.

The manner of constituting it seems to embrace these several objects—1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges: This is the same with that of appointing the officers of the union in general, and has been so fully discussed in

Alexander Hamilton was the first secretary of the treasury and a consistent supporter of strong central government.

the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places: This chiefly concerns their duration in office; the provisions for their support; and the precautions for their responsibility.

According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices *during good behaviour*, which is conformable to the most approved of the state constitutions; and among the rest, to that of this state. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestibly that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislative and executive. For I agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in

continual jeopardy of being overpowered, awed or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like.* Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A

* A *bill of attainder* is a legislative act that inflicts punishment without a judicial trial. Crimes are thus defined by statutes that are general in nature, and the courts interpret those statutes. An *ex post facto* law either makes an act illegal after the fact or removes the legal protection from behavior after that behavior has been performed.

constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcileable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation: So far as they can by any fair construction be reconciled to each other; reason and law conspire to dictate that this should be done. Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will, should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their

pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that body.

If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty. . . .

That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.

There is yet a further and a weighty reason for the permanency of the judicial offices; which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behaviour* as the tenure of their judicial offices in point of duration; and that so far from being blameable on this account, their plan would have been inexcuseably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

Summary Questions

1. Why might a lifetime term for judges and justices be considered a good policy? Why did the framers make office holding contingent on continued "good behaviour" rather than on some more specific criterion?
2. Why did the framers consider the Supreme Court the weakest of the three branches? How can this be so if it has the final say over what the Constitution means?

13.2

Marbury v. *Madison* (1803)

In March, 1801, during the waning hours of his administration, President John Adams appointed William Marbury to be a justice of the peace in Washington, D.C. James Madison, the secretary of state under incoming President Thomas Jefferson, refused to deliver the commission, following Jefferson's instructions. Marbury subsequently applied to the Supreme Court to obtain the position.

This minor controversy offered a great opportunity to John Marshall, whom Adams had appointed Chief Justice in the last months of his tenure. Marshall, no friend of Jefferson's, found in this case a way to establish the Court's power to declare a federal law unconstitutional. Although Hamilton argued strenuously in favor of the judicial review of legislation in *The Federalist,* No. 78 (Selection 13.1), the Constitution did not speak definitively on the topic. In this case Marshall ruled specifically that Marbury was entitled to his commission, but that the Court had no legitimate authority to order it done because the federal statute providing the

to preserve a preexisting society," concludes Brennan, "but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized."

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William J. Brennan, Jr.
FOR "LOOSE" CONSTRUCTION

I am deeply grateful for the invitation to participate in the "Text and Teaching" symposium. This rare opportunity to explore classic texts with participants of such wisdom, acumen and insight as those who have preceded and will follow me to this podium is indeed exhilarating. But it is also humbling. Even to approximate the standards of excellence of these vigorous and graceful intellects is a daunting task. I am honored that you have afforded me this opportunity to try.

It will perhaps not surprise you that the text I have chosen for exploration is the amended Constitution of the United States, which, of course, entrenches the Bill of Rights and the Civil War amendments, and draws sustenance from the bedrock principles of another great text, the Magna Carta. So fashioned, the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority. In all candor we must concede that part of this egalitarianism in America has been more pretension than realized fact. But we are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth interpretation, the interaction of reader and text. The encounter with the constitutional text has been, in many senses, my life's work.

My approach to this text may differ from the approach of other participants in this symposium to their texts. Yet such differences may themselves stimulate

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Address to the Text and Teaching Symposium, Georgetown University, October 12, 1985, Washington, D.C.

reflection about what it is we do when we "interpret" a text. Thus I will attempt to elucidate my approach to the text as well as my substantive interpretation.

Perhaps the foremost difference is the fact that my encounters with the constitutional text are not purely or even primarily introspective; the Constitution cannot be for me simply a contemplative haven for private moral reflection. My relation to this great text is inescapably public. That is not to say that my reading of the text is not a personal reading, only that the personal reading perforce occurs in a public context, and is open to critical scrutiny from all quarters.

The Constitution is fundamentally a public text—the monumental charter of a government and a people—and a Justice of the Supreme Court must apply it to resolve public controversies. For, from our beginning, a most important consequence of the constitutionally created separation of powers has been the American habit, extraordinary to other democracies, of casting social, economic, philosophical and political questions in the Form of lawsuits, in an attempt to secure ultimate resolution by the Supreme Court. In this way, important aspects of the most fundamental issues confronting our democracy may finally arrive in the Supreme Court for judicial determination. Not infrequently, these are the issues upon which contemporary society is most deeply divided. They arouse our deepest emotions. The main burden of my twenty-nine terms on the Supreme Court has thus been to wrestle with the Constitution in this heightened public context, to draw meaning from the text in order to resolve public controversies.

Two other aspects of my relation to this text warrant mention. First, constitutional interpretation for a federal judge is, for the most part, obligatory. When litigants approach the bar of court to adjudicate a constitutional dispute, they may justifiably demand an answer. Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate to the full meaning of the Constitution's provisions. Unlike literary critics, judges cannot merely savor the tensions or revel in the ambiguities inhering in the text—judges must resolve them.

Second, consequences flow from a Justice's interpretation in a direct and immediate way. A judicial decision respecting the incompatibility of Jim Crow with a constitutional guarantee of equality is not simply a contemplative exercise in defining the shape of a just society. It is an order—supported by the full coercive power of the State—that the present society change in a fundamental aspect. Under such circumstances the process of deciding can be a lonely, troubling experience for fallible human beings conscious that their best may not be adequate to the challenge. We Justices are certainly aware 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 the decision. More than the litigants may be affected. The course of vital social, economic and political currents may be directed.

