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The Roberts Court, Stare Decisis, and the Future of Constitutional Law

Geoffrey R. Stone*

In this lecture, I hope to offer some interesting—perhaps even provocative—thoughts about the United States Supreme Court. I intend, at least in part, to express vexation, disappointment, and frustration. I trust I will succeed, at least in expressing my own annoyance at the current state of the law.

In law school, we teach that the law is a ruthlessly rational discipline, devoid of emotion. That is a lie, but a useful one. We lie to our students because, in order for them to learn to “think like lawyers,” they must develop the capacity to argue with cool, clear, and calculating reason. They must learn to put their emotions aside and to use their powers of unsentimental, hard-edged, razor-steel reasoning to sharpen, define, and illuminate their arguments and analyses.

We law professors are right to employ this little deceit, because without the capacity to reason in a brutally analytical manner, a lawyer is of no use to anyone. But, truth be known, the law is not only about hard-edged, analytical, pure-bred logic. It is also quite fundamentally about values, and although in law school we underscore the power of reason, we secretly hope that our students will never forget that their responsibility as lawyers is to use the power of reason to further certain values—the values of liberty, dignity, justice, and equality.

Properly understood, of course, these are neither liberal nor conservative values. They are, rather, our constitutional values—freedom of speech, freedom of religion, the right to due process of law, freedom from cruel and unusual punishment, the right to equal protection of the laws, and so on.¹ These are the values to which all

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1. See U.S. CONST. amend. I (describing freedoms of speech and religion); *id.* amend. V (requiring due process of law); *id.* amend. XIV (requiring due process of law and

lawyers should be committed. Our responsibility as lawyers is to preserve and protect those values, and to do so with passion but always in a way that is intellectually candid, analytically rigorous, and closely reasoned.

The first part of my thesis this afternoon is this: The current majority of the Supreme Court, and particularly Chief Justice John Roberts and Justice Samuel Alito, are failing not only to preserve and protect fundamental constitutional values but also to fulfill their judicial responsibilities in a manner that is analytically rigorous, closely reasoned, and intellectually candid. These are strong words. This is not a talk for the faint-of-heart.

At the core of my thesis is the principle of *stare decisis*. The doctrine of precedent is, of course, central to our legal system.² It is based not on the assumption that prior judges are smarter than their successors but on the need for consistency, efficiency, predictability, and the need not to overpoliticize the judicial process and thereby undermine its credibility.

Of course, to say that precedent is supposed to govern is not to say very much. Not only are there circumstances in which a court is justified in overruling a prior decision, but courts have considerable latitude in interpreting prior decisions more, or less, broadly or narrowly. Every law student learns early on that the art of distinguishing and reconciling precedents invites a sometimes stunning degree of legal creativity.

But, for the judicial process to have integrity, that creativity must be bounded by intellectual candor. It is disingenuous, for example, to distinguish a prior decision on the ground that it was handed down on a Tuesday rather than on a Wednesday, or on the ground that the car was blue rather than green. Moreover, because the act of overruling a prior decision is and should be relatively unusual in our legal system, such an act when it occurs should be openly acknowledged, explained, and justified.

I first began to learn about all this myself in the fall of 1968 when I was a first-year student at the University of Chicago Law School. I took a course called Elements of Law, which was taught by Professor

equal protection of the laws); *id.* amend. VIII (mandating freedom from cruel and unusual punishment).

2. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) ("Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.").

Soia Menschikoff. Menschikoff was a brilliant lawyer, who drilled into her students both the potential for interpretative creativity and the necessity for intellectual integrity.

Two of the required books in my Elements of Law course were Karl Llewellyn's *The Bramble Bush*³ and Edward Levi's *An Introduction to Legal Reasoning*.⁴ In preparing for today's talk, I went back to my dog-eared copies of those works to see whether I remembered correctly what I thought I had learned from Llewellyn, Levi, and Menschikoff almost forty years ago.

Llewellyn expressly referred in *The Bramble Bush* to the "ethical element" in the doctrine of precedent, which he defined as the principle that courts should presumptively "continue what they have been doing."⁵ He characterized this principle as fundamental to the "judicial conscience."⁶ As an illustration of disingenuous judicial behavior, Llewellyn offered the example of a court distinguishing a prior decision by declaring that "[t]his rule holds only of redheaded Walpoles in pale magenta Buick cars."⁷ Llewellyn added that "when you find this said of a past case you know that in effect it has been overruled."⁸

For his part, Edward Levi wrote: "The basic pattern of legal reasoning . . . is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation."⁹ The steps, he said, "are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case."¹⁰ "[T]he key step in the legal process," Levi added, is "[t]he finding of similarity or difference [between the two cases]."¹¹

Of course, the question of similarity or difference is one of *judgment*. The interpretation and application of precedent is not a mechanical or automatic process, and reasonable people can and do

3. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (5th prtg. 1975) (1930).

4. EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949).

5. LLEWELLYN, *supra* note 3, at 65.

6. *Id.*

7. *Id.* at 66-67.

8. *Id.* at 67.

9. LEVI, *supra* note 4, at 1-2.

10. *Id.* at 2.

11. *Id.*

differ about how broadly or narrowly a prior decision should be construed.

Many factors can quite legitimately shape this judgment, including not only the responsibility to identify a “neutral” or “objective” understanding of the precedent but also differing perspectives on the merits of the prior decision and on the wisdom of applying it to the new situation. As Levi wrote, “[l]egal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities.”¹²

But, despite the subtleties inherent in the use of precedent, underlying it must be a commitment to judicial integrity. It is the responsibility of the judge faithfully to apply precedent, to explain his or her reasoning in an honest and forthright manner, to acknowledge the difficulties when they arise, and to explain and to justify any departures from precedent. That is at the very heart of the judicial craft, and it is the very essence of a principled system of law.

In their Senate confirmation hearings, John Roberts and Samuel Alito cast themselves as first-rate lawyers committed to the rule of law and, especially, to the principle of *stare decisis*.¹³ Roberts assured the Senate that judges must “‘be bound down by [strict] rules and precedents.’”¹⁴ He explained that the Framers of the United States Constitution “‘appreciated the role of precedent in promoting evenhandedness, predictability, stability,’” and “‘integrity in the judicial process.’”¹⁵ Although acknowledging that it is sometimes necessary for judges to reconsider precedents, he emphasized that this should be reserved for exceptional circumstances, where a decision has proved clearly “unworkable” over time.¹⁶ “[A] sound judicial philosophy,” he reasoned, must recognize that judges work “within a system of rules developed over the years by other judges equally striving to live up to the judicial oath.”¹⁷

12. *Id.* at 104.

13. *See infra* notes 14-20 and accompanying text.

14. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 142 (2005) (statement of John G. Roberts, Jr.) (quoting THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

15. *Id.*

16. *Id.*

17. *Id.* at 122 (responding in writing to a questionnaire prepared by the Senate Judiciary Committee concerning recent criticisms of judicial activism). He reiterated this sentiment in his oral statement. *Id.* at 55.

