The Imperial Judiciary: Occupational Hazards of a Constitutional Society

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I. INTRODUCTION

C ONSTITUTIONAL law is largely the product of judicial line-drawing that charts the perimeters of government power, delineates the contours of personal rights and liberties and thus traces official bounds of freedom and oppression.1 It is a well-established function of the judiciary "to say what the law is."2 The etching of constitutional lines, nonetheless, is a treacherous process that often elicits substantial dispute and distortion. Controversy regarding the nature of the judiciary's workings and the extent of its role has persisted throughout the Supreme Court's history.3 The Reagan Administration's effort to shape a Court committed more to political concepts of self-restraint than to activism has been highly focused if not unique.4 Much political rhetoric, exemplified by President Bush's contradictory pledge to

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1. The drafting of a constitution "enable[d] the forces and counterforces of government to mesh as needed to execute the purposes of the nation in the community of nations, and to check one another as needed to shield the individual and community from governmental oppression and discrimination." L. Tribe, American Constitutional Law § 2-1 (1978).


3. See infra notes 22-23 & 65 and accompanying text.

4. See Taylor, Meese v. Brennan, The New Republic 17 (Jan. 6 & 13, 1986). Efforts to extend an administration's influence beyond a president's term in office by trying to pack the judiciary are not novel. The practice dates back at least to 1800, when President Adams, in his final days in office, rushed to fill judicial vacancies with appointees committed to Federalist ideology. The appointment of John Marshall as Chief Justice resulted in an activist judiciary that established the power of judicial review and facilitated the emergence of a strong viable national government. Thus Adams succeeded in effectuating important Federalist ambitions long after Federalist control of the executive and legislative branches had ceased. See J. Nowak, R. Rotunda & J. Young, Constitutional Law § 1.2-1.4, at 2-10 (1986).
“appoint judges who will interpret the Constitution as it is written” confounds rather than enlightens the debate.

Whether motivated by ideology or by institutional distrust, blanket opposition to judicial activism is misplaced. History has demonstrated that constitutional and social damage can be done pursuant to decision making that is either activist or deferential. Lost in oversimplified debate over the Court’s proper role, and the consequent focus upon two extremes, has been a more sensitive recognition that some forms of activism and restraint are desirable while others are not. The quality and value of discourse might be enhanced if questions concerning activism were redirected from “whether” to “when” and “how.”

The very existence of the judiciary has evoked concern that the institution is inconsonant with the notion of representative government. From anxiety that the judiciary—although an independent and coequal branch of government—is anti-democratic, has emerged sentiment that it must exercise self-restraint. Critics of so-called judicial activism, who perceive a threat to democratic or republican principles, have advanced analytical methodologies calculated to minimize subjective decision-making. Consequently, they urge judicial review grounded in strict construction of constitutional text or original intent, or upon neutral principles to ensure results that are detached from personal

6. Social and economic change during the first third of the twentieth century was obstructed by an activist Court’s broad reading of due process and narrow reading of the commerce power. See, e.g., Lochner v. New York, 198 U.S. 45 (1905). Official segregation, forced relocation of citizens during war and suppression are among the consequences of judicial restraint. See infra notes 66 & 68-71.
7. The central precept of such theorists is that the exercise of power in a representative democracy must be tied to the consent of the governed. See, e.g., A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-20 (1962). However, the judicial appointment process introduces political decision making and accountability into the judicial process. See infra notes 88-89 and accompanying text. Both the President and Senate determine who will serve as judges and justices. See U.S. Const. art. II, § 2, cl. 2. Furthermore, if the Court strays too far from political consensus, its power may prove theoretical rather than real because it possesses no enforcement power. See Wright, The Role of the Supreme Court in a Democratic Society-Judicial Activism or Restraint? 54 CORNELL L. REV. 1, 11 (1968). The point was made early and forcefully when President Jackson reputedly avowed that, “John Marshall has made his decision; now let him enforce it.” L. Tribe, God Save This Honorable Court 6 (1985).
8. U.S. Const. art. III.
9. See supra note 7.
10. For a discussion of theories which propagate the general notions of judicial restraint, see infra notes 19-64 and accompanying text.
values or ideology.\textsuperscript{11} These theories purport to engender decision-making with a stronger claim to democratic legitimacy.

Warnings regarding the dangers of judicial activism often are coupled with reference to the \textit{Lochner} era of substantive due process review, when the Court elevated freedom of contract to the status of a paramount constitutional liberty. Although Lochnerism represented a misguided breed of activism,\textsuperscript{12} reference to it is insufficient as a basis for abandoning all variants of assertive judicial review. The argument for a consistently deferential Court, even if qualified by tolerance of activism when an explicit guarantee is implicated, leads to the unacceptable conclusion, for instance, that the Court's validation of slavery and refusal to declare official segregation unconstitutional were correct. These consequences, among others, demonstrate why the Court's role cannot be premised merely upon cold or uninspired legalism. Insistence upon a mechanically deferential mode of review ignores the reality that the process of interpreting and applying the law is by its very nature activist. The notion that courts must be paragons of automatism is no more sensitive to the interests of constitutional governance than unvarnished subjectivism.

Invariable bending to majoritarian preferences would make the judiciary an irrelevant institution and is a recipe for constitutional disparagement. Public trust and confidence actually may be dependent upon an activist judiciary which is not cowed into routinely endorsing legislative judgment. The same Court which has absorbed criticism for Lochnerist decision making, for instance, has commanded praise for striking down official segregation. Activism, therefore, may be acceptable and even laudable. Judicial review bestirring the most discomfort seems to occur when the judiciary delves into constitutional demands and principles that are not always self-revealing in search of their meaning.

\textsuperscript{11} See L. Tribe, supra note 1, at § 3-6.

