ESSAY

THE CONSTITUTION AND THE COURTS: A QUESTION OF LEGITIMACY

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Like ill-mannered children, some issues refuse to go away. In 1992, three Supreme Court Justices issued a plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[1] in which they declared that even if the Court had erred in *Roe v. Wade*,[2] that error must stand because to overrule its central holding would inflict "unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."[3] That being the case, the plurality in effect directed the pro-life community to give up, to stop trying to beat a horse that the Court had already put away.[4] But, the criticisms of *Roe* and its successors have only increased, and the efforts to narrow and ultimately reverse their holdings continue unabated.

The American Bar Association (ABA) has had no better luck in confining criticism of the judiciary. Three years ago, in reaction to calls for the impeachment of a controversial judge and to congressional initiatives that would have placed various limitations on federal courts, the ABA appointed a Commission on "the Separation of Powers and Judicial Independence" to address those matters. In due course, the Commission issued a report[5] urging the critics in and out of Congress to "cool it" lest their assaults compromise the judiciary's independence and

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1. 505 U.S. 833 (1992).
2. 410 U.S. 113 (1973).
3. *Casey*, 505 U.S. at 869.
4. *See id.* at 867.
5. A.B.A., AN INDEPENDENT JUDICIARY: REPORT OF THE A.B.A. COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997), *available at* http://www.abanet.org/govaffairs/judiciary/report.html.

undermine public confidence in the courts. The Commission was especially worried about the latter, citing polls that recorded a significant deterioration in public support for the judiciary.[6] To reverse that regression, the Commission recommended that the courts and Congress, particularly Congress, manifest the "spirit of restraint and common purpose" required by a system based on the separation of powers[7] and, most particularly, it expressed a need to "expand the public's knowledge of our judicial systems and the fundamental importance of the principle of judicial independence in a healthy democratic republic."[8]

Those are serious concerns, and the Commission's recommendations were well taken as far as they went. For whatever reason, however, the Commission largely ignored the part played by judicial overreaching in sparking the court-bashing it decried. Instead, it described charges of judicial encroachment on legislative or executive functions as old hat; and although it acknowledged that judges who failed to decide cases in accordance with the law could be a "threat to their own independence," it proclaimed that "activism" had become a "code word for a personal, political or ideological difference with a particular decision."[9]

Thus, in the hoary tradition of too many professional associations, the ABA's response has largely been to circle the wagons in order to protect the judiciary against attacks from any quarter, however legitimate some of the attacks might be. This appears to be the response of the legal establishment generally, *vide* an article by the president of the Los Angeles County Bar Association in which he notes that "our state and federal courts are under attack [for activism] on several fronts" and states that lawyers "have a professional and moral obligation to defend both the courts as institutions and our judges against these unwarranted and dangerous threats."[10] What these defenders of the status quo ignore is that not all of the criticism is unwarranted. Serious persons have leveled

6. *See id.* at 60-61.
7. *Id.* at 61.
8. *Id.*
9. *Id.* at vi.
10. David J. Pasternak, *The Judiciary Under Attack*, L.A. LAWYER, Sept. 1997, at 11.

serious attacks on an approach to constitutional interpretation that has permitted American judges to carve their policy preferences into constitutional granite, and it serves no interest I know of to ignore that fact.

One of the blunter and, given its source, more sobering statements of that concern was issued in 1958 at a conference of the chief justices of the state supreme courts in reaction to the perceived excesses of the Warren Court. Addressing themselves to the problem of federal-state relations, the attending chief justices adopted, by a vote of thirty-six to eight, a resolution in which they respectfully urged

> that the Supreme Court of the United States . . . exercise one of the greatest of all judicial powers—the power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable . . . .[11]

Members of the Supreme Court have delivered even harsher assessments of their colleagues' work. An example is Justice John M. Harlan's dissent from the Court's discovery, some ninety-six years after the Fourteenth Amendment was adopted, that its Equal Protection Clause required one-man-one-vote representation in each house of a state legislature. In his dissent, Justice Harlan lamented what he described as the "current mistaken view . . . that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act."[12] He went on to say:

> This Court . . . does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.[13]

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11. JAMES L. BUCKLEY, IF MEN WERE ANGELS 101 (1975) (quoting *Resolution on Federal-State Relationships as Affected by Judicial Decisions*, 32 ST. GOV'T 74 (1959)).