These three defining characteristics of my relation to the constitutional text—its public nature, obligatory character, and consequentialist aspect—cannot help but influence the way I read that text. When Justices interpret the Constitution they speak for their community, not for themselves alone. The act of interpretation

must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought. Justices are not platonic guardians appointed to wield authority according to their personal moral predilections. Precisely because coercive force must attend any judicial decision to countermand the will of a contemporary majority, the Justices must render constitutional interpretations that are received as legitimate. The source of legitimacy is, of course, a wellspring of controversy in legal and political circles. At the core of the debate is what the late Yale Law School Professor Alexander Bickel labeled "the countermajoritarian difficulty." Our commitment to self-governance in a representative democracy must be reconciled with vesting in electorally unaccountable Justices the power to invalidate the expressed desires of representative bodies on the ground of inconsistency with higher law. Because judicial power resides in the authority to give meaning to the Constitution, the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation.

There are those who find legitimacy in fidelity to what they call "the intentions of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the state—or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states. And apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting all we perceive. One cannot help but speculate that the chorus of lamentations calling for interpretation faithful to "original intention"—and proposing nullification of interpretations that fail this quick litmus test—must inevitably come from persons who have no familiarity with the historical record.

Perhaps most importantly, while proponents of this facile historicism justify it as a depoliticization of the judiciary, the political underpinnings of such a choice should not escape notice. A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such a presumption against claims of right. Nothing intrinsic in the nature of interpretation—if there is such a thing as the "nature" of interpretation—commands such a passive approach to ambiguity. This is a choice no less political than any other; it expresses antipathy to claims of the

minority rights against the majority. Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.

Another, perhaps more sophisticated, response to the potential power of judicial interpretation stresses democratic theory: because ours is a government of the people's elected representatives, substantive value choices should by and large be left to them. This view emphasizes not the transcendent historical authority of the Framers but the predominant contemporary authority of the elected branches of government. Yet it has similar consequences for the nature of proper judicial interpretation. Faith in the majoritarian process counsels restraint. Even under more expansive formulations of this approach, judicial review is appropriate only to the extent of ensuring that our democratic process functions smoothly. Thus, for example, we would protect freedom of speech merely to ensure that the people are heard by their representatives, rather than as a separate, substantive value. When, by contrast, society tosses up to the Supreme Court a dispute that would require invalidation of a legislature's substantive policy choice, the Court generally would stay its hand because the Constitution was meant as a plan of government and not as an embodiment of fundamental substantive values.

The view that all matters of substantive policy should be resolved through the majoritarian process has appeal under some circumstances, but I think it ultimately will not do. Unabashed enshrinement of majority will would permit the imposition of a social caste system or wholesale confiscation of property so long as a majority of the authorized legislative body, fairly elected, approved. Our Constitution could not abide such a situation. It is the very purpose of a Constitution—and particularly of the Bill of Rights—to declare certain values transcendent, beyond the reach of temporary political majorities. The majoritarian process cannot be expected to rectify claims of minority right that arise as a response to the outcomes of that very majoritarian process. As James Madison put it:

> The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority. (I Annals 437)

Faith in democracy is one thing, blind faith quite another. Those who drafted our Constitution understood the difference. One cannot read the text without admitting that it embodies substantive value choices; it places certain values beyond the power of any legislature. Obvious are the separation of powers; the privilege of the Writ of Habeas Corpus; prohibition of Bills of Attainder and *ex post facto* laws; prohibition of cruel and unusual punishments; the requirement of just compensation for official taking of property; the prohibition of laws tending to establish religion or enjoining the free exercise of religion; and, since the Civil War, the banishment of slavery and official race discrimination. With respect to at least such principles, we simply have not constituted ourselves as strict utilitarians.

While the Constitution may be amended, such amendments require an immense effort by the People as a whole.

To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances. The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours. Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluating quite different historical practices. Each generation has the choice to overrule or add to the fundamental principles enunciated by the Framers; the Constitution can be amended or it can be ignored. Yet with respect to its fundamental principles, the text has suffered neither fate. Thus, if I may borrow the words of an esteemed predecessor, Justice Robert Jackson, the burden of judicial interpretation is to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century." *Board of Education* v. *Barnette*, [319 U.S. 624, 639 (1943),].

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time. This realization is not, I assure you, a novel one of my own creation. Permit me to quote from one of the opinions of our Court, *Weems* v. *United States*, [217 U.S. 349,] written nearly a century ago:

> Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice John Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophesy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.

Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not

sufficiently recognized. Thus, for example, when we interpret the Civil War Amendments to the charter—abolishing slavery, guaranteeing blacks equality under law, and guaranteeing blacks the right to vote—we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of slave caste.

Having discussed at some length how I, as a Supreme Court Justice, interact with this text, I think it time to turn to the fruits of this discourse. For the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law. Some reflection is perhaps required before this can be seen.

The Constitution on its face is, in large measure, a structuring text, a blueprint for government. And when the text is not prescribing the form of government it is limiting the powers of that government. The original document, before addition of any of the amendments, does not speak primarily of the rights of man, but of the abilities and disabilities of government. When one reflects upon the text's preoccupation with the scope of government as well as its shape, however, one comes to understand that what this text is about is the relationship of the individual and the state. The text marks the metes and bounds of official authority and individual autonomy. When one studies the boundary that the text marks out, one gets a sense of the vision of the individual embodied in the Constitution.