Similarly, Samuel Alito testified that stare decisis is “a fundamental part of our legal system.”¹⁸ He maintained that this principle “limits the power of the judiciary” and ensures that judges will “respect the judgments and the wisdom that are embodied in prior judicial decisions.”¹⁹ Stare decisis, he added, is “not an inexorable command,” but there is a “presumption that courts are going to follow prior precedents.”²⁰

It is hardly surprising that Roberts and Alito would pay such homage to stare decisis in their confirmation hearings. Stare decisis is a bedrock principle of the rule of law. No nominee who expressed disdain for the principle would ever be confirmed.

Based largely on his quite convincing statements about the rule of law in his confirmation hearings, I publicly supported the confirmation of John Roberts. I wrote, in an opinion piece in the *Chicago Tribune*, that “Roberts is too good a lawyer, too good a craftsman, to embrace . . . a disingenuous approach to constitutional interpretation. Everything about him suggests a principled, pragmatic justice who will act cautiously and with a healthy respect for precedent.”²¹ Those are words I am now, sadly, quite prepared to eat.

Disappointingly, it is apparent to me that John Roberts’s and Samuel Alito’s actions during the 2006 Term speak much louder than their words to Congress. In case after case, Roberts and Alito abandoned the principle of stare decisis, and did so in a particularly insidious manner, indeed, in a manner that brought forth the scorn not only of the so-called “liberals” on the Court, but even of Justices Scalia and Thomas.²²

18. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 318 (2006) (statement of Samuel A. Alito, Jr.).

19. *Id.* at 318-19.

20. *Id.* at 319.

21. Geoffrey R. Stone, *President Bush’s Blink*, CHI. TRIB., July 27, 2005, at 27. I did not support the confirmation of Samuel Alito. See Geoffrey R. Stone, *Why the Senate Should Not Confirm Alito*, CHI. TRIB., Jan. 24, 2006, at 17.

22. See, e.g., *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2683-84 n.7 (2007) (Scalia, J., joined by Kennedy & Thomas, JJ., concurring) (“Indeed, the principal opinion’s attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation.” (citation omitted)); *Morse v. Frederick*, 127 S. Ct. 2618, 2634 (2007) (Thomas, J., concurring) (“Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation

Their technique, which was perfectly anticipated and ridiculed by Karl Llewellyn, is to purport to respect a precedent while in fact cynically interpreting it into oblivion.²³ Every first-year law student knows the tactic: “Appellant argues that *Smith v. Jones* governs the case before us. But *Smith v. Jones* arose out of an event that occurred on Main Street. The event in this case occurred on State Street. We do not overrule *Smith v. Jones*, but we limit it to events that occur on Main Street.” Although this is a parody of the technique of distinguishing a precedent, it captures the spirit of the Roberts/Alito concept of the judicial craft.

Let me offer five concrete examples. First, in *Gonzales v. Carhart*, the Court, in a five-to-four decision, upheld the constitutionality of a federal law prohibiting so-called “partial birth abortions,”²⁴ even though the Court had held a virtually identical state law unconstitutional seven years earlier.²⁵ As Justice Ruth Bader Ginsburg rightly observed in dissent, the majority, which included Justices Roberts, Alito, Scalia, Kennedy, and Thomas, offered no principled basis for ignoring the earlier decision.²⁶ The only relevant difference was that Alito had replaced O’Connor.

Second, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, the same five-Justice majority held unconstitutional as applied a provision of the Bipartisan Campaign Reform Act that limited political expenditures by corporations,²⁷ even though the Court had upheld the exact same provision only four years earlier.²⁸ As Justice David Souter quite accurately observed in dissent, Chief Justice Roberts’s opinion offered no principled basis for distinguishing the earlier decision.²⁹

Third, in *Hein v. Freedom from Religion Foundation, Inc.*, the same five-Justice majority, in an opinion by Justice Alito, held that individual taxpayers had no standing to challenge the constitutionality

of when it operates and when it does not.”); *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2573 (2007) (Scalia & Thomas, JJ., concurring in the judgment) (“Unfortunately, the consistency [of the decision] lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently.”).

23. See LLEWELLYN, *supra* note 3, at 66-67.

24. 127 S. Ct. 1610, 1619 (2007) (internal quotation marks omitted).

25. *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000).

26. *Gonzales*, 127 S. Ct. at 1652-53 (Ginsburg, J., dissenting).

27. 127 S. Ct. at 2658-59.

28. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 245-46 (2003).

29. *Wis. Right to Life, Inc.*, 127 S. Ct. at 2704-05 (Souter, J., dissenting).

of the Bush Administration's program of faith-based initiatives as violative of the Establishment Clause,³⁰ even though the Court had held some forty years ago that taxpayers do have standing to challenge federal expenditures on precisely these grounds.³¹ As Justice Souter rightly observed in dissent, Alito's argument that the earlier decision was distinguishable because it involved a challenge to a Legislative rather than an Executive Branch program had no basis "in either logic or precedent."³²

Fourth, in *Morse v. Frederick*, the same five-Justice majority, in an opinion by Chief Justice Roberts, held that a high school student could constitutionally be suspended for displaying a banner bearing the message "BONG HiTS 4 JESUS" during a school event, even though there was no evidence that the speech had materially or substantially disrupted school activities,³³ and even though the Court held in *Tinker v. Des Moines Independent Community School District* almost forty years earlier that a student cannot constitutionally be disciplined for otherwise constitutionally protected speech unless it materially and substantially disrupts school activities.³⁴ Chief Justice Roberts purported to distinguish *Tinker* on the ground that Frederick's speech could be interpreted as encouraging unlawful conduct.³⁵ But the wearing of black armbands to protest the Vietnam War in *Tinker* could just as readily have been interpreted as encouraging other students to refuse induction into the Army or to participate in unlawful acts of protest.³⁶ It was, again, a distinction without a difference.

Finally, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the same five-Justice majority, in an opinion again by Chief Justice Roberts, held that the consideration of race by school districts in assigning students to public schools in order to increase racial integration violates the Equal Protection Clause,³⁷ even though the Court had unanimously declared more than thirty-five years ago that such a policy "is within the broad discretionary powers of school authorities,"³⁸ and even though the Court had held only four

30. 127 S. Ct. 2553, 2559 (2007).

31. *Flast v. Cohen*, 392 U.S. 83, 87-88 (1968).

32. *Hein*, 127 S. Ct. at 2584 (Souter, J., dissenting).

33. 127 S. Ct. 2618, 2622-24 (2007).

34. 393 U.S. 503, 514 (1969).

35. *See Frederick*, 127 S. Ct. at 2629.

36. *Tinker*, 393 U.S. at 504.

37. 127 S. Ct. 2738, 2746 (2007).

38. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

years ago in *Grutter v. Bollinger* that public universities can take race into account in the much more problematic context of affirmative action.³⁹ As Justice Breyer rightly asked in dissent, “What has happened to *stare decisis*?”⁴⁰

Adding insult to injury, Roberts had the audacity to cite *Brown v. Board of Education*⁴¹ as precedent for his conclusion.⁴² *Brown*, of course, held that government cannot constitutionally assign black and white students to *different* schools in order to *segregate* them.⁴³ Incredibly, Roberts invoked *Brown* as authority for the proposition that government cannot constitutionally assign black and white students to the *same* school in order to *integrate* them.⁴⁴

Chief Justice Roberts’ invocation of *Brown* for this proposition displayed what can only be described as willful ignorance of American history. Here is the critical passage from *Brown*:

We come then to the question presented: Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities? We believe that it does.

. . . To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Segregation of white and colored children in public schools . . . is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn.

. . . .

We conclude that . . . [s]eparate educational facilities are inherently unequal [and that the racial segregation of black and white children deprives the *black* children] of the equal protection of the laws . . .⁴⁵

To cite *Brown v. Board of Education* as authority for the proposition that the Constitution forbids the use of race to promote a more *integrated* society is disingenuous at best.

39. 539 U.S. 306, 343-44 (2003).

40. *Parents Involved in Cmty. Schs.*, 127 S. Ct. at 2835 (Breyer, J., dissenting).

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

42. *Parents Involved in Cmty. Schs.*, 127 S. Ct. at 2767-68.

43. 347 U.S. at 495.

44. *Parents Involved in Cmty. Schs.*, 127 S. Ct. at 2767-68.

45. 347 U.S. at 493-95 (internal quotation marks omitted).

At the risk of overkill, let me also read you an excerpt from Martin Luther King's *Letter from Birmingham Jail*, which captures perfectly, I think, what *Brown* was really about:

We have waited for more than 340 years for our . . . rights. . . . Perhaps it is easy for those who have never felt the stinging darts of segregation to say, "Wait." But when you have seen vicious mobs lynch your mothers and fathers . . . ; when you have seen hate-filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your . . . Negro brothers smothering in an airtight cage of poverty . . . ; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park . . . and see tears welling up in her eyes when she is told that [it] is closed to colored children, and see ominous clouds of inferiority begin to form in her little mental sky . . . ; when you take a cross-country drive and find it necessary to sleep night after night in . . . your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored"; when your first name becomes "nigger," your middle name becomes "boy" . . . and your wife and mother are never given the respected title "Mrs."; . . . when you are forever fighting a degenerating sense of "nobodiness"—then you will understand why we find it difficult to wait.⁴⁶

Is this ancient history? Perhaps. But even if it is, it is history that is critical to understanding *Brown*. Moreover, this is not ancient history. In the United States today, white children are twice as likely as black children to live with two married parents,⁴⁷ white SAT scores are more than 200 points higher than black SAT scores,⁴⁸ white family income is almost double black family income,⁴⁹ black males are seven times

46. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 64, 69-70 (Signett Classic 2000) (1963).

47. ALLEN DUPREE & WENDELL PRIMUS, CTR. ON BUDGET & POLICY PRIORITIES, *DECLINING SHARE OF CHILDREN LIVED WITH SINGLE MOTHERS IN THE LATE 1990S: SUBSTANTIAL DIFFERENCES BY RACE AND INCOME* 3 (2001), <http://www.cbpp.org/6-15-01wel.pdf>.

48. COLLEGE BOARD, 2005 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 6 tbl.4-1 (2005), http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2005/2005-college-bound-seniors.pdf. Note that this data correlates to a 1600-point SAT exam consisting only of math and verbal sections. As of 2005, the SAT includes a third section for writing. See Press Release, College Board, *The College Board Announces a New SAT: World's Most Widely Used Admissions Test Will Emphasize College Success Skills* (June 27, 2002), <http://www.collegeboard.com/press/releases/11147.html>.

49. See BRUCE H. WEBSTER JR. & ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, *INCOME, EARNINGS, AND POVERTY DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY* 3 tbl.1 (2007), <http://www.census.gov/prod/2007pubs/acs-08.pdf> (showing that white

more likely than white males to be in prison,⁵⁰ blacks are twice as likely as whites to be unemployed,⁵¹ and blacks are almost three times as likely as whites to live below the poverty line.⁵²

For Chief Justice Roberts to assert that *Brown v. Board of Education* stands for the proposition that the Constitution prohibits the government from using race in an effort to redress such inequalities is a perversion of American history.

Now, let me be clear. My point is not that the substantive positions of Roberts and Alito in these cases are necessarily unsupportable as a matter of first principles. To the contrary, each of the substantive positions they advance in these cases is plausible, if they were writing on a clean slate. I might even agree with one or two of them.

But they were not writing on a clean slate. They were writing within the context of the American legal system, and I have no doubt that a neutral and detached lawyer, given the relevant precedent and the issue presented in each of these cases, would, in each instance, conclude that the “right” result as a matter of legal reasoning is opposite to the result reached by Justices Roberts and Alito.

In these circumstances, Roberts and Alito had a responsibility either to comply with the law or, as Scalia and Thomas argued, to overrule the precedent and take responsibility for their decision. What they did instead was not sloppy or careless, it was dishonest.

Why would they do this? In each of these cases, Roberts and Alito had three choices: overrule the prior decision, follow the prior decision and reach the opposite result, or do what they did. Overruling these precedents would have made apparent that their testimony in their confirmation hearings was, to be kind, misleading. So, why didn’t they just abide by the precedents?

One possibility, I suppose, is that their overriding commitment to some deeply principled constitutional theory drove them to reach the

households had a median income of \$52,375 and black households had a median income of \$32,372).

50. See WILLIAM J. SABOL ET AL., U.S. DEPT. OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2006, at 9 (2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf> (showing that 4.8% of all black men were in custody at midyear 2006 compared to 0.7% of white men).

51. See JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002, at 5 (2003), <http://www.census.gov/prod/2003pubs/p20-541.pdf> (stating that black persons had an unemployment rate of eleven percent versus five percent for white persons).

52. See *id.* at 7 fig.9 (showing that 22.7% of black persons live below the poverty line as opposed to 7.8% of white persons).

results they did in these cases, even at the expense of intellectual honesty. But, there is no such theory. For example, one might imagine that Roberts and Alito are committed to a passive judicial role, to a humble form of strict construction that rejects any semblance of judicial activism as a legitimate style of constitutional interpretation. Unfortunately, that theory does not fit the facts, for at least two of these five decisions evidenced a quite aggressive form of judicial activism. In both *Wisconsin Right to Life, Inc.*, the campaign finance case, and the Seattle and Louisville cases, involving the use of race, Roberts and Alito exercised a highly activist form of judicial review in order to invalidate laws under the First and Fourteenth Amendments. Similarly, these decisions cannot plausibly be explained on the basis of “originalism,” for nothing in the “original” understanding of the Constitution rationally supports Roberts’s and Alito’s votes in *Wisconsin Right to Life, Inc.* or the Seattle and Louisville cases.