\textsuperscript{12} Substantive due process review that invalidated federal and state legislation during the first third of the twentieth century is avowed to almost consensually as a usurpation of legislative authority and misreading of the Constitution. See, e.g., Vlandis v. Kline, 412 U.S. 441, 467-68 (1973) (Rehnquist, J., dissenting); see also L. Tribe, supra note 1, at § 8-6.

Lochnerism was the product of conservative economic philosophies and anti-labor sentiment harbored by a majority of the Court. See L. Beth, \textit{The Development of the American Constitution 1877-1917}, at 138-66 (1971); A. Paul, \textit{Conservative Crisis and the Rules of Law} (1969). It was characterized by close judicial scrutiny of legislative objectives, concerning redistribution of resources or otherwise reflecting official responses to economic forces, and findings that social and economic regulation were beyond the government's power. See L. Tribe, supra note 1, at § 8-6.
Such inquiry focuses upon and attempts to discern the citizenry’s underlying values. Good activism generally results when the judiciary considers what an enlightened and reflective public would demand. Judicial review, whether activist or restrained is misplaced, however, when it merely aligns itself with popular instincts that are narrow, uninformed, thoughtless or prejudiced, or advance personal dogma in the disguise of constitutional principle. Much criticism of activism unfortunately fails to distinguish properly between the promotion of personal whim or popular prejudice, and exercises which are an unavoidable and indispensable feature of constitutional society. As a means for curbing judicial excesses, restraint may engender the greater harm of paralysis.

The Court’s reputation as an institution does not rest upon its capacity to render and abide by precise legal formulas or maintain a low profile. Some of its best moments have included instances in which it transcended legalisms and narrow doctrine and crafted new constitutional principles based upon discerned values. Even if not articulated in the Constitution, for instance, the right of privacy is a Court-recognized guarantee that has evoked criticism on strict legal grounds, but has generally met with public approval.\(^{13}\) Identification of such fundamental rights is troubling to critics who perceive the Court’s decisions as having anti-democratic overtones and resurrecting discredited concepts of natural justice. Natural law theories are problematical in the sense that they breed unresolvable competition between or among conflicting moralities. Judicial restraint, however, provides no assurance against resort to natural law or personal subjectivism. Rather, it effectively may disguise activism that, by purposely evading constitutional inquiry, advances private concepts of justice or dogma. As illustrated later, hypocritical professions of restraint that hide subjectivism are more deserving of criticism than activism that is open and subject to critical evaluation.

Arguments against judicial activism too often have been

\(^{13}\) Regardless of whether it can be tied to constitutional text, a right to be free from official intrusion into the conduct of one’s personal life probably is accepted by most citizens as a basic guarantee. Because the right is not identified by any constitutional text, however, recognition of the right has begotten criticism on the basis that it was bred by “formulas based on ‘natural justice,’ . . . [which] require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary.” Griswold v. Connecticut, 381 U.S. 479, 511-12 (1965) (Black, J., dissenting).
overbroad, misdirected and even disingenuous. The purpose of this essay is to: (1) identify some common and exaggerated concerns about judicial activism and debunk the common rationales for and theories of judicial restraint; (2) illustrate how activism may be essential both to the judiciary's effectiveness and esteem as well as to society's well-being; and (3) explain how the judiciary is accountable to the citizenry and structure criteria for discerning between acceptable and intolerable forms of activism.

II. JUDICIAPHOBIA AND THEORIES OF RESTRAINT

The concept of an activist judiciary more often than not elicits an almost reflexive negative response rather than thoughtful consideration of the merits of its proper utilization. Notions that the Court should perform a mere mechanical function were articulated early in its history and periodically have been restated and embellished. Justice Story described the Constitution as "practical [in] nature . . . designed for common use and fitted for common understanding."14 A century later, Justice Roberts observed that the Court need only "lay the article of the [C]onstitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former."15 Such exponents of judicial restraint have left enduring impressions upon the legal community, but these individuals are probably largely forgotten by the general citizenry. Many of the justices best and most positively remembered by the public are those who transcended mere legal doctrine and rote recitations and were able to bond their thinking with common human concerns.16 The recent failure of the Bork nomination constitutes fresh evidence for the proposition that society requires not only intellectual capacity but tangible evidence of compassion, flexibility and other overtly humane traits.17 Nevertheless, the search for someone whom opponents would "object to just as much"18 as they did to Bork, suggests that investment in concepts of judicial restraint endures.

16. See infra note 17.
A. The Theory and Impracticability of Strict Constructionism

Theories of judicial restraint have been propounded under a variety of labels. Justice Black advanced the starkest version by regularly insisting that “the Court has no power to add to or subtract from the procedure set forth by the Founders.”19 Central to such strict constructionism is the notion that the Court should read the Constitution “in a straightforward manner . . . paying close attention to its words and avoid twisting or stretching [its] meanings [so] there will be few occasions for controversies that can be manipulated . . . .”20 Justice Black thus promoted fidelity to constitutional text as a methodology to ensure results that would be objectively right rather than influenced by personal preference or ideology.21

Insofar as the Court must make essentially mechanical decisions, such as whether a person who is not a citizen or resident of the United States or is under the age of thirty may serve as President or in the Senate,22 a simple textual focus is sufficient. Pure literalism has little if any utility, however, as a guide for reading such critical passages as “freedom of speech, or of the press,”23 “unreasonable searches,”24 “speedy trial,”25 “impartial jury,”26 “Assistance of Counsel for his Defence,”27 “Excessive bail,”28 “cruel and unusual punishment,”29 “privileges and immunities,”30 “due process”31 and “equal protection.”32 The belief that such language is scrutable, if only closely read, ignores the patent ambiguities requiring an effort to suffuse the language