As augmented by the Bill of Rights and the Civil War amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual. This vision is reflected in the very choice of democratic self-governance: the supreme value of a democracy is the presumed worth of each individual. And this vision manifests itself most dramatically in the specific prohibitions of the Bill of Rights, a term which I henceforth will apply to describe not only the original first eight amendments, but the Civil War amendments as well. It is a vision that has guided us as a people throughout our history, although the precise rules by which we have protected fundamental human dignity have been transformed over time in response to both transformations of social condition and evolution of our concepts of human dignity.

Until the end of the nineteenth century, freedom and dignity in our country found meaningful protection in the institution of real property. In a society still largely agricultural, a piece of land provided men not just with sustenance but with the means of economic independence, a necessary precondition of political independence and expression. Not surprisingly, property relationships formed the heart of litigation and of legal practice, and lawyers and judges tended to think stable property relationships the highest aim of the law.

But the days when common law property relationships dominated litigation and legal practice are past. To a growing extent economic existence now depends on less certain relationships with government—licenses, employment, contracts, subsidies, unemployment benefits, tax exemptions, welfare and the like. Government participation in the economic existence of individuals is pervasive and deep. Administrative matters and other dealings with government are at the epicenter of the exploding law. We turn to government and to the law for controls which

would never have been expected or tolerated before this century, when a man's answer to economic oppression or difficulty was to move two hundred miles west. Now hundreds of thousands of Americans live entire lives without any real prospect of the dignity and autonomy that ownership of real property could confer. Protection of the human dignity of such citizens requires a much modified view of the proper relationship of individual and state.

In general, problems of the relationship of the citizen with government have multipled and thus have engendered some of the most important constitutional issues of the day. As government acts ever more deeply upon those areas of our lives once marked "private," there is an even greater need to see that individual rights are not curtailed or cheapened in the interest of what may temporarily appear to be the "public good." And as government continues in its role of provider for so many of our disadvantaged citizens, there is an even greater need to ensure that government act with integrity and consistency in its dealings with these citizens. To put this another way, the possibilities for collision between government activity and individual rights will increase as the power and authority of government itself expands, and this growth, in turn, heightens the need for constant vigilance at the collision points. If our free society is to endure, those who govern must recognize human dignity and accept the enforcement of constitutional limitations on their power conceived by the Framers to be necessary to preserve that dignity and the air of freedom which is our proudest heritage. Such recognition will not come from a technical understanding of the organs of government, or the new forms of wealth they administer. It requires something different, something deeper—a personal confrontation with the wellsprings of our society. Solutions of constitutional questions from that perspective have become the great challenge of the modern era. All the talk in the last half-decade about shrinking the government does not alter this reality or the challenge it imposes. The modern activist state is a concomitant of the complexity of modern society; it is inevitably with us. We must meet the challenge rather than wish it were not before us.

The challenge is essentially, of course, one to the capacity of our constitutional structure to foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure. During the time of my public service this challenge has largely taken shape within the confines of the interpretive question whether the specific guarantees of the Bill of Rights operate as restraints on the power of State government. We recognize the Bill of Rights as the primary source of express information as to what is meant by constitutional liberty. The safeguards enshrined in it are deeply etched in the foundation of America's freedoms. Each is a protection with centuries of history behind it, often dearly bought with the blood and lives of people determined to prevent oppression by their rulers. The first eight amendments, however, were added to the Constitution to operate solely against federal power. It was not until the Thirteenth and Fourteenth Amendments were added, in 1865 and 1868, in response to a demand for national protection against abuses of state power, that the Constitution could be interpreted to require application of the first eight amendments to the states.

It was in particular the Fourteenth Amendment's guarantee that no person be deprived of life, liberty or property without process of law that led us to apply many of the specific guarantees of the Bill of Rights to the States. In my judgment, Justice Cardozo best captured the reasoning that brought us to such decisions when he described what the Court has done as a process by which the guarantees "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption . . . [that] has had its source in the belief that neither liberty nor justice would exist if [those guarantees] . . . were sacrificed." *Palko* v. *Connecticut*, [302 U.S. 319, 326 (1937),]. But this process of absorption was neither swift nor steady. As late as 1922 only the Fifth Amendment guarantee of just compensation for official taking of property had been given force against the states. Between then and 1956 only the First Amendment guarantees of speech and conscience and the Fourth Amendment ban of unreasonable searches and seizures had been incorporated—the latter, however, without the exclusionary rule to give it force. As late as 1961, I could stand before a distinguished assemblage of the bar at New York University's James Madison Lecture and list the following as guarantees that had not been thought to be sufficiently fundamental to the protection of human dignity so as to be enforced against the states: the prohibition of cruel and unusual punishments, the right against self-incrimination, the right to assistance of counsel in a criminal trial, the right to confront witnesses, the right to compulsory process, the right not to be placed in jeopardy of life or limb more than once upon accusation of a crime, the right not to have illegally obtained evidence introduced at a criminal trial, and the right to a jury of one's peers.