The sad truth is that Roberts and Alito seem to have been driven by nothing more than their own desire to reach results they personally prefer: they do not like abortion, they don’t like speech that mocks Jesus, they don’t like laws that regulate corporate speech, they don’t like affirmative action, and they do like faith-based initiatives. If ever such phrases as “result-oriented” and “ideologically driven” ring true, it is in the conduct of Justices Roberts and Alito during the 2006 Term. It was among the most disheartening judicial performances I have ever witnessed.

I would like to turn now to a look forward—to the future of constitutional law. I fear that the 2006 Term marks the opening salvo of a paradigm shift in the Supreme Court’s constitutional jurisprudence, so let me begin with some observations about the current Supreme Court.

In the media, we constantly read about how “closely divided” the Court is and about how many cases are decided by a vote of five-to-four. There are, according to the media, the “conservative” Justices—Scalia, Thomas, Roberts, and Alito; the “liberal” Justices—Stevens, Souter, Ginsburg, and Breyer; and Justice Kennedy—the “man in the middle.”⁵³ The impression created by such accounts is that this is an “evenly balanced” Court. This is a fallacy and a dangerous one at that.

53. E.g., Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST, May 13, 2007, at A1.

What do we mean by “balance”? Why don’t the many five-to-four decisions prove that this is a “well-balanced” Court?

The Supreme Court has discretionary jurisdiction.⁵⁴ It generally agrees to decide only the “hardest” cases. What are the “hardest” cases? Most often, they are the ones about which the Justices are divided. That, indeed, is largely what makes them “hard.” Thus, one can reasonably expect that the Supreme Court is most likely to hear those cases that will most sharply divide the Justices because those are the cases about which the law is most uncertain. Even a Court consisting of nine Scalias or nine Ginsburgs would eventually wind up dividing five-to-four in the cases it agrees to decide because it is the division within the Court itself that defines the cases that most demand the Court’s attention.

The important question, then, is not whether the Court often divides five-to-four, but where on the constitutional spectrum the decisive Justice sits. Depending on the makeup of the Court, that Justice might split the difference between Scalia and Thomas, on the one end, or she might split the difference between Brennan and Douglas, on the other.

Within any set of nine Justices, some will be relatively more “conservative” and some will be relatively more “liberal.” That they often divide five-to-four tells us nothing about “balance” and nothing about whether the Court as a whole is “liberal,” “conservative,” moderate, or whatever. It tells us only that the Justices often divide five-to-four, which tells us nothing about the Court as a whole.

The current Supreme Court is not “balanced” in any meaningful sense of that term. It is, in fact, an extremely conservative Court—more conservative than any group of nine Justices who have sat together in living memory. Here are some ways of testing this proposition:

- Seven of the current nine Justices were appointed by Republican presidents.⁵⁵
- Twelve of the fourteen most recent Supreme Court appointments have been made by Republican presidents.⁵⁶

54. Portions of this discussion previously appeared in Geoffrey R. Stone, *Judicial Activism & Ideology*, 6 GREEN BAG 2d 281 (2003).

55. See SUPREME COURT OF THE UNITED STATES, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES 1-2, <http://www.supremecourtus.gov/about/members.pdf> (last visited Mar. 10, 2008).

56. See *id.*

- Four of the current Justices are more conservative than any other Justice who has served on the Court in living memory.
- The so-called “swing vote” on the Court has moved to the right every single time it has shifted over the past forty years, from Stewart to Powell to O’Connor to Kennedy.
- As Justice Stevens recently observed, every Justice who has been appointed in the past forty years was more conservative than the Justice he or she replaced.⁵⁷
- If we regard Warren, Douglas, Brennan, and Marshall as the model of a “liberal” Justice, then there is no one within even hailing distance of a “liberal” Justice on the current Supreme Court.

In fact, the current Court consists of five conservative Justices, four of whom are very conservative, and four moderate Justices, one of whom, Ginsburg, is moderately liberal. As Justice Stevens recently observed, it is only the presence of so many very conservative Justices that makes the moderate Justices appear liberal.⁵⁸ But, this is merely an illusion.

Now, I know I have been tossing around the terms “conservative” and “liberal” as if they have clear, well-defined meanings, when of course they do not. So, let me clarify what I mean by these terms. First, there is the distinction between judicial “activism” and judicial “restraint.” According to traditional conservatives, judicial activists legislate, which is bad, but judicial passivists interpret, which is good. Traditional liberals, of course, say that judicial activists interpret, which is good, but that judicial passivists abdicate, which is bad. What we learn here is that everyone agrees that interpreting is good. We just don’t know it when we see it. One might say that some interpreters use a text, whereas others use a pretext.

There is also the distinction between judicial “conservatives” and judicial “liberals.” A conservative, it has been said, is “[someone] who believes that nothing should be done for the first time.”⁵⁹ According to liberals, the central tenet of judicial conservatism must be the conservation of all liberal precedents. Liberals complain that conservatives who overturn such precedents are radicals who are outside the “mainstream.” Liberals, as we know, always advocate “balance” on the Supreme Court—when they are in the minority.

57. Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § 6 (Magazine), at 50, 52-53. Justice Stevens mentioned Justice Ginsburg as a possible exception. *Id.*

58. *Id.* at 52.

59. DICTIONARY OF QUOTABLE DEFINITIONS 107 (Eugene E. Brussell ed., 1970) (attributed to Alfred E. Wiggam).

Conservatives, of course, like corporations, but they don't like criminals—unless they are corporations. According to liberals, a corporation is an artificial person created by law to prey upon real things. A criminal is a real person with predatory instincts, but who lacks sufficient capital to form a corporation.

Finally, there is the principle of "original intent," which we have all found so entertaining since the 1980s. As more than twenty years of experience has amply demonstrated, the core methodology of those judges who purport to seek the original intent of the Framers is to ask what they would have intended had they been Framers and—presto!—there it is.

Let me turn now to a more serious analysis of these terms. When people think of a "liberal" Justice, they are usually thinking of Justices like Earl Warren, William Brennan, and Thurgood Marshall. What made these Justices "liberal"? To begin with, they shared a common vision of the purpose of judicial review. They believed that a primary responsibility of the judiciary is to protect individual liberties, and most especially the rights of minorities and others whose rights might not be fairly protected in the majoritarian political process.⁶⁰ They believed that this responsibility was both contemplated and intended by the Framers of our Constitution as a fundamental check on the power of the elected branches of government, and they believed that courts can fulfill this responsibility only by actively interpreting the Constitution to ensure that democracy operates both properly and fairly.⁶¹

It was therefore a "liberal" approach to constitutional interpretation that produced such decisions as *Brown v. Board of Education*, forbidding racial segregation,⁶² *Engel v. Vitale*, prohibiting school prayer,⁶³ *Reynolds v. Sims*, protecting the principle of "one person, one vote,"⁶⁴ *Gideon v. Wainwright*, guaranteeing the right to

60. See, e.g., William J. Brennan Jr., *What the Constitution Requires*, N.Y. TIMES, Apr. 28, 1996, at E13 (identifying the "protection of individual rights and human dignity" as one of the great achievements of his tenure).