19. In re Winship, 397 U.S. 358, 377 (1970) (Black, J., dissenting). Pursuant to Black’s thinking, the Court should not infer constitutional principles from the perceived spirit or nature of the Constitution or recognize peripheral constitutional rights to help secure specific ones. See also Griswold v. Connecticut, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting) (government may invade individual’s privacy unless prohibited by specific constitutional provision).
20. L. Tribe, supra note 7, at 41.
21. See id., at 41-49; Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975).
22. Such eligibility standards for the Presidency and the Senate are set respectively by U.S. Const. art. II, § 1, cl. 5 and art. I, § 3, cl. 3.
23. U.S. Const. amend. I.
24. U.S. Const. amend. IV.
25. U.S. Const. amend. VI.
26. Id.
27. Id.
28. U.S. Const. amend. VIII.
29. Id.
31. Id.
32. Id.
with meaning and thus relevance. The ninth and tenth amendments, which reserve unspecified powers to the people\textsuperscript{33} and the states,\textsuperscript{34} on their face are bereft of precise meaning. The presence of such open-ended residual provisions reinforces the notion that an active reading and application of the Constitution is not only desirable but necessary.

The futility of strict literalism is further evidenced by the tortured mental gymnastics which must be resorted to on its behalf. Justice Black consistently subscribed to the notion that the first amendment's guarantees were unequivocal.\textsuperscript{35} Yet, his strict constructionist premise eventually failed as an analytical device for delineating the contours of freedom of expression. The term "speech" is not defined by the Constitution and, because it can be read broadly to include symbolic expression or narrowly to include only verbal communication,\textsuperscript{36} eventually it required interpretation. By concluding that speech and conduct were conceptually and constitutionally separate, Justice Black settled for a distinction that was more convenient than principled.\textsuperscript{37} Justice Black's adoption of a more restrictive meaning of "speech" represented his participation in active, competitive line-drawing. An exclusively textual focus thus proved inadequate in the hands of perhaps its most prominent and ardent enthusiast.

B. The Theory and Impracticability of Original Intent

Strict constructionism by itself, as noted, is patently insufficient as a guide to reading much of the Constitution. Urgings for

\textsuperscript{33} U.S. Const. amend. IX. 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." \textit{Id.}

\textsuperscript{34} U.S. Const. amend. X. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." \textit{Id.}

\textsuperscript{35} See, e.g., Konigsberg v. State Bar, 366 U.S. 36, 56-80 (1961) (Black, J., dissenting) (first amendment should prevent state from denying admission to bar applicant for refusing to answer questions pertaining to membership in Communist party).

\textsuperscript{36} The wearing of black armbands to protest the Vietnam War, for instance, was considered within the purview of speech by a majority of the Court. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505-06 (1969). Justice Black, however, would have placed conduct, such as "[s]tanding, patrolling, or marching" beyond the perimeters of speech. Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring). He likewise would have found an offensive message emblazoned on a jacket and displayed in protest of government policy, to be unprotected conduct. Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

\textsuperscript{37} See \textit{Cox}, 379 U.S. at 580-81 (Black, J., concurring).
judicial restraint consequently have been augmented by interpretivist notions, such as originalism and neutrality, which essentially would afford the judiciary additional but minimal latitude in reading and applying the Constitution. Such concepts if fully subscribed to, however, would weaken the judicial process without necessarily curbing judicial subjectivism.

The notion that the Court, when confronted with vague or facially indeterminate language need only refer to the original intent of the Framers, is delusional. Delegates to the Constitutional Convention, like the states which ratified the Constitution, may have supported a given provision for diverse reasons. Consequently, identification of a singular intent is at best the product of guesswork and at worst a self-serving fabrication. Thus, originalism invites activism without meaningful guidance.

Even if it were possible to discern the Framers' intent, it would not necessarily follow that an identified purpose at the time of enactment or ratification should govern the present or the future. Segregated schools were commonplace in the North and public education was an undeveloped and marginal social institution for instance, when the fourteenth amendment was adopted. At the time, many of the provision's architects considered liberty of contract to be a key to equal protection and probably did not intend to prohibit school segregation. Reference to original intent would be misplaced in a modern equal protection


39. Such a focus actually may divert necessary attention from difficult questions that merit at least the effort to answer. See L. TRIBE, supra note 7, at 47-49.


41. Insofar as a constitutional provision resulted from assorted purposes, it is conceivable that the process of divining original intent may devolve into a search for the most serviceable motive.

42. See L. TRIBE, supra note 7, at 46; Tushnet, supra note 38, at 800.

43. See Tushnet, supra note 38, at 800.

44. Id.
context, therefore, to the extent that it would disregard the altered dimensions and priorities of separate contexts. Education eventually supplanted freedom of contract as a perceived key to equal opportunity. Inquiries into equal protection like other constitutional issues thus require adaptation to altered perceptions and acquired knowledge.  

Resistance to adaptive analysis elevates the Constitution’s architects to a mythical status of omniscience and discounts the ability of subsequent generations to engage in a critical facet of self-governance. Issues regularly arise that could not have been anticipated when the Constitution was drafted. The record of the Constitutional Convention is bereft of any contemplation, for instance, of whether electronic eavesdropping is subject to the fourth amendment’s reasonable search standards, or whether the electronic media are part of the press and thereby protected by the first amendment. A principled search for the Framers’ intent in those instances inescapably necessitates the conscientious exercise of discretion, which is the source of distress for proponents of originalism.

Insistence upon resort to Framers’ intent is further disquieting to the extent it represents a preference for the judgment of the Constitution’s architects in favor of their progeny—who must confront details never contemplated by the drafters but who possess the accumulated wisdom of two centuries of constitutional experience. Blind faith in the Framers represents investment in a manifestly imperfect body evidenced among other things by the original conditioning of constitutional rights and liberties on race and gender. Further unvarying subscription to early visions and perceptions disregards the reality that much valuable constitutional law has evolved from experience rather than original dict-

45. *Id.*

46. *Id.*

47. Wiretapping, when first considered by the Court, was found to constitute neither a search nor seizure for fourth amendment purposes. See *Olmstead v. United States*, 277 U.S. 438, 464 (1928), overruled by *Katz v. United States*, 389 U.S. 347 (1967).