12. Reynolds v. Sims, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting).

13. *Id.* at 625.

That last statement places the issue of judicial activism in its constitutional context. What we are faced with, at heart, is a question of legitimacy: whether, in issuing a particular decision, a court has acted within the scope of its constitutional authority. In addressing that question, it is useful to review some constitutional fundamentals, beginning with the source of all legitimate governmental powers as it is understood in the American tradition.

The Declaration of Independence affirms that governments "deriv[e] their just powers from the consent of the governed."[14] The Framers required that the Constitution be ratified by special conventions so that "We the People," through the act of ratification, might register our consent to the Constitution's assignment of specific powers to the three branches of the federal government and to its limits on their exercise.

In *The Federalist No. 78,* Alexander Hamilton described the federal judiciary as "the least dangerous" of the three branches because it had "neither FORCE nor WILL, but merely judgment."[15] Hamilton saw no threat in the judiciary because its role, as he and his contemporaries understood it, was to exercise judgment, i.e., to examine the language of the Constitution or of a particular statute and, having ascertained its meaning, to apply it in the resolution of a case or controversy. As John Marshall would later affirm, "the framers of the constitution contemplated that instrument as a rule for the government of *courts,* as well as of the legislature."[16]

Unfortunately, there is a deep division today over the rules of interpretation that are to be applied to the Constitution. One school, exemplified by Justice Antonin Scalia's focus on original meaning, maintains, essentially, that in construing the Constitution, a judge is bound by the meaning of its text as illuminated by contemporaneous usage and tradition, which is to say, its meaning as understood by those who ratified it.[17] The second school, as epitomized by the late Justice William

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

15. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

16. Marbury v. Madison, 5 U.S. (1 Cranch) 49, 179-80 (1803) (emphasis in original).

17. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

Brennan, views the Constitution as a "living" document that each generation of jurists is at liberty to adapt to the exigencies of the times. Thus, as Justice Brennan expressed it in an address at Georgetown University, "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[18] Needless to say, such a view of the Constitution will allow a jurist to make rather breathtaking departures from the original understanding of what the Constitution permits.

There is, of course, an uneasy middle ground between the Brennan and Scalia positions that is characterized by shifting blocks of "swing" Justices. My sense of it is that although such Justices do not expressly subscribe to either camp, in difficult cases they will allow themselves to be guided by their own understanding of what is desirable. That view was reinforced by a *New York Times* obituary which reported the reasons the late Justice Lewis Powell had given, in post-retirement interviews, for his vote with the majority in *Roe* and for coming to regret his support of capital punishment. In each instance, those reasons rested entirely on considerations of policy rather than on an analysis of the Constitution.[19]

For better or worse, an inclination among federal judges to take policy into account is hardly new. What *is* new is the profound impact that a number of the Court's more recent decisions have had on the social and political life of this country, which is directly relevant to the concerns expressed by the ABA Commission over the erosion of public confidence in the judiciary.

To appreciate the full effect of these decisions, it is important to understand the social consequences that can flow from a particular Supreme Court ruling. There is a fundamental difference between a practice that society condemns and may or may not choose to forbid, and one that the Court has declared to be constitutionally protected. The latter tips the psychological as well as the legal balance in favor of a newly

18. Justice William J. Brennan, Jr., Address at the Text and Teaching Symposium, Georgetown University (October 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 17 (1986).

