THE SUPREME COURT AS A PARTIALLY POLITICAL INSTITUTION

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Justice is not frequently discussed by courts today. Although judges must consider the law, *justice* has nearly become almost a dirty word in judicial circles. A number of people have argued in discussions like this one that compassion is simply not a factor that should affect judges—that judges should simply apply the law. I have a very different view, and it stems from a very different view about the courts, government, and society. Addressing these arguments one might begin with the question posed by Judge Silberman: "Do judges see the Supreme Court as a court or as a political institution?"[1] The obvious response is that the Court is both a court and a political institution. It is many other things as well. I argue here that these dual roles present no paradox.

Professor Schauer has correctly stated that one's views of the courts, government, law, and society largely hinge on how one interprets and defines the Constitution.[2] Most people agree with the assertion by judges that they simply apply the law when making judicial decisions. People also believe, however, that judges simply apply the Constitution. Such a belief may be accurate, but what does "the Constitution" mean? What are judges to apply?

The answers to these questions flow from what one believes about the Constitution, its purpose, and what function it plays in our society. There are two basic views. For some, the Constitution consists only of the concepts that may have been in the minds of the Framers over two hundred years ago. To proponents of this first view, the Constitution means what *they* think was in the minds of the Framers. Professor Lino Graglia's attacks on the great Justice William Brennan for inappropriately combining policymaking with judging are a good example of this position.[3]

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1. Laurence Silberman, Judge, United States Court of Appeals for the District of Columbia Circuit, moderated this roundtable discussion.

2. *See* Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45, 52-53 (1994).

3. Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL'Y 119, 120 (1994). Professor Graglia was uncharacteristi-

In addition to emphasizing the intent of the Framers, this first view perceives the Constitution as merely a structural and procedural document drafted by engineers to distribute power among groups. For example, the Executive Branch has certain powers while the Congress has others, although this distribution may change from time to time. Clearly, the Supreme Court has thought the Executive Branch was wonderful in recent years, and whatever an administrative agency said, that was really the tops.[4] What Congress has to say about its statutes did not matter much—that was just legislative history.[5] I wonder whether the Supreme Court will continue to view the other two branches and the administrative agencies in the same manner over the next few years. What will its attitude be now that there is a President Clinton? What would it be if we were to have a Majority Leader Robert Dole two years from now? The course is not yet clear, and we will have to wait and see. However the Court changes over the next few years, however, some people will continue to construe the Constitution as merely a procedural charter, a technical document allocating power among governmental units.

To a second group of people, the Constitution is a living, growing document that has as its fundamental purpose the securing of a certain type of liberty for all Americans.[6] Justice Holmes described the Constitution in this second way, as did Justice Brennan and many other great justices.[7] This view conceives of the Constitution as a set of principles set down in writing and designed to ensure that people who live in this country have a certain quality of life. According to those who subscribe to the

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cally mild with Justice Brennan, last time I heard Professor Graglia speak, he said that Chief Justice Burger should have been impeached for his decision in Griggs v. Duke Power Corp., 401 U.S. 424 (1971).

4. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (holding that "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations").

5. *See* Cass R. Sunstein, *Interpreting Statutes in the Legislative State*, 103 HARV. L. REV. 405, 429 (1989).

6. *See* Ronald M. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 496 (1981) (reasoning that "some part of any constitutional theory must be independent of the intentions of beliefs or indeed acts of the people the theory designates as Framers").

7. *See, e.g.*, William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, Text and Teaching Symposium, Georgetown University (1985) *reprinted in* 19 U.C. DAVIS. L. REV. 2, 7-8 (1985) ("Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized"); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

view that we have a living Constitution, it ensures that the United States will remain a nation with a particular will and spirit.

For those who consider the Constitution a living document, the Bill of Rights and the Fourteenth Amendment were designed to ensure dignity for the individual and freedom from arbitrary governmental action.[8] Proponents of this second view consider these amendments crucial to protect minorities against oppression by the majority. According to this view, the Framers did not establish fundamental rights in a well-defined code, but rather by means of a series of key phrases that must be interpreted and clarified. In this conception, the phrases represent principles that need to be given life and further meaning as our society develops and learning increases.