The history of the quarter century following that Madison Lecture need not be told in great detail. Suffice it to say that each of the guarantees listed above has been recognized as a fundamental aspect of ordered liberty. Of course, the above catalogue encompasses only the rights of the criminally accused, those caught, rightly or wrongly, in the maw of the criminal justice system. But it has been well said that there is no better test of a society than how it treats those accused of transgressing against it. Indeed, it is because we recognize that incarceration strips a man of his dignity that we demand strict adherence to fair procedure and proof of guilt beyond a reasonable doubt before taking such a drastic step. These requirements are, as Justice Harlan once said, "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, [397 U.S. 358, 372 (1970),] (concurring opinion). There is no worse injustice than wrongly to strip a man of his dignity. And our adherence to the constitutional vision of human dignity is so strict that even after convicting a person according to these stringent standards, we demand that his dignity be infringed only to the extent appropriate to the crime and never by means of wanton infliction of pain or deprivation. I interpret the Constitution plainly to embody these fundamental values.

Of course the constitutional vision of human dignity has, in this past quarter century, infused far more than our decisions about the criminal process. Recognition of the principle of "one person, one vote" as a constitutional one redeems the

promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process. Recognition of so-called "new property" rights in those receiving government entitlements affirms the essential dignity of the least fortunate among us by demanding that government treat with decency, integrity and consistency those dependent on its benefits for their very survival. After all, a legislative majority initially decides to create governmental entitlements; the Constitution's Due Process Clause merely provides protection for entitlements thought necessary by society as a whole. Such due process rights prohibit government from imposing the devil's bargain of bartering away human dignity in exchange for human sustenance. Likewise, recognition of full equality for women—equal protection of the laws—ensures that gender has no bearing on claims to human dignity.

Recognition of broad and deep rights of expression and of conscience reaffirm the vision of human dignity in many ways. They too redeem the promise of self-governance by facilitating—indeed demanding—robust, uninhibited and wide-open debate on issues of public importance. Such public debate is of course vital to the development and dissemination of political ideas. As importantly, robust public discussion is the crucible in which personal political convictions are forged. In our democracy, such discussion is a political duty, it is the essence of self government. The constitutional vision of human dignity rejects the possibility of political orthodoxy imposed from above; it respects the right of each individual to form and to express political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite. Recognition of these rights of expression and conscience also frees up the private space for both intellectual and spiritual development free of government dominance, either blatant or subtle. Justice Brandeis put it so well sixty years ago when he wrote: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means." *Whitney* v. *California* [274 U.S. 357, 375 (1927),] (concurring opinion).

I do not mean to suggest that we have in the last quarter century achieved a comprehensive definition of the constitutional ideal of human dignity. We are still striving toward that goal, and doubtless it will be an external quest. For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.

Indeed, I cannot in good conscience refrain from mention of one grave and crucial respect in which we continue, in my judgment, to fall short of the constitutional vision of human dignity. It is in our continued tolerance of State-administered execution as a form of punishment. I make it a practice not to comment on the constitutional issues that come before the Court, but my position on this issue, of course, has been for some time fixed and immutable. I think I can venture some thoughts on this particular subject without transgressing my usual guideline too severely.

As I interpret the Constitution, capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. This is a position of which I imagine you are not unaware. Much discussion of the merits of capital punishment has in recent years focused on the potential arbitrariness that attends its administration, and I have no doubt that such arbitrariness is a grave wrong. But for me, the wrong of capital punishment transcends such procedural issues. As I have said in my opinions, I view the Eighth Amendment's prohibition of cruel and unusual punishments as embodying to a unique degree moral principles that substantively restrain the punishments our civilized society may impose on those persons who transgress its laws. Foremost among the moral principles recognized in our cases and inherent in the prohibition is the primary principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. Death for whatever crime and under all circumstances is a truly awesome punishment. The calculated killing of a human being by the State involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the State from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is, indeed, "cruel and unusual." It is thus inconsistent with the fundamental premise of the Clause that even the most base criminal remains a human being possessed of some potential, at least, for common human dignity.

This is an interpretation to which a majority of my fellow Justices—not to mention, it would seem, a majority of my fellow countrymen—does not subscribe. Perhaps you find my adherence to it, and my recurrent publication of it, simply contrary, tiresome, or quixotic. Or perhaps you see in it a refusal to abide by the judicial principle of *stare decisis*, obedience to precedent. In my judgment, however, the unique interpretive role of the Supreme Court with respect to the Constitution demands some flexibility with respect to the call of *stare decisis*. Because we are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive, again, to the anachronistic views of long-gone generations. I mentioned earlier the judge's role in seeking out the community's interpretation of the Constitutional text. Yet, again in my judgment, when a Justice perceives an interpretation of the text to have departed so far from its essential meaning, that Justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path. On this issue, the death penalty, I hope to embody a community striving for human dignity for all, although perhaps not yet arrived.

You have doubtless observed that this description of my personal encounter with the constitutional text has in large portion been a discussion of public developments in constitutional doctrine over the last century. That, as I suggested at the outset, is inevitable because my interpretive career has demanded a public

reading of the text. This public encounter with the text, however, has been a profound source of personal inspiration. The vision of human dignity embodied there is deeply moving. It is timeless. It has inspired Americans for two centuries and it will continue to inspire as it continues to evolve. That evolutionary process is inevitable and, indeed, it is the true interpretive genius of the text.

If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. For the political and legal ideals that form the foundation of much that is best in American institutions—ideals jealously preserved and guarded throughout our history—still form the vital force in creative political thought and activity within the nation today. As we adapt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity—liberty and justice for all individuals—will continue to inspire and guide us because they are entrenched in our Constitution. The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit is inherent in the aspirations of our people.