19. *See* Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. TIMES, Aug. 26, 1998, at A1.

defined right, because that which society may not forbid will inevitably acquire the presumption of moral legitimacy. After all, how can one condemn the exercise of a constitutional right?

Although widely criticized Warren Court decisions such as *Mapp v. Ohio*[20] and *Miranda v. Arizona*[21] may have given rise to grumbling over the Court's perceived "coddling" of criminals, they did not cause citizens to take to the streets. In recent years, however, the Supreme Court has entered the cultural arena and issued decisions based on newly defined rights that millions of Americans see as threats to their most deeply held values. Because many of these decisions have overturned laws and practices that date back to the earliest days of the Republic, it is hardly surprising that great numbers of Americans have come to view the Court as an active player, perhaps *the* major player, in the ongoing culture wars as it pursues goals that they believe to be beyond its authority. Three particularly sensitive lines of cases come to mind, namely, those in which the Supreme Court has virtually banished religion from public life, extended First Amendment protection to the most explicit pornography, and proclaimed an essentially unrestricted right to abortion.

For most of our nation's history, the Establishment Clause was understood to do no more than forbid the enactment of laws preferring one faith over another.[22] As Thomas Cooley noted in his authoritative treatise, *Constitutional Limitations*, the Framers considered it appropriate for government "to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order."[23] Thus, early Congresses made grants of land in support of religious purposes and funded sectarian education among the Indians.[24] Yet in its 1962 decision in *Engel v. Vitale*,[25] the Supreme Court declared that the daily recitation of a voluntary twenty-two-word non-denominational prayer in New York's public schools violated the Establishment Clause, notwithstanding the fact

20. 367 U.S. 643 (1961).
21. 384 U.S. 436 (1966).
22. *See* Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting).
23. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 470 (1871); *see also Wallace*, 472 U.S. at 106 (quoting COOLEY, *supra*).
24. *See Wallace*, 472 U.S. at 103 n.5.
25. 370 U.S. 421 (1962).

that the Congress that had authored the First Amendment had itself begun its days with prayer.[26]

In so holding, the Court ended a practice that had been part of the American experience since the outset of public education and that an overwhelming majority of American parents wished to have continued. *Engel* was part of a relentless drive to root religion out of public life that began in 1947 with the Court's embrace of Jefferson's "wall of separation" between church and state.[27] With a few ceremonial exceptions, our government is no longer allowed to acknowledge the existence of the God invoked by the Founders in the Declaration of Independence and in which the vast majority of our people continue to believe. The net effect of the new dispensation has been to encourage a belief that religion is irrelevant to the public welfare. More than that, it has led to what Yale Professor Stephen Carter has described as a discomfort and a disdain for religion in our public life that sometimes curdles into intolerance.[28]

The Supreme Court's recent interpretations of the Free Speech Clause have had an equally dramatic impact on our society. For better or worse, its expansion of protected speech to include pornography has abolished any meaningful limitations on its commercial distribution. The Court did hold, in *Roth v. United States*,[29] that obscenity is not protected by the First Amendment,[30] and it described as obscene any work that, in the view of "the average person, applying contemporary community standards, [has a] dominant theme [that] . . . taken as a whole appeals to prurient interest."[31] But, such has been the erosion of community standards since the Court opened the floodgates for pornography that the Second Circuit recently had to rule that the notorious film "Deep Throat," which contains wall-to-wall depictions of sexual intercourse, fellatio,

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26. *Cf. id.* at 439-40 (Douglas, J., concurring) (noting that the Rules of both houses of Congress "provide that each calendar day's session shall open with prayer").

27. Everson v. Board of Education, 330 U.S. 1, 16 (1947).

28. *See generally* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF (1994) 52-56, 92-96 (discussing the importance of religious beliefs in public discourse and the ways in which religious beliefs are marginalized).

29. 354 U.S. 476 (1957).

30. *See id.* at 485.

31. *Id.* at 489.

and masturbation, was not obscene because it was not patently offensive to jaded New York City audiences.[32] Gresham's law, it seems, is as applicable to culture as it is to currency.