61. Chief Justice Warren's view of active interpretation inheres in this famous passage from *Trop v. Dulles*: "[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 100-01 (1958) (plurality opinion).

62. 347 U.S. 483, 495 (1954).

63. 370 U.S. 421, 424 (1962).

64. 377 U.S. 533, 558, 568 (1964).

counsel to those accused of crime,⁶⁵ *Plyler v. Doe*, prohibiting the government from denying an education to the children of illegal immigrants,⁶⁶ *Goldberg v. Kelly*, requiring a hearing before the termination of welfare benefits,⁶⁷ and the *Pentagon Papers* case, forbidding the government to enjoin the publication of classified information about the Vietnam War.⁶⁸ Each of these decisions, and many others besides, illustrates what most people mean by a “liberal” approach to judicial review.

Defining a “conservative” Justice is more difficult. I would identify at least three different types of judicial conservatives. First, there is what we might call the “judicial passivist.” This type of “conservative,” typified by Felix Frankfurter and John Marshall Harlan, acts on the view that judicial review is an extraordinary exercise of undemocratic governmental authority and that it should therefore be employed only when a law is *clearly* unconstitutional. At their best, such judicial passivists are principled, even-handed, and neutral in their reluctance to invoke the power of judicial review.

The basic assumption of this type of “conservative” jurist is that democratically enacted laws are presumptively constitutional and should be invalidated only when there is no doubt of their invalidity.⁶⁹ To do otherwise, they believe, would be an illegitimate judicial usurpation of the legitimate authority of the majority to make whatever laws they see fit, subject only to clear and unequivocal constitutional limitations.⁷⁰ One former colleague of mine, whom I might fondly describe as a “judicial passivist gone wild,” proudly proclaims that, in his view, the Supreme Court has *never* considered a law that it should have held unconstitutional.

When critics attacked the “liberal” Justices of the Warren Court as “activist” in the 1950s and 1960s, what they usually said they wanted were “passivist” Justices who would exercise “judicial restraint” and give the democratic branches of government the deference they deserve.⁷¹ I should note, by the way, that judicial passivists do not necessarily reach politically “conservative” results.

65. 372 U.S. 335, 339-40 (1963).

66. 457 U.S. 202, 230 (1982).

67. 397 U.S. 254, 269-70 (1970).

68. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

69. See CHARLES L. BLACK, JR., *PERSPECTIVES IN CONSTITUTIONAL LAW* 4 (1963).

70. See *id.*

71. See G. Edward White, *Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1089, 1122-25 (2005).

On some issues, such as the constitutionality of affirmative action, campaign finance regulation, regulations of the market, and regulations of commercial advertising, principled passivists will reach results that are politically liberal. Thus, this approach is institutionally, but not necessarily politically, conservative.

A second form of “conservative” Justice is the so-called “originalist.” Originalism is, in a sense, a variant of “passivism,” but it is not institutional passivism. That is, it is not based on the assumption that courts should err in favor of upholding laws. Rather, it is based on the assumption that courts should invalidate laws only when they are confident that the Framers affirmatively intended the particular practice at issue to be unconstitutional.⁷² Thus, in theory, originalists can be either activist or passivist, depending on their reading of the Framers’ intent in any specific situation.

Justices Scalia and Thomas are the best examples of “originalist” conservatives. Unlike “liberal” Justices, they do not ask whether the law at issue infringes the underlying purpose of a particular constitutional provision; and, unlike conservative passivists, they do not uphold every law that has a reasonable justification. Rather, they ask whether the Framers themselves affirmatively intended to prohibit the practice or policy in question.⁷³

In theory, originalism can be “liberal” as well as “conservative” in its results, depending upon what the Justice thinks the Framers intended. Justice Scalia, for example, has taken what might be seen as conventionally “liberal” positions in cases involving such issues as flag burning,⁷⁴ the Confrontation Clause,⁷⁵ and habeas corpus,⁷⁶ because of his understanding of the Framers’ intent. Most often, however, originalism, at least as it applied by its typically conservative adherents, leads to results that are conventionally conservative.

The third form of “conservative” Justice is the “conservative activist.” A conservative activist aggressively interprets the Constitution

72. See Lino A. Graglia, *“Interpreting” the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1023-24 (1992).

73. *Id.*

74. See *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (listing Justice Scalia as joining the majority in holding that the defendant’s conviction for flag burning conflicted with the First Amendment).

75. See *Crawford v. Washington*, 541 U.S. 36, 37, 68 (2004) (listing Justice Scalia as writing for the majority and holding that the introduction of tape-recorded statements as testimonial evidence violated the Confrontation Clause).

76. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 568-69 (2004) (Scalia, J., dissenting) (arguing that the Framers intended to limit the wartime detention authority of the Executive).

and invokes the power of judicial review to implement conservative political values.⁷⁷ Justices McReynolds, Sutherland, and Peckham are good examples, as illustrated by their decisions during the *Lochner* era, when they broadly construed the so-called “freedom of contract” to invalidate all sorts of progressive legislation.⁷⁸ In the modern era, I would describe Justices Rehnquist, Roberts, Alito, and sometimes Scalia, Thomas, and Kennedy, as “conservative activists.”

Recent cases that illustrate “conservative activism” include decisions that aggressively interpret the First Amendment to invalidate restrictions on commercial advertising⁷⁹ and campaign finance regulations,⁸⁰ aggressively interpret the Equal Protection Clause to invalidate affirmative action,⁸¹ aggressively interpret the Takings Clause to invalidate laws regulating property,⁸² and aggressively interpret the principle of federalism to invalidate federal laws dealing with such issues as domestic violence,⁸³ handguns,⁸⁴ the environment,⁸⁵ and age discrimination.⁸⁶

Because I believe “conservative activism” is the least principled and least justified of the four approaches I have identified, I should

77. See Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 *FORDHAM L. REV.* 675, 676-77 (2006) (depicting Justice Thomas as starting a trend toward conservative activism by urging the Court to produce new limits on government power).

78. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 560-62 (1923), *overruled in part* by *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (striking down a federal statute proscribing a minimum wage); *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918), *overruled in part* by *United States v. Darby*, 312 U.S. 100 (1941) (striking down federal regulation of child labor); *Lochner v. New York*, 198 U.S. 45, 64-65 (1905), *overruled in part* by *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) (striking down a state law limiting employee working hours).

79. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360 (2002) (striking down restrictions on pharmaceutical advertising); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 589-90 (2001) (striking down restrictions on tobacco advertisements).

80. See *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2658-59 (2007).

81. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 249-51 (2003) (holding that a university admissions policy violated the Equal Protection Clause); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (plurality opinion) (holding that a city ordinance preferring minority applicants for construction contracts violated the Equal Protection Clause).

82. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting) (arguing that a city plan to confiscate property for private use violated the Takings Clause).