Before his nomination Bork had a distinguished career. He served in the U.S. Marine Corps, became a partner in a major law firm, taught constitutional law at the Yale Law School, served as solicitor general and acting attorney general of the United States under Richard M. Nixon, and finally as a circuit court judge in the U.S. Court of Appeals for the District of Columbia circuit.

At the time of Bork's nomination most political observers expected that he would be confirmed, although not without a fight. He had written many articles during his tenure at Yale expressing what liberals considered to be unacceptable conservative and unorthodox opinions on important issues of constitutional law. As professors are wont to be he was often purposely provocative. Most importantly, although he had not written on the subject, he had publicly denied that a constitutional right to privacy existed, an opinion that his liberal opponents felt would put him on the side of Supreme Court justices who favored overturning *Roe* v. *Wade* (1973), which had affirmed the right to privacy as the basis of the right to abortion.

Bork's confirmation became a bitter struggle between liberals and conservatives, the former emerging victorious when the Senate failed to confirm him. In answer to his critics Bork wrote *The Tempting of America* (New York: The Free Press, 1990) from which the following selection is taken. He presents a viewpoint that contrasts sharply with that of a former justice, William J. Brennan, Jr., in selection 66.

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Robert H. Bork
THE TEMPTING OF AMERICA

THE SUPREME COURT AND THE TEMPTATIONS OF POLITICS

A popular style in complaining about the courts is to contrast modern judges with those of a golden or, at least, a less tarnished age. Many people have a fuzzy impression that the judges of old were different. They did things like "follow precedent" and "apply the law, not make it up." There is a good deal to be said for that view. The practice of judicial lawmaking has certainly accelerated spec-

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From Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), pp. 15–18, 351–355. Copyright 1990 by Robert H. Bork. Reprinted by permission of The Free Press, a Division of Macmillan, Inc.

tacularly in this century, particularly in the past four or five decades. Nevertheless, the whole truth is rather more complicated.

From the establishment of the federal judiciary at the end of the eighteenth century, some judges at least claimed the power to strike down statutes on the basis of principles not to be found in the Constitution. Judges who claimed this power made little or no attempt to justify it, to describe its source with any specificity, or to state what principles, if any, limited their own power. No more have the activist judges of our time. Justifications for such judicial behavior had, for the most part, to await the ingenuity of modern law faculties. But the actions of the federal judiciary, and in particular those of the Supreme Court, have often provoked angry reaction, though rarely a systematic statement of the appropriate judicial role. The appropriate limits of judicial power, if such there be, are thus the center of an ancient, if not always fruitful, controversy. Its confused and unfocused condition constitutes a venerable tradition, which is one tradition, at least, modern scholarship leaves intact. . . .

. . . [I]t is important to keep in mind that any court seen engaging in overt revisionism will, in all probability, have engaged in many more instances of disguised departures from the Constitution. A court that desires a result the law does not allow would rather, whenever possible, through misuse of materials or illogic, publish an opinion claiming to be guided or even compelled to its result by the Constitution than state openly that the result rests on other grounds. That is because popular support for judicial supremacy rests upon the belief that the court is applying fundamental principles laid down at the American founding. We would hardly revere a document that we knew to be no more than an open warrant for judges to do with us as they please.

Disguised or not, the habit of legislating policy from the bench, once acquired, is addictive and hence by no means confined to constitutional cases. The activist or revisionist judge, as we shall see, can no more restrain himself from doing "good" in construing a statute than when he purports to speak with the voice of the Constitution.

The values a revisionist judge enforces do not, of course, come from the law. If they did, he would not be revising. The question, then, is where such a judge finds the values he implements. Academic theorists try to provide various philosophical apparatuses to give the judge the proper values. We may leave until later the question of whether any of these systems succeed. The important point, for the moment, is that no judge has ever really explained the matter. A judge inserting new principles into the Constitution tells us their origin only in a rhetorical, never an analytical, style. There is, however, strong reason to suspect that the judge absorbs those values he writes into law from the social class or elite with which he identifies.

It is a commonplace that moral views vary both regionally within the United States and between socio-economic classes. It is similarly a commonplace that the morality of certain elites may count for more in the operations of government than that morality which might command the allegiance of a majority of the people. In no part of government is this more true than in the courts. An elite moral or

political view may never be able to win an election or command the votes of a majority of a legislature, but it may nonetheless influence judges and gain the force of law in that way. That is the reason judicial activism is extremely popular with certain elites and why they encourage judges to think it the highest aspect of their calling. Legislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment. The judge is free to reflect the "better" opinion because he need not stand for reelection and because he can deflect the majority's anger by claiming merely to have been enforcing the Constitution. Constitutional jurisprudence is mysterious terrain for most people, who have more pressing things to think about. And a very handy fact that is for revisionists.

The opinions of the elites to which judges respond change as society changes and one elite replaces another in the ability to impress judges. Thus, judicial activism has had no single political trajectory over time. The values enforced change, and sometimes those of one era directly contradict those of a prior era. That can be seen in the sea of changes constitutional doctrine has undergone in our history. There will often be a lag, of course, since judges who have internalized the values of one elite will not necessarily switch allegiances just because a new elite and its values have become dominant. When that happens, when judges are enforcing values regarded by the dominant elite as passé, the interim between the change and the replacement of the judges will be perceived as a time of "constitutional crisis." The fact of judicial mortality redresses the situation eventually, and new judges enforce the new "correct" values. This has happened more than once in our history. The intellectuals of the newly dominant elite are then highly critical of the activist judges of the prior era for enforcing the wrong values while they praise the activist judges of their own time as sensitive to the needs of society. They do not see, or will not allow themselves to see, that the judicial performances, judged as judicial performances, are the same in both eras. The Supreme Court that struck down economic regulation designed to protect workers is, judged as a judicial body, indistinguishable from the Court that struck down abortion laws. Neither Court gave anything resembling an adequate reason derived from the Constitution for frustrating the democratic outcome. So far as one can tell from the opinions written, each Court denied majority morality for no better reason than that elite opinion ran the other way.