The Supreme Court has ruled that although merely "indecent" pornography is protected speech, it is nonetheless subject to reasonable regulation in pursuit of a compelling government interest in protecting the well-being of the young.[33] Thus, peddlers of non-obscene pornography may be prohibited from selling their wares to customers under the age of eighteen. Unfortunately, thanks to cable television and the Internet, our children now have ready access to the raunchiest materials in the privacy of their own homes, and thanks, too, to recent Supreme Court rulings that adults have a constitutional right to view indecencies during hours when well-behaved children are presumed to be at school or asleep.[34] Thus, a constitutional right to self-gratification trumps the efforts of society to protect its young. Under the circumstances, it is hard to disagree with citizens who complain that the effect of the Court's First Amendment jurisprudence has been to degrade our culture and rob our children of their innocence.

The Supreme Court's decisions in *Roe* and *Doe v. Bolton*[35] have had a similarly traumatic effect on traditional values. In discovering a right to abortion for any reason and, as a practical matter, at any time, the Court overturned the laws of all fifty states and unleashed the most divisive political issue since *Dred Scott v. Sanford*,[36] one that remains a dominant factor in American politics twenty-seven years after the decision was announced. Once again, we see in action the Court's power to shape perceptions of what conduct is permissible. Even though polls confirm that the vast majority of Americans strongly disapprove of the reasons most women give for seeking abortions, they now accept the Court's decree that women have a right to have them.

The Supreme Court revisited each of these areas earlier this

32. United States v. Various Articles of Obscene Merchandise, 709 F.2d 132, 134, 137 (2d Cir. 1983).

33. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968).

34. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996); *see also* Reno v. ACLU, 521 U.S. 844 (1997) (striking down key provisions of the Communications Decency Act of 1996).

35. 410 U.S. 179 (1973).

36. 60 U.S. 393 (1856).

year and, in each instance, it broadened the scope of its prior holdings. In an opinion that dissenting Chief Justice Rehnquist described as "bristl[ing] with hostility to all things religious in public life,"[37] the Court carried its ban on religion a step further by outlawing a school district rule that would have allowed a representative of the student body to begin a high school football game with prayer if the *student* so chose. In another case, the Court reaffirmed its holding that a state has a legitimate interest in fetal life prior to viability and, thereafter, may "regulate, and even proscribe, abortion" except where necessary for the protection of the mother's life or health.[38] But in overturning Nebraska's ban on partial birth abortions, the majority made it clear that the Court would reject *any* limitation on the means by which a woman and a compliant doctor might choose to dispose of an unwanted life. Finally, although the Court has recognized a *state's* compelling interest in safeguarding the emotional well-being of minors,[39] last May it set aside a statutory provision requiring cable television operators to scramble sexually explicit materials during certain hours because *parents* had the less restrictive option of blocking the reception of offending channels.[40]

Aside from their dramatic impacts on American life, what these three lines of cases have in common is their creation of constitutional rights for which there is no historical or textual basis and that anyone with a feel for American history must know the authors of the Bill of Rights would never have condoned. As then-Associate Justice Rehnquist observed in his dissent in *Wallace v. Jaffree*,[41] because there is no historical basis for reading a wall of separation into the Establishment Clause, "[i]t would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution . . . prohibits the Alabama Legislature from 'endorsing' prayer."[42] Nor could

37. Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2283 (2000) (Rehnquist, C.J., dissenting).

38. Stenberg v. Carhart, 120 S. Ct. 2597, 2609 (2000) (internal quotation marks and citation omitted).

39. *See* New York v. Farber, 458 U.S. 747, 756-57 (1982); *see also* Action for Children's Television v. FCC, 58 F.3d 654, 660-63 (D.C. Cir. 1995).

40. United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878 (2000).

41. 472 U.S. 38 (1985).