48. New media, such as motion pictures, were originally regarded as beyond the purview of the press and merely as “business, pure and simple.” *Mutual Film Corp. v. Industrial Comm’n*, 236 U.S. 230, 244 (1915), overruled by *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). Although eventually recognized as part of the press, the electronic media’s constitutional protection is diluted. See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27 (1943) (Federal Communication Commission’s denial of radio licenses to persons engaged in network practices contrary to public interest not violative of first amendment).
tate. Finally singular investment in the Framers’ intent at the expense of acquired knowledge, evinces undue reverence for the Constitution’s architects and has limited utility in ensuring a charter with enduring relevance.

C. The Theory and Impracticability of Neutral Principles

Fear of and opposition to judicial activism has fostered thinking to the effect that “[w]here constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other . . . [so a] judge must stick close to the text and the history, and their fair implications, and not construct new rights.” The so-called “neutral principles model of review” translates essentially into a demand for objective constancy. A court’s obligation in a given case, pursuant to that analytical formula, would be to devise general principles that favored no particular group and apply them consistently even if later they might be subjectively distasteful.

Neutrality or consistency is better consigned to theory than practice. A court that found discrimination unconstitutional because race should be irrelevant, for instance, might consider itself obligated to find affirmative action unconstitutional pursuant to the same principle and thus reach a consistent result. The neutrality concept is sufficiently malleable, however, to permit a court to reach a contrary but principled decision. An equally neutral premise, making race irrelevant unless the classification touched a group traditionally excluded from, or underrepresented in the political process, could support findings that discrimination generally was unconstitutional but permissible if tied to affirmative action.

At its worst, the neutral principles formula may translate into blind adherence to precedent. In demanding school desegregation in the face of massive southern resistance, the Court concluded that neighborhood school, student transfer and freedom of choice plans did not satisfy equal protection demands for a unitary school system. A court should not be disabled from considering at a later time, however, whether such methodologies may

49. Bork, supra note 38, at 8.
50. See Tushnet, supra note 38, at 805-06.
51. See Green v. County School Bd., 391 U.S. 430 (1968) (“freedom of choice” plan could not effectuate transition to unitary system); Griffin v. County School Bd., 377 U.S. 218, 234 (1964) (closing public schools for which desegregation ordered while at same time increasing funding for white children at private schools denied black children equal protection); Goss v. Board of Educ.,
promote equal protection ends by deterring resegregation.\textsuperscript{52}

Insistence upon utilization of neutral principles would demand performance that is unrealistic and constitutionally derogating. It would be inconsistent with elementary and consensual limiting principles of judicial review, for instance, if a judge formulated law in anticipation of dimensions that had yet to unfold.\textsuperscript{53} The neutral principles formula, given its demand for consistency, might invite contemplation of future possibilities even if not immediately relevant. Concern with the risk of articulating a principle that may prove undesirable in the long-term might undermine the quality of an immediate decision. Although a principle may be embraced in one instance, enduring adherence to it may be a reflection of stubborn and obsolete thinking rather than enlightened thought. Insistence upon congruency of results in purportedly similar instances disregards inevitable disagreement over what facts and issues are genuinely alike. It also may have no deterrent effect upon a result-oriented judge who reasonably might expect never to face a comparable case in the future or otherwise is determined to reach a certain outcome.

The neutral principles model is especially flawed because of its presumption that a singular principle links multifold decisions into a coherent body of law. Constitutional rulings tend to be based upon multiple principles, rather than any single unifying one, and the relative emphasis upon such principles may vary. For instance, the Court originally held that a shopping center was the functional equivalent of a company town and thus peaceful labor picketing could not be enjoined.\textsuperscript{54} Although it appeared that the nature of the forum was the determinative concern in that case, another principle—the nature of the expression—was pivotal in a subsequent but similar case. In the subsequent case, the Court upheld an injunction against anti-war leafleting at a shopping center because the expression did not relate to the site's ac-


\textsuperscript{53} The "policy of strict necessity in disposing of constitutional issues" disfavors a focus that is broader than "required by the precise facts to which the ruling is to be applied." Rescue Army v. Municipal Court, 331 U.S. 549, 568-69 (1947). Thus, prophesying would contravene some basic constitutionally derived principles of judicial restraint.

\textsuperscript{54} Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 319 (1968).
tivities. To the extent decisions rest upon multiple principles, therefore, neutrality is no assurance against varying or conflicting results begotten by a shift in emphasis or tone.

What might otherwise appear to be a deviation from a previously enunciated principle may also follow from the evolution of principles, neither formulated nor foreseen, when an initial decision was rendered. The determination that automobiles could be searched without a warrant was originally tied to their mobility. Later, in justifying warrantless searches even if an automobile had been immobilized, the Court noted that individuals have a diminished expectation of privacy in a motor vehicle. A different result would have followed in the later case if the initial concern with mobility had governed. Enunciation of a neutral principle does not preclude amplification or augmentation and, therefore, does not necessarily deter results that the original formulation might not countenance.

Theories of judicial restraint not only have been generally unpersuasive but, if affirmatively responded to, would facilitate adverse consequences. Judicial reticence might ensure that constitutional inquiry would terminate where meaningful analysis should commence. The notion that a judge can discover the meaning of and properly apply the Constitution, if text and history are closely scrutinized, or principles are consistent, ignores the nature of the Constitution and is fundamentally naive. As noted above, constitutional text and history generally are unrevealing, so an examination of underlying principles and a willingness to etch and adjust lines are essential for any analysis that is pertinent to modern circumstances. To the extent the judiciary presents any danger to a democratic or republican system, the threat is magnified by a functioning that is mechanical rather than enlightened.