This expansive view of our Constitution, the one I espouse, involves a rather optimistic view of life and human nature. The philosophy sees our nation and our world as evolving in a progressive manner, recognizing new human rights as our consciousness grows and develops. This view takes a document that has phrases such as "equal protection" and "due process," and seeks to discover what the phrases mean by re-examining them from time to time in light of what we have learned—as we increase our understanding of human nature, the nature of society, and the universe.

If one accepts this view as embodying the purpose and meaning of the Constitution, it is not very difficult to reach the conclusion that, in construing the Constitution, a Supreme Court appointed for life has a role as a political institution. Its obligation to protect minorities against the majority, and to protect the people from their government, is quasi-political in nature. To the extent that the Court must delineate the rights of American citizens—minority or majority—as it must on a regular basis, it acts in an important sense as a brake on majoritarianism.

To exercise its brand of decision-making power, the Court must not only be a partly political institution, but must also be one that has the independence to make the right decisions even if those decisions are unpopular. Indeed, there is merit in the position that it is not noble for a court to take a particular stand on a highly controversial issue simply to avoid jeopardizing its

8. *See generally* JOHN H. ELY, DEMOCRACY AND DISTRUST (1980), for an extended elaboration of the theme that the role of the courts is to protect certain groups that are excluded from or are unable to participate fully in politics.

legitimacy in the public mind. Taking a stand to avoid public disapproval is not what our courts are entrusted to do. A court is supposed to resist the popular will when that will trenches on the rights of minorities. That resistance is the basic concept of the Bill of Rights, and only a court appointed for life can perform this function.[9] Thus, while a court may make decisions that are in some sense political in *effect*, it should never make them on the basis of political *considerations*.

The difference between a court and a truly political institution was dramatically overlooked by Chief Justice Rehnquist in *Herrera v. Collins*.[10] The case is a story in itself; the notion that it is not unconstitutional to execute innocent persons offends many people deeply. More specifically, Justice Rehnquist's argument in *Herrera* that the gubernatorial clemency power is an effective check on executing innocent people is wholly unrelated to political reality.[11] To understand political realities, one need only read the February 22, 1993 *New Yorker*, which describes the execution in Arkansas of a person with only part of a brain in the middle of Bill Clinton's presidential campaign.[12] Reading the description of that execution, it becomes clear why only the federal courts can ensure justice in certain instances, and why lifetime appointments were a stroke of genius. Perhaps the political problem the Governor of Arkansas confronted was an unusual one, but it is not significantly different from the problems faced by other governors who have to run for re-election, or by state Supreme Court justices in certain states when they have to appear on a ballot.

What clearly emerges from these problems is that only the federal courts (and here we are concerned particularly with the Supreme Court) consist of judges who are secure for life and are therefore free to resist majoritarianism. Professor Graglia scoffs at the Court for rejecting school prayer and other ideas that are

9. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 23-28 (1962) (noting that "courts have certain capacities for dealing with matters of principle that legislators and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.").

10. 113 S. Ct. 853 (1993) (holding that the gubernatorial clemency power is a constitutionally sufficient safeguard to protect against the execution of a factually innocent person who has been convicted of a capital crime).

11. *See id.* at 866 (reasoning that clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted").

12. Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105.

inconsistent with the First Amendment. He wonders how the justices became better at determining societal standards than the people themselves.[13] He forgets that the whole point of our Bill of Rights is that the majority is not supposed to prevail when it seeks to diminish the rights of others. We do not simply take a poll in order to enact automatically what the majority of people desire. We have a Supreme Court that is designed in large part to protect us from both elected officials and majorities that are willing to sacrifice certain constitutional principles for momentary advantage—or are willing to lay them aside in the heat of battle. No function in our political system is more important than standing up to those challenges.

Now, what is the Constitution? That brings us back to where we started. The differences among us, our philosophies, and our approach to precedent[14] are largely reducible to our differences over what the Constitution is, its purpose, and its meaning. I generally prefer the view of Justice Homes and Justice Brennan.

13. *See* Graglia, *supra* note 3, at 120, 127-28.

14. For an interesting perspective on precedent, see Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).