42. *Id.* at 113 (Rehnquist, J., dissenting).

Justice White find anything "in the language or history of the Constitution to support" the Court's discovery of a right to abortion, which he characterized as "an exercise of raw judicial power."[43] Justices Rehnquist and White were speaking in dissent, of course, but what they had to say does suggest that it is an oversimplification to dismiss citizens who express identical views as soreheads in need of instruction in basic civics.

Furthermore, federal courts at every level continue to issue opinions that keep the debate over judicial activism alive, especially when the proclamation of new rights or the expansion of old ones frustrate the popular will as expressed in referenda. Examples of the latter include a California district court decision enjoining enforcement of a newly-adopted provision that would bar race- and sex-based preferences in public employment,[44] a Ninth Circuit decision holding that an Arizona initiative making English the state's official language violated the First Amendment,[45] and the Supreme Court's latest entry in the culture wars, its decision to set aside an amendment to the Colorado constitution that would deny a favored status to homosexuals, in part because of what the Court considered to be the mean-spiritedness of the Coloradans who had voted for it.[46]

At this point, I need to emphasize that the vast majority of the decisions issued by our federal courts fall within the bounds of the constitutional or statutory texts being applied, with the important understanding that the lower courts are required to apply the Supreme Court's interpretation of those texts. The problem lies principally with those Supreme Court decisions in which the Court may reasonably be charged with having acted beyond its authority. It is these decisions that have sent shock waves through the body politic and raised doubts about the stability of the law.

It is because of this sense that something is seriously awry that the ABA Commission's plea to "cool it" has been ignored. Too much is at stake, and nothing could be more certain to

43. Doe v. Bolton, 410 U.S. 179, 221-22 (1973) (White, J., dissenting).

44. Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), *vacated*, 110 F.3d 1431 (9th Cir. 1997).

45. Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995).

46. Romer v. Evans, 517 U.S. 620, 632-35 (1996).

undermine confidence in the rule of law than a perception that Supreme Court Justices have the authority to update the Constitution to suit their own notions of what it ought to require. Yet that perception has become the prevailing view. What else explains the passions that have turned Senate judicial confirmation hearings into political circuses, or the argument so often heard during the recent campaign that the most important reason for electing the Democratic or Republican Party's presidential candidate is that the next President may fill as many as three vacancies on the Court?

It is this pervasive perception that should worry the ABA and other professional legal organizations, because judges who serve as philosopher kings have no place in a polity based on a separation of powers and the rule of law. If the legal profession is to encourage confidence in our judiciary, it must first acknowledge that, on occasion, federal courts have indeed trespassed on legislative prerogatives and then see what can be done to rein in judicial overreaching before Congress is provoked into enacting unacceptable limitations on judicial independence.

This task will require a significant change in a legal culture that too often has excused the blurring of judicial and legislative lines. It will most certainly require a repudiation of Justice Brennan's statement, in his Georgetown lecture, that the act of constitutional interpretation "must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought."[47] Among the many things wrong with his statement is that it begs the question of a tenured judge's competence to speak for the community at large. More fundamentally, it assigns a legislative role to judges that the Constitution has reserved for Congress.

Although I am aware of the sophisticated arguments offered in support of Justice Brennan's "living" Constitution, I am persuaded that a reliance on original meaning is not only sounder in principle but better designed to narrow the occasions for the ultimate judicial sin, the abuse of power. It ought to be clear that in a polity based on the rule of law, federal judges have no license to insert their own views of what is right or appropriate into the Constitution and laws they are

47. Brennan, *supra* note 18, at 14.

sworn to apply. To put it bluntly, no federal judge, however wise, has the moral authority or political competence to write the laws for a self-governing people, and no American should wish it otherwise. The federal judiciary is recruited from a professional elite, it enjoys life tenure, and, at the appellate level at least, it is sheltered from the rough and tumble of everyday life.