56. The Court eventually determined that speech content was an irrelevant concern and concluded that privately owned shopping centers were not so akin to company towns that the state action doctrine should operate. See Hudgens v. N.L.R.B., 424 U.S. 507 (1976).
57. Carroll v. United States, 267 U.S. 132 (1925). The basic concern, given probable cause that the motor vehicle contained contraband, was that it readily could be moved out of the jurisdiction and evidence would be lost. Id. at 153.
58. United States v. Chadwick, 433 U.S. 1 (1977). By focusing upon a diminished expectation of privacy, rather than exigent circumstances, the Court was able to justify a warrantless search regardless of whether the vehicle might later be moved. Id. at 12-13.
III. Judicial Activism: Reflections of an Enlightened Citizenry

Given the Court’s role of reviewing and sometimes displacing or redressing governmental action and policy, it is not surprising that “[e]very Justice has been accused of legislating and everyone has joined in that accusation of others.”69 As noted above, however, much key constitutional language is facially indeterminate, and the collective intent of the drafters, like legislators, is generally undecipherable.60 Constitutional analysis thus must include apprehension and adaptation of principles underlying the text.

Constitutional perimeters are charted or realigned regardless of whether the review process is characterized as active or restrained.61 Neither label denotes whether a judge will use or abuse his or her power to promote constitutional interests. Cramped readings of due process or equal protection guarantees may satisfy proponents of restraint, but even such interpretation actively defines or redefines official power. Failure to examine the spirit of the Constitution, or discern rights that may be implicit rather than expressed, can reflect judicial law-making purporting to be restrained but which may be both activist and mischievous.

The Court’s invalidation of social and economic policies during the first third of this century, despite their enactment through

60. For a discussion of the difficulty in discerning legislative intent, see supra notes 38-41 and accompanying text.
61. Courts make law even when they do nothing, since deference to legislative judgment affirms and validates whatever scheme may be at issue and defines any affected rights accordingly. The Court’s embrace of the desegregation principle illustrates the point. By actively emphasizing the equality component of the fourteenth amendment, the Court impared what “can be called a ‘freedom’ [for the liberty interest] of the white.” Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 429 (1960). Had it been deferential to legislative action, however, the Court still would have been activist to the extent that it presided over the elevation of liberty above equality interests. Deference to liberty interests may be a “thin disguise” for official displacement of equal protection. Plessy v. Ferguson, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) (criticizing Court’s upholding Louisiana statute which required railroad companies to provide separate accommodations for white and black passengers).

The Court, in Scott v. Sandford, pretended to exercise self-restraint in noting that “[i]t is not the province of the [C]ourt to decide upon the justice or injustice, the policy or impolicy, of these laws.” Scott v. Sandford, 60 U.S. (19 How.) 399, 405 (1856). The decision, however, evoked criticism and harvested shame on grounds that the Court had actively advanced its own conviction that blacks were inherently inferior and thus had intervened as “the citadel of slaveocracy.” A. Mason, The Supreme Court From Taft to Burger 16 (1979).
the representative process, has been widely condemned as an especially prominent example of judicial imperialism.\(^\text{62}\) The Lochnerist period has been described as one in which the Court freely and without principle measured the wisdom of state and federal legislatures against its own subjectivism primarily and against constitutional principle as an afterthought.\(^\text{63}\) Criticism of Lochnerism may be deserved but for the most part it is exaggerated and misplaced. The Court has been accused of Lochnerist thinking in more modern times, for example, for constructing a right of privacy or engaging in elevated equal protection review regarding classifications other than race.\(^\text{64}\) Such a response suggests that the wrong lessons have been learned from Lochnerism. Analogy to Lochnerism fails because modern decisions, including those recognizing rights to privacy and freedom to associate or travel, vindicate rather than repress values to which an enlightened and reflective citizenry would subscribe. Lochnerism is a unique and especially poor reference point for assessing activism, moreover, insofar as the citizenry and its representatives rather than the Court had taken the lead in adapting basic values to changing circumstances.

Constitutional principles held hostage to unreflective whims or instincts by either the judiciary or the public merits objection. Still, criticism of activism tends to become especially pointed when it overrides legislative enactments representing majoritarian sentiment. Decision making tied to imminent temperament more than enlightened or abiding values, however, may be short-sighted and self-destructive.\(^\text{65}\) Long-term institutional prestige and respect actually may necessitate decisions which are contrary to popular custom or conventional thinking. Although no equal protection clause existed at the time of the Court’s pro-slavery decisions, for instance, ample wisdom existed which could have been the basis of an enlightened decision consistent with

\(^{62}\) See, e.g., Vlandis v. Kline, 421 U.S. 441, 467-68 (1973) (Rehnquist, J., dissenting); L. Tribe, supra note 1, § 8-4, -6.

\(^{63}\) See L. Tribe, supra note 1, § 8-6.


\(^{65}\) First amendment decisions that responded to popular but exaggerated fears, for instance have detracted from, rather than contributed to, the Court’s and the nation’s heritage. See infra notes 70-71 and accompanying text.
constitutional principle. The Court's upholding of slavery, even if purportedly deferential to original intent,66 devastated public confidence in the Court and is a lasting monument to stunted constitutional vision.67 Other decisions that have diminished its standing, from a historical perspective, have included those affirming the separate but equal doctrine,68 forced relocation of citizens of Japanese descent during World War II,69 imprisonment of government critics during the Great Red Scare of the 1920's,70 and McCarthyism of the 1950's.71 Those decisions, even if consistent with popular sentiment at the time, or the product of deference to legislative judgment, have since become regarded as unqualified stains upon the Court's record. Each also demonstrates why it is essential to discern the spirit, rather than just read the letter, of the Constitution.