. . . [T]he Supreme Court's activism was at various times enlisted in the protection of property, the defense of slave owners, the protection of business enterprise in an industrializing nation, the interests of groups in the New Deal coalition, and, today, the furtherance of the values of the elite or cluster of elites known as the "new class" or the "knowledge class." The point ought not be overstated. We are discussing a strong tendency, not invariable conduct. No Court behaves in this way all of the time, in every case. Few judges are so willful as that. The structure of the law does have force, and, in any event, most cases do not present a conflict between elite morality and the law's structure. Yet such occasions arise in important matters, and it is those occasions that give the Court of each era its distinctive style.

Part of any revisionist Court's style, in addition to the nature of the nonconstitutional values enforced, is the rhetoric employed. The Court of each era is likely to choose different provisions of the Constitution or different formulations of invented rights as the vehicles for its revisory efforts. These are different techniques for claiming that what is being done is "law." The shifts in terminology do not alter the reality of the judicial performance as such. Still, the rhetoric employed will often disclose what values are popular with the elites to which the Court responds. Thus, the Court's shift from the use of the word "liberty" in the due process clause, popular in the closing decades of the last century and the opening decades of this century, to the idea of equality in the equal protection clause signified a shift in dominant values. It also signified a change in the social groups to which the Court responded, a decline in the influence of the business class and a rise in that of the New Deal political coalition and its intellectual spokesmen. Similarly, the change from "liberty of contact," used in striking down economic reform legislation, to the "right of privacy" employed to guarantee various aspects of sexual freedom, signals a change in dominant values from capitalist free enterprise to sexual permissiveness, and, again, a change in dominant elites from the business class to the knowledge class, though now with less concern than previously for the social values of those who made up the New Deal coalition.

CONCLUSION

The Constitution has been many things to Americans. It has been and remains an object of veneration, a sacred text, the symbol of our nationhood, the foundation of our government's structure and practice, a guarantor of our liberties, and a moral teacher.

But the Constitution is also power. That is why we see political struggle over the selection of the judges who will wield that power. In our domestic affairs and even to some degree in our foreign dealings, the Constitution provides judges with the ultimate coercive power known to our political arrangements. In the hands of judges, words become action: commands are issued by courts, obeyed by legislatures, and enforced by executives. The reading of the words becomes freedoms and restrictions for us; the course of the nation is confirmed or altered; the way we live and the ways we think and feel are affected.

It will not do to overstate the matter. We are an incredibly complex and intricate society and no power is without checks, some obvious and direct in operation, some subtle and intangible. But a major check on judicial power, perhaps the major check, is the judges' and our understanding of the proper limits to that power. Those limits may be pressed back incrementally, case by case, until judges rule areas of life not confided to their authority by any provision of the Constitution or other law. We have, in fact, witnessed just that process. The progression of political judging, judging unrelated to law . . . has greatly accelerated in the past few decades and now we see the theorists of constitutional law urging judges on to still greater incursions into Americans' right of self-government.

This is an anxious problem and one that can be met only by understanding that judges must always be guided by the original understanding of the Constitution's provisions. Once adherence to the original understanding is weakened or abandoned, a judge, perhaps instructed by a revisionist theorist, can reach any result, because the human mind and will, freed of the constraints of history and "the sediment of history which is law," can reach any result. As we have seen, no set of propositions is too preposterous to be espoused by a judge or a law professor who has cast loose from the historical Constitution.

The judge's proper task is not mechanical. "History," Cardinal Newman reminded us, "is not a creed or a catechism, it gives lessons rather than rules." No body of doctrine is born fully developed. That is as true of constitutional law as it is of theology. The provisions of the Constitution state profound but simple and general ideas. The law laid down in those provisions gradually gains body, substance, doctrines, and distinctions as judges, equipped at first with only those ideas, are forced to confront new situations and changing circumstances. It is essential, however, that the new developments always be weighed in the light of the lessons history provides about the principles meant to be enforced. Doctrine must be shaped and reshaped to conform to the original ideas of the Constitution, to ensure that the principles intended are those which guide and limit power, and that no principles not originally meant are invented to deprive us of the right to govern ourselves. The concept of original understanding itself gains in solidity, in articulation and sophistication, as we investigate its meanings, implications, and requirements, and as we are forced to defend its truths from the constitutional heresies with which we are continually tempted.

Among the stakes is the full right of self-government that the Founders bequeathed us and which they limited only as to specified topics. In the long run, however, there may be higher stakes than that. As we move away from the historically rooted Constitution to one created by abstract, universalistic styles of constitutional reasoning, we invite a number of dangers. One is that such styles teach disrespect for the actual institutions of the American nation. A great many academic theorists state explicitly, and some judges seem easily persuaded, that elected legislators and executives are not adequate to decide the moral issues that divide us, and that judges should therefore take their place. But, when Americans are morally divided, it is appropriate that our laws reflect that fact. The often untidy responses of the elected branches possess virtues and benefits that the "principled" reactions of courts do not. Our popular institutions, the legislative and executive branches, were structured to provide safety, to achieve compromise when we are divided, to slow change, to dilute absolutisms. They both embody and produce wholesome inconsistencies. They are designed, in short, to do the very things that abstract generalizations about moral principle and the just society tend to bring into contempt. That is a dangerous civics lesson to teach the citizens of a republic. As Edmund Burke put it:

> All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter. We balance incon-

> veniences; we give and take; we remit some rights, that we may enjoy others; and, we choose rather to be happy citizens, than subtle disputants.