83. See *United States v. Morrison*, 529 U.S. 598, 601-02 (2000).

84. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

85. See *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001).

86. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000).

take a moment to make clear how strongly this approach has shaped the jurisprudence of some recent Justices.

I will offer two examples. First, there is the approach adopted by Justices Rehnquist, Scalia, and Thomas with respect to the Equal Protection Clause. My interest in this particular example was triggered several years ago by the Court's five-to-four decision in *Bush v. Gore*, in which the majority held that the recount process ordered by the Florida Supreme Court in the 2000 presidential election violated the Equal Protection Clause.⁸⁷ The decision in *Bush v. Gore* rested upon a conventionally "liberal"-type interpretation of the Equal Protection Clause.⁸⁸ What was surprising, at least to me, was not the constitutional principle but that Justices Rehnquist, Scalia, and Thomas endorsed it.⁸⁹

No one familiar with the jurisprudence of Justices Rehnquist, Scalia, and Thomas could possibly have imagined that they would vote on this basis to invalidate the Florida recount process in light of their own well-developed and oft-invoked approach to the Equal Protection Clause.⁹⁰ In the decade leading up to *Bush v. Gore*, Justices Rehnquist, Scalia, and Thomas cast sixty-five votes in nonunanimous Supreme Court decisions interpreting the Equal Protection Clause. Nineteen of those votes were cast in cases involving affirmative action, and I will return to them in a moment.

Of the forty-six votes that these Justices cast in cases not involving affirmative action, Rehnquist, Scalia, and Thomas collectively cast only two votes to uphold a claimed violation of the Equal Protection Clause. Thus, these three Justices found a violation of Equal Protection only four percent of the time in nonaffirmative action cases. For the sake of comparison, over this same period, and in these very same cases, the colleagues of Justices Rehnquist, Scalia, and Thomas collectively voted seventy-four percent of the time to uphold the Equal Protection Clause claim. Seventy-four percent versus four percent. Of course, those cases involved laws that disadvantaged African-Americans, women, gays, the disabled, and the

87. 531 U.S. 98, 103 (2000) (per curiam).

88. *Id.* at 104-10 (applying principles from Equal Protection Clause jurisprudence, such as "one person, one vote" to invalidate the Florida recount process).

89. *See id.* at 111 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring) (joining in the per curiam opinion).

90. Portions of this discussion previously appeared in Geoffrey R. Stone, Equal Protection? The Supreme Court's Decision in *Bush v. Gore* (2001), <http://fathom.lib.uchicago.edu/1/77777122240/>.

poor—groups that are surely less deserving of concern under the Equal Protection Clause than the beneficiary of the Court's decision in *Bush v. Gore*.⁹¹

Against this background, one surely must wonder why Justices Rehnquist, Scalia, and Thomas suddenly discovered power and beauty in the Equal Protection Clause in *Bush v. Gore*. Indeed, as a group they cast more votes (three, to be exact) to sustain the Equal Protection Clause claim in *Bush v. Gore* than they previously cast in all of the nonaffirmative action Equal Protection Clause cases that they considered in the previous decade.

But, this is not a fair characterization. After all, I have excluded from the above analysis the votes of Justices Rehnquist, Scalia, and Thomas in affirmative action cases. In those cases, these three Justices consistently demonstrated the same spirit of bold and innovative interpretation of the Equal Protection Clause that they manifested in *Bush v. Gore*. Indeed, in the decade leading up to *Bush v. Gore*, these three Justices collectively cast nineteen votes to invalidate various forms of affirmative action. This represents 100% of their votes in those cases—a perfect record. Their colleagues, by contrast, voted only thirty-three percent of the time to invalidate such programs.

What does this tell us? It tells us that Justices Rehnquist, Scalia, and Thomas have a rather odd view of the United States Constitution. Apparently, the Equal Protection Clause, which was enacted after the Civil War primarily to protect the rights of newly freed slaves, is to be used for two and only two purposes—to invalidate affirmative action and to invalidate the recount process in the 2000 presidential election.

My second illustration of “conservative activism” involves Justice Rehnquist and the First Amendment. Here is a straightforward analysis of Rehnquist's record in cases involving the First Amendment's “freedom of speech, or of the press.”⁹² In his more than thirty years on the Supreme Court, Justice Rehnquist participated in 259 decisions involving these freedoms. In these cases, Rehnquist voted to support the First Amendment claim only twenty percent of the

91. See, e.g., *Romer v. Evans*, 517 U.S. 620, 623-24 (1996) (gays and lesbians); *United States v. Virginia*, 518 U.S. 515, 555-58 (1996) (women); *United States v. Fordice*, 505 U.S. 717, 742 (1992) (African-Americans); *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (the disabled); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70-72 (1973) (Marshall, J., dissenting) (poor groups).

92. Portions of this discussion previously appeared in Geoffrey R. Stone, *The Hustler: Justice Rehnquist and “The Freedom of Speech, or of the Press”*, in *THE REHNQUIST LEGACY* 11, 11 (Craig M. Bradley ed., 2006).

time. In these same cases, the other Justices with whom he sat voted to uphold the First Amendment claim fifty-three percent of the time. Thus, Rehnquist's colleagues were 2.6 times more likely than Rehnquist to hold a law in violation of "the freedom of speech, or of the press."

But, this only scratches the surface. Even the Supreme Court has easy cases. Sixty-three of the 259 cases were decided by unanimous vote. If we exclude those "easy" decisions, we find that Justice Rehnquist voted to reject the First Amendment claim an astonishing ninety-two percent of the time. In these same cases, the other Justices voted to uphold the First Amendment challenge fifty-five percent of the time. Thus, in nonunanimous decisions the other Justices were *six times more likely* than Justice Rehnquist to find a law in violation of "the freedom of speech, or of the press."

Even more striking were Justice Rehnquist's votes in cases involving "the freedom of . . . the press." These decisions addressed such issues as whether the First Amendment guarantees a journalist-source privilege, whether the government may enjoin the publication of truthful information, and whether the press has a First Amendment right of access to certain places or information. In the thirty-three nonunanimous decisions involving "the freedom of . . . the press," Rehnquist rejected the constitutional claim *100% of the time*. In more than thirty years on the Court, Rehnquist *never once* found a violation of "the freedom of . . . the press" in a nonunanimous decision.

Indeed, there were only four areas in which Justice Rehnquist showed any interest in enforcing the constitutional guarantee of free expression: in cases involving commercial advertising, religious expression, campaign finance regulation, and the right of the Boy Scouts to exclude gays. Rehnquist was 2.6 times more likely to invalidate laws restricting commercial advertising than laws restricting political or artistic expression. He voted to invalidate campaign finance legislation sixty-seven percent of the time, and he voted to invalidate restrictions on religious expression 100% of the time. Indeed, in nonunanimous decisions, Rehnquist was 14.7 times more likely to vote to invalidate a law restricting commercial advertising, campaign expenditures, or religious expression than one involving any other aspect of "the freedom of speech, or of the press."