The Court's eventual and activist determination that racial separation was inherently unequal72 and its consequent insistence upon desegregation,73 although the source of immediate controversy and hostility, is generally regarded as one of its finer mo-

66. As mentioned in note 61, supra, the Court's purported adherence to judicial restraint in Scott v. Sandford was questionable. Instead of declaring Missouri rather than Illinois law controlling, the Court invalidated the Missouri Compromise and further asserted that Congress was powerless to grant citizenship to slaves. Affirmance of slavery represented, prior to the Civil War, the Court's only interference with Congress' power under the Commerce Clause. Purported fealty to framers' intent, masking perceptions of blacks as inferior persons, thus engendered a morally and politically bankrupt decision and widespread vilification of the Court. See R. McCloskey, The American Supreme Court 93-96 (1960).
67. R. McCloskey, supra note 66; see also A. Mason, supra note 61, at 16.
68. Plessy v. Ferguson, 163 U.S. 537 (1896).
73. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18-32 (1971) (school board's desegregation plan judged by its effectiveness; burden on school board to prove one-race school not caused by past or present discrimination); Green v. County School Bd., 391 U.S. 430, 435 (1968) (rejecting
ments. In Brown v. Board of Education, the Court overtly relied upon social science data in substituting its wisdom for legislative judgment and social custom.\(^7\) Thus its decision was unequivocally activist. What made Brown a positive contribution to the Court’s legacy was its contemplation and comprehension of what an enlightened and informed, rather than an impassioned or prejudiced citizenry would demand from the Constitution. What distinguishes Brown from Lochner is that instead of impeding the evolution of a policy tied to fundamental values subscribed to by a reflective public, the Court facilitated such interests. Displacement of majoritarian or strongly held sentiments, even if they are irrational or unlinked to normative values, may engender resentment, as the desegregation mandate did. To the extent the Court’s decision is tied to fundamentally identifiable values that the populace itself may aspire toward, but does not necessarily reflect at a given moment, the eventual inclination to revere Brown but despise Lochner becomes consonant and understandable.

In probing the citizenry’s conscience when necessary, the Court must nonetheless observe limits that ensure it does not simply package its subjective preferences in the wrapping of constitutional principle. Because review pursuant to broad notions of compassion and justice can translate into judicial imperialism,\(^5\) it is essential not only to identify limits but to know when they are reached. Construction of limiting principles is a treacherous process, as the evolution of the desegregation mandate itself demonstrates. Given public hostility to busing and possible pervasive expansion of segregation remedies to the North and West, the Court curbed the reach of the desegregation principle,\(^5\) grafted a discriminatory intent requirement upon it\(^7\) and

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\(^7\) Brown, 347 U.S. at 494 n.11. The Court noted the findings of sociologists, anthropologists, and psychiatrists in concluding that segregation fostered a sense of inferiority. Id.

\(^5\) The Court has asserted that if it literally applied equal protection rules to all legislation, “very few laws . . . would survive [them].” United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980).


\(^7\) “[T]he differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.” Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (emphasis in original); see also Washington v.
thus restricted its use to eradication of officially segregated schools. Criticism of the desegregation formula, which originally was tied to its very existence, thereafter could be directed toward its enfeeblement.

Adoption of the discriminatory intent requirement constituted a significant turning point in the Court’s equal protection thinking that eventually could detract from a positive legacy. It represented a softening of the Court’s insistence upon desegregation and was responsive to strident but largely transient public sentiments. By contouring equal protection doctrine in a way

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78. See Milliken, 418 U.S. at 744-45 (rejecting district court’s finding of purposeful discriminatory state action and consequent interdistrict remedy).


To the extent discriminatory intent may be easily disguised or is unconscious, an equal protection violation may be impossible to prove. Laws that require segregation are patently discriminatory and vulnerable, but government action neutral on its face requires a searching inquiry that often will be unproductive. See, e.g., Personnel Adm’r v. Feeney, 442 U.S. 256, 272-74 (1979) (Massachusetts law giving veterans preference for state civil service jobs did not unconstitutionally discriminate against women). Because “reliable evidence of subjective intentions is seldom obtainable,” factors such as “degree, inevitability, and foreseeability of any disproportionate impact as well as alternatives reasonably available” have to be assessed before a court may infer discriminatory intent. Id. at 283 (Marshall, J., dissenting). Such analysis by its nature, however, may amount to little more than guesswork and is a “tortuous effort.” Keyes, 413 U.S. at 224 (Powell, J., concurring in part dissenting in part). The Court itself has acknowledged that it is “extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.” Palmer v. Thompson, 403 U.S. 217, 224 (1971) (citing United States v. O’Brien, 391 U.S. 567, 383-84 (1968)).

80. See Milliken, 418 U.S. at 814-15 (Marshall, J., dissenting); B. Schwartz, supra note 76, at 186-89. As it turns out, the public generally has come to accept busing and other assertive remedies as necessary means for effectuating equal protection aims. See generally L. Harris, Inside America (1987).
that catered to aroused majoritarian inclinations, the Court ironically has helped perpetuate or restore segregated schools without even insisting on an accompanying equality requirement.81

The Court, even when its activism results in error, should be criticized for wrong-headedness but not necessarily for constitutional overreaching. For example, it wrongly concluded that the rights of viewers and listeners were paramount to the rights of broadcasters and thus found fairness regulation constitutional.82 The Court was mistaken because the fairness doctrine disserved both constitutional and regulatory objectives. The decision, however, reflected a worthy motive of ensuring that individual views and diversity were not lost in what had become the dominant modern mass medium.83 Even the Court’s standing of first amendment text on its ear, by elevating the interests of listeners above speakers, might have been palatable if fairness regulation promoted rather than undermined first amendment values.84

The Court should not be institutionally faulted when it aspires to identify and respond to the normative expectations and values of an enlightened citizenry. More than once the judiciary has protected constitutional interests from ill-conceived majoritarian or legislative sentiments that would subordinate on the basis of race, suppress expression, or promote other mischief to fundamental values. As the Court’s original deferral to and later resistance to involuntary sterilization schemes demonstrate, activism is an essential and sometimes final resort of a constitutional society.85

81. See Lively, The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society, 48 OHIO ST. L.J. 117, 126-27 (1987). The devolution of the desegregation mandate, however, defuses a fundamental premise of activist criticism. The eventual emergence of limiting principles in conformance with perceived majoritarian sentiment contradicts much imagery of the judiciary as being insensitive to public will or anti-democratic. For a discussion of judicial accountability to the citizenry, see infra notes 88-89 and accompanying text.

82. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-91 (1969). At issue in Red Lion was whether the “fairness doctrine,” imposed on broadcasters by the FCC, which required that broadcasters give those with differing views on the same issue equal and fair coverage was constitutional.

83. As of 1987, television and radio were present in 98% and 99% of the nation’s households, respectively. Daily newspapers, in contrast, reached barely more than 25% of the population in 1986. Statistical Abstract of the United States 1988, No. 878 at 523.

84. Eventually recognizing that the principle disserved the first amendment interests of broadcasters and the public, the FCC recently abandoned the fairness doctrine. See Syracuse Peace Council, 2 F.C.C. Rec. 5043 (1987).

85. In Buck v. Bell, 274 U.S. 200 (1927), the Court upheld a Virginia statute that authorized the involuntary sterilization of patients in state mental insti-
IV. Learning to Love Judicial Activism

Improvident constitutional line-drawing may merit criticism, but it affords no more support for having the Court restrict its role than poor policy judgment by the executive or legislative branches would militate in favor of self-emasculating. Good faith by government is a normative expectation of the public, which assumes that officials will generally perform their duties conscientiously. No sound reason exists for excluding the judiciary from the implications of that assumption, not only as it reviews laws amenable to mechanical application, but also as it identifies and demands adherence to basic values.

Fear of the judiciary nonetheless persists insofar as it is perceived to be an anti-democratic and counter-majoritarian force. As noted previously, the Court's function and prestige may necessitate displacing legislative judgment and transcending prevailing public sentiment. Failure to eventually recognize misapprehension or error in discerning fundamental values properly should beget the buffeting, pressure and even bullying, that dogmatic intransigence merits. In that sense, President Roosevelt's Court-packing plan, which finally helped effectuate Lochnerism's demise, was a positive rather than negative response. If the strategy is subject to any criticism, the most pertinent one may be that it was a belated checking exercise contemplated by a dynamic framework of separation of powers.

Rather than being detached from the political process, the judiciary is very much the product of and subject to democratic forces. Judges and justices are nominated by the President and appointed with the advice and consent of the Senate. Contrary to conventional wisdom, screening of a judicial nominee by an elected president and the Senate can shape the judiciary.

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86. Thus, it has been asserted that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That...is the reason the charge can be made that judicial review is undemocratic." A. BICKEL, supra note 7, at 16-17.

87. See J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 4, § 2.6, at 33-35.

88. U.S. CONST. art. II, § 2, cl. 2.

firmation of a judge or justice translates into willingness of the executive and legislative branches, representing majoritarian public will, to subject themselves and their actions to the appointee's constitutional judgment. A judicial appointment thereby represents consent of those who govern and, in a representative system, consent of the governed to subsequent judicial action.

The judiciary is held to a double standard to the extent that poor performance, or even disregard for the Constitution by more directly representative institutions, may be more readily countenanced. The judiciary is not the only branch of the government obligated to read the Constitution and capable of subjective or self-serving interpretation. Nor is it uniquely capable of disrupting democratic or constitutional principles. Because it has no enforcement power and thus cannot lead where the executive, legislature and public will not follow, however, the Court may pose the least threat to democratic values. Experience suggests that more profound harm to those interests has originated with executive or legislative readings of the Constitution and corresponding actions that traumatized fundamental values. Insofar as the Court has affirmed executive or legislative judgment in those instances, the case for active judicial review is strengthened rather than weakened.

Still, the judiciary is not right merely because it says it is

90. Both the executive and legislative branches are obligated to conform their actions to constitutional standards. See, e.g., Cooper v. Aaron, 358 U.S. 1, 18 (1958).

91. The executive branch, for instance, has advanced the notion that it possesses inherent power to suppress information in the interest of national security and to maintain absolute secrecy with respect to all presidential communications. See New York Times Co. v. United States, 403 U.S. 713, 723 (1971) (national security claim to suppress Pentagon Papers); see also United States v. Nixon, 418 U.S. 683, 703 (1974) (absolute privilege claim to suppress tapes of Oval Office conversations). The Court in both cases rejected the executive branch's interpretation of the Constitution. New York Times Co., 403 U.S. at 714; Nixon, 418 U.S. at 713.

92. The Court has recognized this reality from the moment it asserted the power of judicial review in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Knowing that President Jefferson would disregard an order to deliver judicial commissions to last minute Federalist appointees, Chief Justice Marshall established the judiciary's power but denied a remedy in order to avert an invariably losing battle with the executive. See J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 4, § 1.2, at 2-3.