It may be significant that this passage is from Burke's speech on *Moving His Resolutions for Conciliation with the Colonies*, delivered to Parliament in 1775. The English government elected to stand on abstract principles of sovereignty and lost the American colonies.

The attempt to define individual liberties by abstract moral philosophy, though it is said to broaden our liberties, is actually likely to make them more vulnerable. I am not referring here to the freedom to govern ourselves but to the freedoms from government guaranteed by the Bill of Rights and the post–Civil War amendments. Those constitutional liberties were not produced by abstract reasoning. They arose out of historical experience with unaccountable power and out of political thought grounded in the study of history as well as in moral and religious sentiment. Attempts to frame theories that remove from democratic control areas of life our nation's Founders intended to place there can achieve power only if abstractions are regarded as legitimately able to displace the Constitution's text and structure and the history that gives our legal rights life, rootedness, and meaning. It is no small matter to discredit the foundations upon which our constitutional freedoms have always been sustained and substitute as a bulwark only the abstract propositions of moral philosophy. To do that is, in fact, to display a lightmindedness terrifying in its frivolity. Our freedoms do not ultimately depend upon the pronouncements of judges sitting in a row. They depend upon their acceptance by the American people, and a major factor in that acceptance is the belief that these liberties are inseparable from the founding of the nation. The moral systems urged as constitutional law by the theorists are not compatible with the moral beliefs of most Americans. Richard John Neuhaus wrote that law is "a human enterprise in response to human behavior, and human behavior is stubbornly entangled with beliefs about right and wrong." Law will not be recognized as legitimate if it is not organically related to "the larger universe of moral discourse that helps shape human behavior." Constitutional doctrine that rests upon a parochial and class-bound version of morality, one not shared by the general American public, is certain to be resented and is unlikely to prove much of a safeguard when crisis comes.

Robert Bolt's play about Thomas More, *A Man for All Seasons*, makes the point. When More was Lord Chancellor, his daughter, Margaret, and his son-in-law, Roper, urged him to arrest a man they regarded as evil. Margaret said, "Father, that man's bad." More replied, "There is no law against that." And Roper said, "There is! God's law!" More then gave excellent advice to judges: "Then God can arrest him. . . . The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal. . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester."

Roper would not be appeased and he leveled the charge that More would give the Devil the benefit of law.

MORE Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER I'd cut down every law in England to do that!

MORE . . . Oh? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down— . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.

This is not a romanticized version of the man, for the historic More is reported to have said of his duty as a judge: "[I]f the parties will at my hands call for justice, then, all were it my father stood on the one side, and the Devil on the other, his cause being good, the Devil should have right." It is a hard saying and a hard duty, but it is the duty we must demand of judges.

Judges will always be tempted to apply what they imagine to be "God's law," cutting a great road through man's law. When they have done, when man's law has been thoroughly weakened and discredited, and when powerful forces have a different version of God's law or the higher morality, we may find that the actual rights of the Constitution and the democratic institutions that protect us may have all been flattened.

The difference between our historically grounded constitutional freedoms and those the theorists, whether of the academy or of the bench, would replace them with is akin to the difference between the American and the French revolutions. The outcome for liberty was much less happy under the regime of the abstract "rights of man" than it has been under the American Constitution. What Burke said of the abstract theorists who produced the calamities of the French Revolution might equally be said of those, judges and professors alike, who would remake our constitution out of moral philosophy: "This sort of people are so taken up with their theories about the rights of man that they have totally forgotten his nature." Those who made and endorsed our Constitution knew man's nature, and it is to their ideas, rather than to the temptations of utopia, that we must ask that our judges adhere.

❖❖ Justice William J. Brennan, Jr., argues in the next selection that strict construction is a myth. Many constitutional provisions, by their very nature, are vague and require judicial interpretation. "It is arrogant to pretend," writes Brennan, "that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." The Supreme Court must apply the Constitution in a contemporary context, and adapt it to present needs. "Our Constitution was not intended

Griswold v. Connecticut[1]

Introduction

The *Griswold* decision, as indicated in the opinions to follow, was a controversial one when it was reached in 1965; in one way or another, it has remained controversial ever since. The case raised questions of relations between the state and the individual, between the judiciary and the legislature, and between the words of the Constitution and the effort to find implied meanings, or "penumbras," in the rights that those words spelled out.

In the following selections from the Supreme Court's opinions, two of the opinions uphold the majority decision to recognize a "right of privacy" as an extension of other rights already upheld by the Court, while the two dissenting opinions attack this judicial invention of a right as unwarranted and unwise. Other justices expressed additional opinions on the case, but this is probably enough complication for now.

In 1987, when Judge Robert Bork was nominated—but not confirmed—for a seat on the Supreme Court, his willingness to uphold the *Griswold* decision (he said that he would) was a key issue.