What all this leads me to conclude is that Justice Rehnquist's record with respect to "the freedom of speech, or of the press" cannot be defended as principled, coherent, or neutral. His inclination to

sustain First Amendment claims *only* when they involved commercial advertising, campaign expenditures, religious expression, or the exclusion of homosexuals belies any plausible theory of originalism, judicial restraint, or even-handed constitutional interpretation. When all is said and done, Justice Rehnquist's First Amendment belongs to corporations, wealthy political candidates, churches, and homophobes. This is an example of what I mean by "conservative activism."

Having now identified at least four approaches to constitutional interpretation—judicial passivism, originalism, conservative activism, and liberalism—I would like to say a few words about the relative wisdom of each. Judicial passivism, the approach that says courts should uphold all laws unless they are unconstitutional beyond a reasonable doubt, has the virtue of insulating courts from difficult constitutional issues and giving great deference to the decisions of the democratically elected branches of government. Unfortunately, these are also its vices. Most fundamentally, this approach misapprehends the essential nature of our constitutional system and abdicates a central responsibility of the judiciary.

To understand why this is so, it is helpful to return to the original debate over the adoption of a Bill of Rights. Those who opposed a Bill of Rights argued, among other things, that a list of enumerated rights in the Constitution would serve little, if any, purpose, for in a self-governing society the majority could simply run roughshod over whatever rights are guaranteed in the Constitution.⁹³ How would listing our rights restrain the people from violating them? Moreover, as skeptics about human nature, the Framers had little doubt that for reasons of self-interest, prejudice, panic, passion, and intolerance, the majority of the people would pay little attention to the rights of minorities.

James Madison, the most influential of the Framers, understood that the protection of rights in a self-governing society posed a novel question.⁹⁴ Where traditional theory had focused on rights as necessary to protect the people against the King, Madison recognized that in a republic, rights are necessary to protect one segment of the

93. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 297-99 (Robert A. Rutland & Charles F. Hobson eds., 1977), reprinted in JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 160 (1998).

94. *Id.* at 298.

community—particularly minorities—against the self-interested demands and interests of the majority.⁹⁵

As Madison wrote at the time, the real source of the problem “lies among the people themselves,” because they see democracy as a means to enforce their own private interests over and against both the public good and the rights of their fellow citizens.⁹⁶ This led Madison to pose the following question: “In republican Government the majority . . . ultimately give [sic] the law. Whenever therefore an apparent interest or common passion unites a majority[,] what is to restrain them from unjust violations of the rights and interests of the minority . . . ?”⁹⁷ “What use,” he asked Thomas Jefferson, “can a bill of rights serve in popular Governments?”⁹⁸ Jefferson wrote back to Madison, “Your thoughts on the subject” of a Bill of Rights fail to address one consideration “which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent . . . merits great confidence for their learning & integrity.”⁹⁹

On June 8, 1789, Madison proposed a Bill of Rights to the House of Representatives.¹⁰⁰ He acknowledged that some might think that such “paper barriers against the power of the community, are too weak to be worthy of attention,” but then, echoing Jefferson’s argument to him, Madison insisted that if these rights are

incorporated into the constitution, independent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.¹⁰¹

95. *Id.*

96. James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 93, at 348, 355 (Robert A. Rutland & William M.E. Rachal eds., 1975), *quoted in* RAKOVE, *supra* note 93, at 104.

97. *Id.*

98. Letter from James Madison to Thomas Jefferson, *supra* note 93, in 11 THE PAPERS OF JAMES MADISON, *supra* note 93, at 298, *reprinted in* RAKOVE, *supra* note 93, at 160, 162.

99. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 93, at 13 (Charles F. Hobson & Robert A. Rutland eds., 1979), *reprinted in* RAKOVE, *supra* note 93, at 165, 165.

100. *See* RAKOVE, *supra* note 93, at 170.

101. James Madison, *Speech to the House of Representatives* (June 8, 1789), in 1 THE CONGRESSIONAL REGISTER OR HISTORY OF THE PROCEEDINGS AND DEBATES OF THE FIRST

The Framers' "solution" to the seemingly insoluble dilemma of how to enforce individual liberties in a self-governing society against the "overbearing majorities" that control the legislative and executive branches of government was the third branch of government—the courts, which could serve as "an impenetrable bulwark" against majoritarian encroachments on the liberties of political, social, religious, and other minorities.¹⁰²

James Iredell, a future Justice of the Supreme Court, penned an eloquent statement to this effect in a newspaper essay in North Carolina, in which he explained that judges must refuse to enforce any law that is not "warranted by the constitution," explaining that "[t]his is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges *for the benefit of the whole people, not mere servants of the Assembly*."¹⁰³

Similarly, Alexander Hamilton argued in *Federalist No. 78* that constitutional limits could "be preserved in practice no other way than through the medium of the courts of justice."¹⁰⁴ The courts, he maintained, are "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."¹⁰⁵ The "independence of the judges," Hamilton added, is intended to enable them "to guard the constitution and the rights of individuals from the effects of those ill humours which . . . sometimes disseminate among the people themselves."¹⁰⁶ Judges, he insisted, have the right and the responsibility to resist invasions of constitutional rights even if they are "instigated by the major voice of the community."¹⁰⁷

HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA 423, 431-34 (Harrison & Purdy 1789), *reprinted in* RAKOVE, *supra* note 93, at 170, 177, 179.

102. *See generally* Letter from James Madison to Thomas Jefferson, in 11 THE PAPERS OF JAMES MADISON, *supra* note 93, at 297-99, *reprinted in* RAKOVE, *supra* note 93, at 161-62 (showing Madison's concerns that a bill of rights would be ineffective against "overbearing majorities" intent on curtailing the rights of others); THE FEDERALIST NO. 78, *supra* note 14, at 525-27 (arguing that an independent federal judiciary is necessary to protect the rights of individuals); 3 DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 397 (1962) (noting Jefferson's suggestion to Congress that the judiciary could be relied on to uphold a bill of rights defending individual liberties).

103. James Iredell, Address to the Public, in 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 145, 148 (N.Y., D. Appleton & Co. 1858).

104. THE FEDERALIST NO. 78, *supra* note 14, at 524.

105. *Id.* at 525.

106. *Id.* at 527.

107. *Id.* at 528.

The problem with "judicial passivism," in other words, is that it abdicates judicial responsibility and subverts a fundamental part of the genius of the American constitutional system. By evading their duty to enforce the Constitution in a meaningful manner, judicial passivists betray a central feature of our constitutional system.

The second conservative approach, "originalism," purports to respect the intent of the Framers. But it has gained no credibility over the past quarter century, despite the earnest efforts of its proponents, in part because it does precisely the opposite. The central intellectual premise of conservative originalism is that courts should hold nothing unconstitutional that the Framers themselves did not intend to hold unconstitutional. But, this conception of constitutional law misreads the intent of the Framers. It assumes that the Framers intended to limit the effect of the Constitution to only those outcomes that they themselves consciously expected and intended.