93. Even if deferred to by the judiciary, constitutional affronts such as the "separate but equal doctrine," relocation of citizens of Japanese ancestry from certain areas during war time and various suppressions of first amendment freedoms originated with the executive or legislative branches. For a discussion of these cases, see supra notes 68-71 and accompanying text.
right. Although it has the power "to say what the law is,"94 such authority does not necessarily make a judgment the final word if the reading proves unacceptable. If the Court reaches too far or pushes too hard, society may ignore it or resort to the democratic process of amending the Constitution.95 To the extent such rejection does not occur, however, it may be assumed that even decisions which might not have reflected popular sentiment when rendered eventually have received the imprint of democratic consent.96

The record demonstrates that activism consonant with the vision of an enlightened and reflective citizenry, as exemplified by such results as the invalidation of official segregation, survives as an essential effectuating mechanism for basic values. Activism promoting the personal ideology of the Court, or underdeveloped preferences of an uninformed or prejudiced citizenry, resulting in slavery, forced relocation of citizens during wartime, forced sterilization and other misconceived schemes has eventually been regretted and defeated by more thoughtful popular judgment. Activism thus ultimately is susceptible to the public marketplace which, in the event of overreaching, will beget persistent legislative or executive efforts to defeat the judiciary. The demise of Lochnerism, curbing of the desegregation principle and future confirmance or curtailment of a woman's freedom to choose an abortion all exemplify that when the judiciary miscalculates or is unresponsive to enduring popular sentiment, it is invariably checked by the unabated pull of the citizenry's will.

Much anxiety concerning activism disregards practical restraints that already curb the judiciary's reach. Given its resource limitations, the Court is almost bound to be more passive than

95. Despite controversies over the Supreme Court's busing, school prayer and abortion decisions, Congress has considered but resisted proposals to curb the Court's jurisdiction or amend the Constitution. See G. GUNTER, CONSTITUTIONAL LAW 44-48 (11th ed. 1985). Congress' failure to act, after such consideration, may be read as a ratification of the Court's pronouncements.
96. The Court is presently considering whether to overturn Runyan v. McCrory, 427 U.S. 160 (1976), which held that a civil rights law giving all persons the same right to make and enforce contracts barred private schools from refusing admission on the basis of race. See Patterson v. Mc Cleary Credit Union, 805 F.2d 1145 (4th Cir. 1986), cert. granted, 108 S. Ct. 65 (1988). An amicus brief has been filed by members of the Senate and House of Representatives urging the Court not to overrule Runyon. The brief demonstrates how legislative ratification may result even when Congress might claim that the power exercised belonged to it, rather than the judiciary. Overturning Runyon would thus invite criticism of the Court for being disruptively activist at the same time it professed adherence to restraint.
active. Of the many constitutional controversies presented to the Court annually, it has the capacity to review a relative few.\textsuperscript{97} Although the actual selection of cases may have a profound impact, the judiciary's operations and influence even then are restricted by the granting of certiorari collectively rather than individually.\textsuperscript{98} Cautious exercise of judicial power also is encouraged, perhaps intangibly but nonetheless realistically, by concerns regarding judicial activism that never have and probably never will abate. Pervasive criticism of judicial activism and fear of being accused of Lochnerism, even if much of the objection and concern is misplaced, have become so embedded in the legal culture that appointees probably are bred to be careful rather than adventurous.

Because Supreme Court justices have a personal interest in securing a respectable place in history, incentive exists for learning from the past. Chief Justice Taney provides a negative role model for most,\textsuperscript{99} as does Chief Justice Warren for some.\textsuperscript{100} To the extent history helps guide the fashioning of reputation, Lochner provides clear instruction that the Court should not hold society hostage to personal ideology or sterile dogma. However, Lochnerism affords no basis for a persuasive argument that the Court should refrain from discerning fundamental values by probing what it perceives to be the conscience of an enlightened and reflective citizenry. Failure to suffuse text with meaning derived from that analytical process and effectuate guarantees which are not self-executing, as history shows, may pose a more serious risk to constitutional governance.

To the extent the Court attempts to fashion principles, which are anchored in the Constitution, normatively subscribed to by

\textsuperscript{97} Chief Justice Vinson observed that "[i]f we took every case in which an interesting legal question is raised, or our \textit{prima facie} impression is that the decision below is erroneous, we could not fulfill the \textit{c}onstitutional and \textit{stu}datory responsibilities placed upon the Court." Vinson, \textit{Work of the Federal Courts}, 69 S. Cr. V, VI (1949) (forward to volume).

\textsuperscript{98} "Under the well-settled 'rule of four,' certiorari is granted whenever four justices vote for a grant . . . ." C. Wright, \textit{Handbook of the Law of Federal Courts} 551 (3d ed. 1976).

\textsuperscript{99} As author of the Court's decision upholding slavery, Taney was responsible for a judgment that shattered the public's confidence in the Court and seriously undermined its moral authority. \textit{See supra} notes 61 & 66-67 and accompanying text.

\textsuperscript{100} Chief Justice Rehnquist, for instance, not only has criticized Warren's judicial philosophy but observed that "the few opinions of Warren's I have seen have not been very good . . . but I don't suppose one should hold that against him; maybe writing opinions is an art for which the knack is acquired." '50's \textit{Memos Illustrate Rehnquist Consistency}, Wash. Post, July 20, 1986, at 14, col. 4.
the populace and responsive to contemporary realities, it may be faulted for how it resolves a particular issue, but not for its activist nature. The judiciary invites trouble when it engages in activism but cannot reasonably be purporting to probe the values of an enlightened and reflective citizenry, or when it attempts to disguise its motive under a veneer of restraint. The Constitution, as it has evolved, has not only been a source of legal principles but a highly romanticized document thought to express the values and aspirations of society at its best. The Court serves itself and the citizenry best when it recognizes both of these dimensions.

Constitutional affront is best avoided insofar as all branches of government keep in mind “the traditions and conscience of [the] people.” When the executive or legislature departs from values to which an informed citizenry normally would subscribe, however, judicial displacement may be an appropriate response. Judicial activism is not by definition an institutional transgression. Occasional and even serious perversion of the Constitution, especially if done openly, is ultimately preferable to its evisceration by neglect. An activist Court also may be a conservative one, in a particularly meaningful sense, insofar as it ensures fidelity to deeply embedded social values. Discernment and vindication of those interests may engender sharp disagreement. Such activism does not justify a response, however, that would neutralize the judiciary’s essential function.