Mr. Justice Douglas Delivered the Opinion of the Court

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven—a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to *married persons* as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are Sections 53–32 and 54–196 of the General Statutes of Connecticut (1958 rev.). The former provides:

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

[1] This decision, delivered by the Supreme Court in 1965, was prompted by the appeal of a Connecticut law that forbade the dissemination of birth-control information. The appellants had worked at a Planned Parenthood League clinic and had been arrested for disseminating such information to married persons, contrary to the Connecticut law. 381 U.S. 479 (1965).

Section 54–196 provides:

> Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. . . .

. . . The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

. . . In *NAACP* v. *Alabama*, 357 U.S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Ibid.* In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. *NAACP* v. *Button*, 371 U.S. 415, 430-431. In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (*id.*, at 244) and was not action of a kind proving bad moral character. *Id.*, at 245-246.

Those cases involved more than the "right of assembly"—a right that extends to all irrespective of their race or ideology. *DeJonge* v. *Oregon*, 299 U.S. 353. The right of "association," like the right of belief (*Board of Education* v. *Barnette*, 319 U.S. 624), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

. . . [T]he right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

Mr. Justice Goldberg, whom The Chief Justice and Mr. Justice Brennan join, concurring.

. . . This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

. . . While this court has had little occasion to interpret the Ninth Amendment, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury* v. *Madison*, 1 Cranch 137, 174. In interpreting the Constitution, "real effect should be given to all the words it uses." . . . The Ninth Amendment to the Constitution may by regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people."(Emphasis added.)

. . . [T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. . . . The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a *State's* infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon *federal* power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifi-

cally mentioned in the first eight amendments. Cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 94–95.

. . . The entire fabric of the Constitution and purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family ar of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

. . . The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

. . . Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any "subordinating [state] interest which is compelling" or that it is "necessary . . . to the accomplishment of a permissible state policy." The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of contraception. . . . But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. . . . The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. See Conn. Gen. Stat. Sections 53-218, 53-219 *et seq*. These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to "invade the area of protected freedoms," *NAACP* v. *Alabama*, *supra*, at 307. . . .

. . . In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

Mr. Justice Black, with whom
Mr. Justice Stewart joins, dissenting.

I agree with my Brother Stewart's dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers Harlan, White and Goldberg who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitututional.

. . . The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the"privacy" of individuals. But there is not. . . .

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. . . . For theses reasons I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provisions. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

. . . The due process argument which my Brothers Harlan and White adopt here is based, as their opinions indicate, on the premise that the Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. While I completely subscribe to the holding of *Marbury* v. *Madison*, 1 Cranch 137, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of

fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.

. . . I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the powers of States to govern themselves which the Constitution plainly intended them to have.

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. . . . That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. . . .

. . . So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

Mr. Justice Stewart, whom
Mr. Justice Black joins, dissenting

. . . In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

. . . What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amend-

ment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

Questions for Understanding and Discussion

1. In Douglas's opinion for the Court, how does he reach the conclusion that specific guarantees in the Bill of Rights have "penumbras"? Then how does he argue for "zones of privacy"?
2. In Goldberg's concurring opinion, what role is played by the Ninth Amendment? How does he reject the reasoning of the dissenting opinions?
3. In Black's dissenting opinion, what does he have to say about the wisdom of the Connecticut law? About its constitutionality? On what grounds does he believe that the Supreme Court can—or cannot—find laws unconstitutional?
4. What recourse does Stewart suggest that the people have against laws? What can you infer about his notion of judicial power?
5. Do you personally support the Connecticut law against disseminating birth-control information? Do you support the idea of overturning that law by judicial rather than legislative means? By a declaration of unconstitutionality, absent any specific guarantee in the Constitution against such laws?

AP GOVT. Name _____

"How the Supreme Court Arrives at Decisions, by William J. Brennan, Jr.

DIRECTIONS: ANSWER ON SEPARATE PAPER. Attach as cover sheet.

1. Compare and contrast how the Court handles the extraordinary demands of an adversary culture with the way Congress handles its increasingly heavy workload?

2. How does the Friday Conference operate?

3. If a case is heard in October, why does it often take until June to announce the opinion of the Court?

4. What is the meaning and effect of the uniform rule of the Court?

5. How does Justice Brennan deal with the painful accusations against the integrity of the Court?

AP GOVT. NAME_____

"Judicial Self-Restraint," by John P. Roche In Woll, p. 576

DIRECTIONS: STAPLE THIS TO YOUR ANSWERS AS A COVER SHEET. WRITE ON ONLY ONE SIDE OF THE PAPER.

1. What does Roche mean by labeling the role of the judicial system as one of "social chaperonage?"

2. How does the Supreme Court use the process of "certiorari" as a mechanism of procedural self-restraint?

3. What is the Court's "doctrine of political questions?"

4. How does the Court use parsimony to escape from dangerous issues? Give an example.

5. How does the Court use the "doctrine of political inexpertise?"

AP GOVT. NAME_____

"What Am I? A Potted Plant?" by Richard A. Posner in Ciglar/Loomis, p.603

DIRECTIONS: STAPLE THIS TO YOUR ANSWERS AS A COVER SHEET. WRITE ON ONLY ONE SIDE OF THE PAPER.

1. According to Posner, why is the notion of "original intent" indefensible as a serious legal doctrine?

2. What are the two ways one could "read" the Sixth Amendement's provision for the right to counsel?

3. What are two of the very specific grants of rights in the Bill of Rights that have not stood up well to the test of time?

4. Do all judges make policy, at least part of the time? Explain your answer.

5. What is the connection between discretion and consequences that Posner makes in explaining judicial activism?