If we are to keep faith with the Constitution, however, we may have to do more than embrace originalism; here, I acknowledge that the views I am about to express are based on intuition rather than scholarship. As I see it, there is a more benign explanation than judicial activism for most of the departures from constitutional bedrock that have occurred over the years. I refer to our application of the precedent-bound methodology of the common law to the application of written law. That was Thomas Jefferson's concern after having observed federal courts in action for thirty years. In 1823, he wrote that the judiciary was proving to be the most dangerous branch of the federal government, because "their decisions . . . become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance."[48]

While it is true that *stare decisis* is conducive to stability and predictability in the law, it poses an inherent hazard when a court is fleshing out the meaning of a constitutional provision. Over time, judges adding another link to a precedential chain can become so intent on exploring the implications of the last preceding case that they lose sight of the underlying text and its inherent limits. Freed of textual restraints, the Supreme Court only took thirty-one years to transmute *Skinner v. Oklahoma*'s[49] constitutional right to procreate into *Roe*'s right to abort—with an assist, admittedly, from the penumbras emanating from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments that the Court detected *ex nihilo* in *Griswold v.*

48. Letter from Thomas Jefferson to A. Coray (Oct. 31, 1823), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 487 (Andrew A. Libscomb & Albert Elery Bergh eds., 1903).

49. 316 U.S. 535 (1942).

Connecticut.[50]

There may be another problem with the common law methodology as now applied. Prior to the publication of Oliver Wendell Holmes's *The Common Law*,[51] common law judges believed that its rules were based on immutable principles of justice. They spoke of the "seamless fabric" of the common law, and when they found it necessary to go beyond existing precedent to resolve a case, they thought of themselves as doing no more than unveiling principles that had hitherto remained hidden. Even if this notion was a legal fiction, as Justice Holmes would later prove it to be, it nonetheless fostered a formalism that discouraged judges trained in the common law tradition from being influenced by their own policy preferences when deciding a case.

The publication of *The Common Law*, however, changed the dynamics of the judicial process. Holmes's elegant demonstration that common law judges had actually been engaged in creating new law necessarily transformed what had been an unconscious, evolutionary process into one in which those judges were aware of their roles as lawmakers. With that awareness has come a shift from formalism to subjectivism that must encourage at least some post-Holmes judges to shape the law more aggressively, whether they are dealing with common law principles or the Constitution and statutes of the United States.

If these thoughts have any merit, the task of changing our common law-based legal culture will prove a formidable one. Professor Mary Ann Glendon of the Harvard Law School, however, has given considerable thought to this matter. She notes that European jurists raised in the tradition of the civil code have developed approaches to the interpretation and application of written law that American judges could well adopt. At the same time, she believes that the Europeans would benefit from the stability provided by an appropriate respect for precedent.[52]

Whether such a synthesis is feasible, I leave to others. At the

50. 381 U.S. 479 (1965).

51. OLIVER WENDELL HOLMES, THE COMMON LAW (1881).

52. *See* Mary Ann Glendon, Comment, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 95 (1997).

very least, however, we must go beyond the ABA's desire to instruct the public on the importance of judicial independence. We must recognize that if it is at risk, it is in substantial part because our courts have led so many Americans to believe that judges have the authority to write policy into law. It is for this reason that we hear so few objections when the political branches establish issue-based tests for the selection or confirmation of candidates for the judiciary, or when congressmen introduce bills that would impose ill-advised restrictions on our courts.

This is the reality with which we have to deal. Therefore, if we are to protect the independence of judges, we must do far more than remind Americans of the imperative need to shield the judiciary from political interference. We will have to disabuse them of the notion that judges are entitled to act as philosopher kings and at the same time dissuade our more venturesome judges from acting as if they were. In the meantime, pending that happy day when originalism is generally accepted, there can be no surer way to enhance public confidence in our courts than for all judges to practice the virtue that our state chief justices urged on the Warren Court a generation ago, the virtue of judicial self-restraint.