But, in drafting the Constitution, the Framers were not enacting a series of specific and predetermined rules. "Congress shall make no law . . . prohibiting the free exercise" of religion or "abridging the freedom of speech,"¹⁰⁸ no person shall "be deprived of life, liberty, or property, without due process of law,"¹⁰⁹ and the prohibition of "cruel and unusual punishments,"¹¹⁰ were not designed as crabbed, narrow-minded ordinances like speed limits. Rather, they were intended to serve as open-ended aspirations that would gain meaning and vitality over time.

As men of the Enlightenment, the Framers conceived of rights as inherent in nature and "founded on the immutable maxims of reason and justice."¹¹¹ They understood them much as they understood the laws of science. That is, just as they knew that they did not know all there was to know about biology and physics, so too did they know that they did not know all there was to know about their rights. Just as reason, observation, and experience would enable man to gain more insight into philosophy, science, and human nature, so too would they

108. U.S. CONST. amend. I.

109. *Id.* amend. V.

110. *Id.* amend. VIII.

111. John Dickinson, An Address to the Committee of Correspondence in Barbados (1766), in *THE POLITICAL WRITINGS OF JOHN DICKINSON* 262 (Paul Leicester Ford ed., Da Capo Press 1970) (1895), *quoted in* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 77 (2d ed. 1992).

enable him to learn more over time about man's inalienable rights, which would have to be distilled from "reason and justice."¹¹²

With this mindset, the notion that any particular moment's conception of rights should be taken as exhaustive would have seemed patently wrong-headed to the Framers, just as it would have seemed wrong-headed to them for anyone to assume that their knowledge of the human body or of the universe should be taken as final and conclusive. Such a conception was antithetical to the very core of Enlightenment thought and to everything the Framers stood for.

They were not timid men. They were bold. They knew full well that the rights they had identified did not "exhaust the great treasury of human rights."¹¹³ They knew full well that their understanding of these freedoms "marked out the minimum not the maximum boundaries" of man's inalienable rights.¹¹⁴ "The preservation of liberty," they knew, "would continue to be what it had been in the past, a bitter struggle with adversity," which would demand constant vigilance both to protect the rights they had recognized and to be alert to the recognition of new rights yet to be discovered.¹¹⁵

The crabbed, frightened originalism of Clarence Thomas and Antonin Scalia would have seemed absurd to the Framers. As a constitutional methodology, it not only invites manipulative and result-oriented history, but it also and more fundamentally denies the true original understanding of the Framers of our Constitution.

The third approach—"conservative activism"—sounds like an oxymoron, and it should. But it is in fact the dominant form of jurisprudence on the Supreme Court today. As we have seen, it is conservative activism that explains the Court's decisions invalidating regulations of commercial advertising, invalidating campaign finance regulations, invalidating affirmative action programs, invalidating the use of race to increase integration, invalidating zoning laws, invalidating laws prohibiting the Boy Scouts from discriminating against gays and lesbians, and invalidating federal laws dealing with the environment, handguns, domestic violence, and age discrimination.

Conservative activism offers the worst of both worlds. It undermines the decisions of democratic majorities, not to protect the rights of minorities, or the powerless, or the oppressed, or the

112. *Id.*

113. BAILYN, *supra* note 111, at 78.

114. *Id.*

115. *Id.* at 85.

disenfranchised, or the dispossessed, or the poor, or the downtrodden, or the accused, but to protect the interests of whites, corporations, the wealthy, the privileged, and the powerful. Like the *Lochner* era of which it is the constitutional and moral descendent, modern-day conservative judicial activism is a perversion of the values that the Constitution is designed to protect and, more specifically, of the values the Constitution relies on the *Court* to protect.

Finally, there is the approach that has variously been called "liberalism," or "judicial activism," or "not strict constructionism." In my view, a better and more descriptive term would be "constitutionalism." The central mission of this approach to constitutional interpretation is to embrace the responsibility the Framers imposed upon the judiciary to serve as a check against the inherent dangers of democratic majoritarianism and to maintain the vitality of fundamental individual liberties in a constantly changing world.

This is not an easy task. But, nor is self-governance easy. Constitutionalism is not mechanical, it is not mindless, and it is not value-free. It requires judges to exercise judgment. It calls upon them to consider text, history, precedent, values, and ever-changing social and cultural conditions. It requires restraint, humility, curiosity, wisdom, and intelligence. Perhaps above all, it requires intellectual honesty, courage, a recognition of the judiciary's unique strengths and weaknesses, and a deep understanding of our nation's most fundamental constitutional aspirations.

Let me use the Warren Court as an example. Is the United States a better or worse nation today because of the decisions in *Brown v. Board of Education*,¹¹⁶ *Engel v. Vitale*,¹¹⁷ *Goldberg v. Kelly*,¹¹⁸ *Reynolds v. Sims*,¹¹⁹ *Mapp v. Ohio*,¹²⁰ *Miranda v. Arizona*,¹²¹ *Gideon v. Wainwright*,¹²² and *New York Times Co. v. Sullivan*?¹²³ That is a fair question. The proof, after all, is in the results. In my judgment, however controversial some or all of these decisions might have been, every one of them properly understood and implemented the values with which the Framers sought to imbue our Constitution. And,

116. 347 U.S. 483, 495-96 (1954).

117. 370 U.S. 421, 424-25 (1962).

118. 397 U.S. 254, 260-61 (1970).

119. 377 U.S. 533, 568 (1964).

120. 367 U.S. 643, 660 (1961).

121. 384 U.S. 436, 444-45 (1966).

122. 372 U.S. 335, 339-40 (1963).

123. 376 U.S. 254, 291-92 (1964).

however controversial those decisions might have been at the time, every one of them is today regarded as a beacon of what the United States stands for in the world. I can say with absolute confidence that Justices Roberts, Alito, Scalia, and Thomas would have reached the opposite result in every one of these cases, had they been on the Court at the time.

Speaking of counterfactuals, let me step off the cliff a bit further and tell you what issues I think a Court made up of Justices committed to a theory of *constitutionalism* would today be deciding:

(1) Not that affirmative action is unconstitutional, but that there are circumstances in which affirmative action is constitutionally required;

(2) Not that cigarette companies have a constitutional right to shill their product to children, but that children have a constitutional right to an adequate education;

(3) Not that the state can execute juveniles, but that individuals accused of crime have a constitutional right to DNA testing;

(4) Not that the government can constitutionally ban partial birth abortions even when the ban endangers the lives of women, but that the government cannot constitutionally ban stem-cell research in order to enforce the faith-based beliefs of the religious right;

(5) Not that billionaires have a constitutional right to spend millions of dollars to buy the elected representatives of their choice, but that public officials cannot use partisan gerrymandering to ensure their perpetuation in power;

(6) Not that the Boy Scouts have a constitutional right to discriminate against gays and lesbians, but that gays and lesbians have a constitutional right to marry.

Constitutional law is about precedent, and text, and history, and law. But, it is also about values and vision. I ask you, what is your vision for the constitutional future of our nation?
